AGENDA

Rule Development Workshop

Rule 40E-10 and Section 3.11 of the Basis of Review for Water Use Reservation of Water Identified for Protection by the CERP Biscayne Bay Coastal Wetlands (Phase 1) Project

April 6, 2012 – 10:00 A.M. Biscayne National Park Headquarters 9700 SW 328th Street Homestead, FL 33033-5634

- 1. Introductions
- 2. Status of Development of Draft Technical Document to Support Rule
- 3. Overview of Statement of Estimated Regulatory Costs
- 4. Summary of Public Comments Received
- 5. Status of Rule Language
- 6. Additional Public Comments

THIS WORKSHOP IS OPEN TO THE PUBLIC

COMMENTS ON THE PRESENTATION MATERIAL ARE REQUESTED TO BE SUBMITTED WITHIN THE NEXT THREE (3) WEEKS:

Jan Sluth, Senior Paralegal, Office of Counsel, South Florida Water Management District, P.O. Box 24680, West Palm Beach, FL 33406; (800) 432-2045, ext. 6299; (561) 682-6299; jsluth@sfwmd.gov or submit comments directly to the Rule Development Forum of the SFWMD web conferencing board available at: http://sfwmd.websitetoolbox.com/



Water Reservation for the Biscayne Bay Coastal Wetlands Phase I CERP Project

Recap of Water Reservation

Beth Lewis Senior Specialist Attorney Office of Counsel

Don Medellin
Principal Scientist
Coastal Ecosystems Section



Federal Process - Protecting Water for Natural System

- Water Resources Development Act of 2000 requires that Project Implementation Report identify the appropriate quantity, timing and distribution of water dedicated and managed for natural system and that State responsible for protecting water using State process—Sec. 601(h)(4)(A)
- Programmatic Regulations for the Implementation of CERP required development and use of Guidance Memorandum to identify natural system water -33 C.F.R Sec. 385.(b)(3)



Federal Process – Protecting Water for Natural System

- Guidance Memorandum sets forth planning level evaluation that proscribes a federal process for water identification based on the Selected Alternative Plan – Draft CERP Guidance Memorandum #4
- Federal identification and State rulemaking mandates have different requirements and additional evaluation is required as part of State rulemaking process.



State Process for Establishing Water Reservation

- Reservation established by rule
 - Rulemaking governed by Section 120.54,
 F.A.C. Administrative Procedures Act
 - Public participation
 - Coordination with Office of Fiscal Accountability and Regulatory Responsibility
 - Governing Board for policy direction
 - Florida Department of Environmental Protection (DEP), Joint Administrative Procedures Committee (JAPSC), Small Business Regulatory Advisory Council and Department of Economic Opportunity for Review



Legal Standards Associated with Rule Development

- Florida Administrative Procedures Act requirements are not based on the scientific method
- Rule must not be an invalid exercise of delegated legislative authority
 - Must have specific statutory authority
 - Can't be reasonably related to the purpose of the enabling statute
 - Agency has burden of proving by preponderance of evidence rule is valid
- Invalid rule if:
 - Enlarges, modifies, or contravenes the law implemented
 - Vague
 - Arbitrary or capricious



Legal Standards Associated with Rule Development

Rule is invalid if it:

- Enlarges, modifies, or contravenes the law implemented
 - Look at specific statutory authority
 - Give words 'common & ordinary' meaning
- Vague
 - Fails to establish adequate standards
 - Vests unbridled discretion in agency interest balancing
- Arbitrary or capricious
 - No factual basis or logic
 - Without thought or reason or is irrational



Legal Standards cont'd

- Must make connection to protection of fish and wildlife
- Biology-Hydrology linkage necessary
 - Use of best available information
- Deference accorded to Agency that interprets statute
- Rules are subject to periodic review and update



Consistency Between PIR and Proposed Rule

Federal process:

- Planning Level Evaluation based on certain assumptions, designed pump capacity and project performance measures
 - Flow Target
 - Total Diverted Canal Flow
 - Total Available Canal Flow



Consistency Between PIR and Proposed Rule

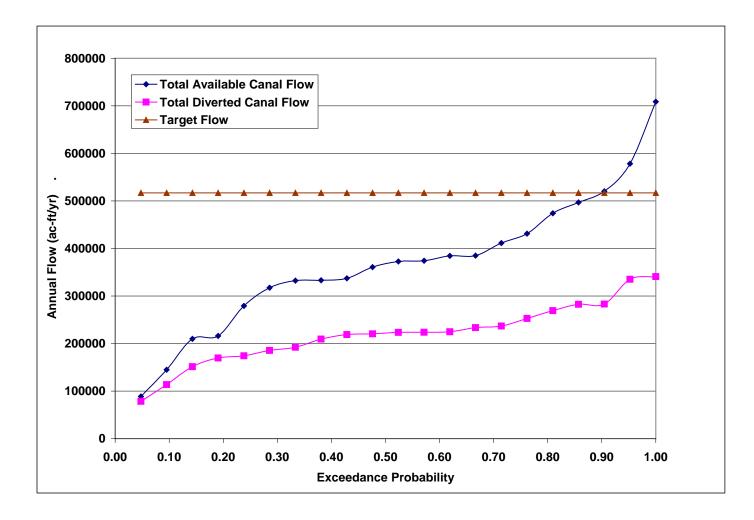
The PIR states:

 "The SFWMD has further committed to protect the difference between the existing water in the system, identified as the "Total Available Canal Flow" and the "Total Diverted Canal Flow" up to the "Target Flow" line under the State's reservation... authority."

Annex C, C.1.3.1.4, July 2011



Consistency and Status of Draft Document to Support the Rule



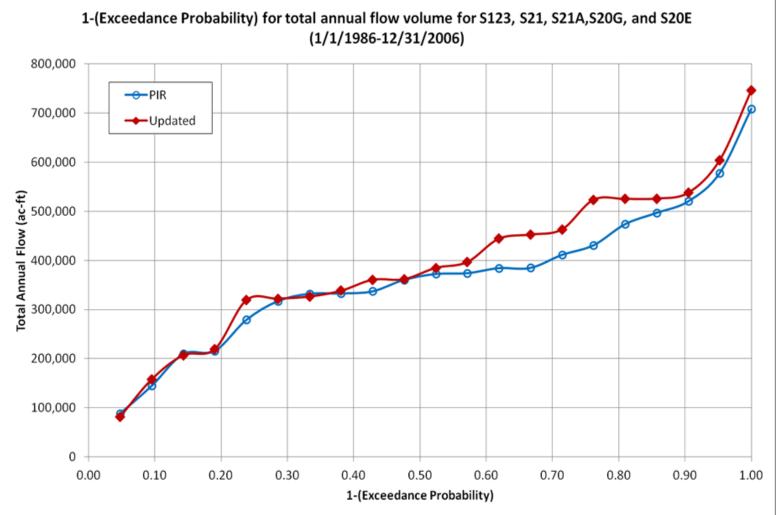


Consistency and Status of Draft Document to Support the Rule

- State process involves:
 - Annual vs. seasonal analysis
 - PIR period of record vs. best available information
 - Additional Inflows (Military Canal)
 - Updated Data Record
 - Basin wide assessment of contributing flows
 - Subdividing the target by basin
 - Coordinate reservation rule with existing water resource protection rules

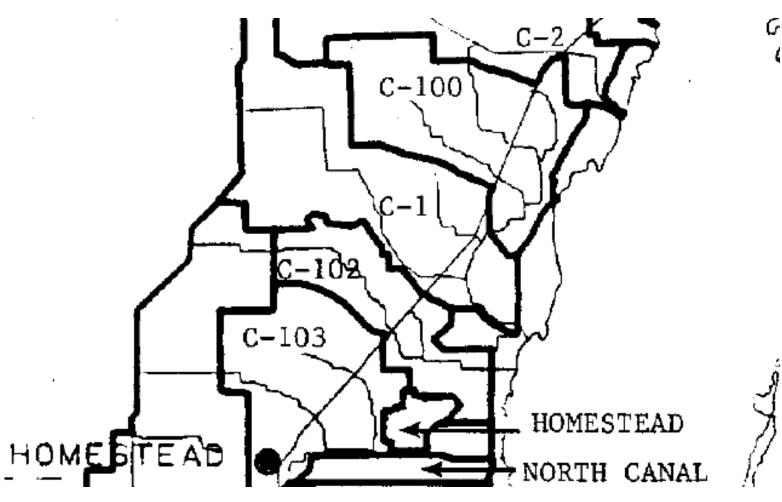


Consistency and Status of Draft Document to Support the Rule



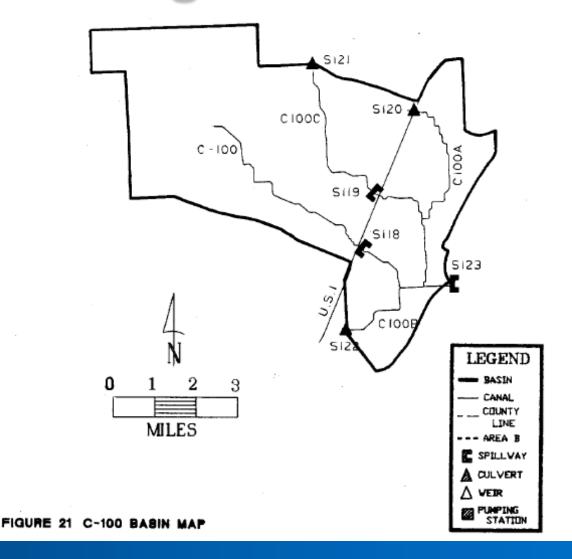


Surface Water Management Basins Associated with Coastal Structures



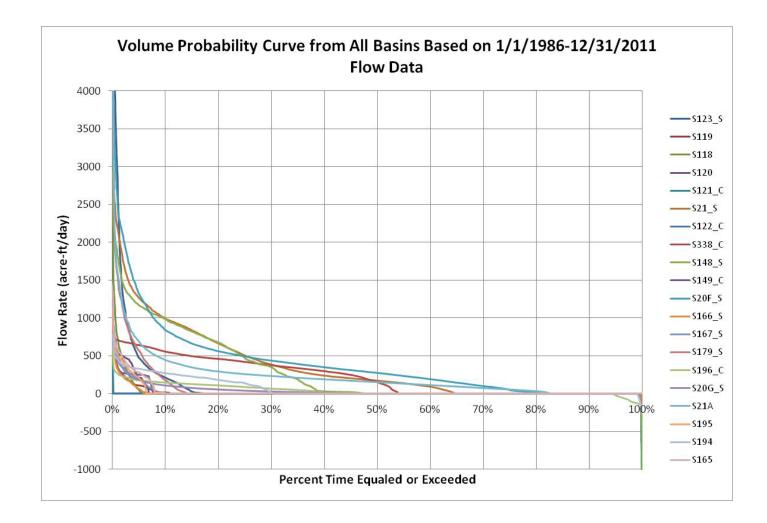


C-100 Surface Water Management Basin





State Process





Recap of Water Reservation

- All of the total available canal flow up to the target flow will be reserved for the protection of fish and wildlife.
 - Evaluations continuing
 - Draft rule language and document to support rule will be developed following completion of evaluations
 - Statement of Estimated Regulatory Costs will begin after completion of evaluations



Recap of Water Reservation

 Staff will recommend to the Governing Board that "all presently existing uses of water shall be protected so long as such use is not contrary to the public interest." Chapter 373.223 (4), Florida Statutes



Discussion / Questions?

Water Reservation for the Biscayne Bay Coastal Wetlands Phase I CERP Project

Reservation Recap

Don Medellin
Principal Scientist
Coastal Ecosystems, Applied Sciences Bureau



Statements of Estimated Regulatory Costs

lan Miller

Lead Economist
Intergovernmental Coordination



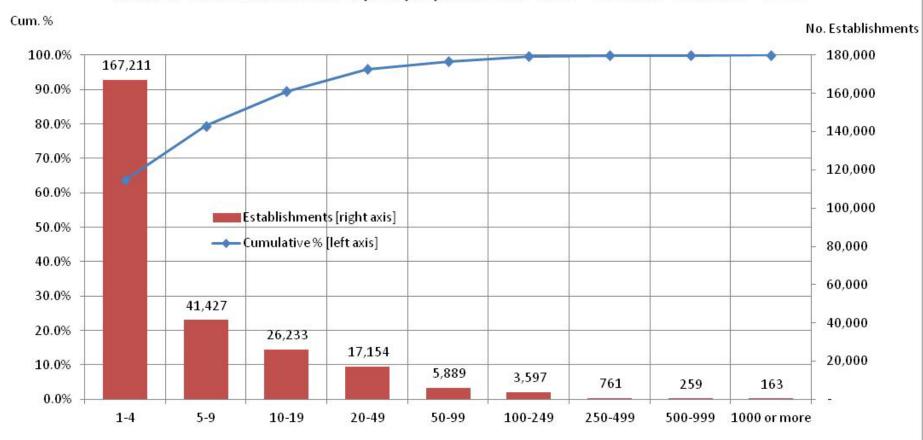
SERCs - Background & Purpose

- Part of agency Rulemaking activities
 - → Florida Statutes: Chapter 120 Administrative Procedure Act
 - 120.54 Rulemaking
 - → 120.541 Statement of Estimated Regulatory Cost
- Example→ Secure long-term availability of water, adopt water reservation rule, implement the laws.
- Initial Screening for Necessity:
 - Adverse economic impact determination:
 - Economic & Non-economic factors (i.e., increased fees, opportunity for profits, transactional costs, time and effort expended etc.
 - Adverse economic impact determination:
 - Small Business Determination (200 or < permanent employees)
 - Or Indirectly or directly increase regulatory costs (>\$200K in aggregate within 1 year of implementation)

SERCs – Background & Purpose

As a practical matter, most businesses are < 200 permanent employees.

Number of Establishments by Employment Size Class - SFWMD Counties - 2009



Employment Size Class, [No. of Employees Per Establishment]

Source: U.S. Census County Business Patterns, 2009,

Note: Total Establishments = 262,694, Total Employees = 3.1 million, Total Annual Payroll = \$120 billion



SERCs – Statutory Elements

- F.S. 120.541
- (2) A statement of estimated regulatory costs shall include:
 - (a) An <u>economic analysis</u> showing whether the rule <u>directly or indirectly</u> is likely to have an adverse impact on:
 - economic growth
 - private sector job creation or employment
 - private sector investment
 - business competitiveness,
 - productivity or innovation
 - Or increase regulatory costs (including any transactional costs),

in excess of \$1 million in the aggregate within 5 years after the implementation of the rule;

- (b) A good faith estimate of the number of individuals and entities
- (c) A good faith estimate of the:
 - cost to the agency, and to any other state and local government entities
 - any anticipated effect on state or local revenues



SERCs – Statutory Elements

- F.S. 120.541
- (2) A statement of estimated regulatory costs shall include:
 - (d) A good faith estimate of the <u>transactional costs</u> necessary to comply with rule. Examples:
 - direct costs such as filing fees,
 - licensing costs,
 - equipment or procedures,
 - Operation and maintenance (O&M),
 - monitoring and reporting, and any other costs necessary to comply with the rule.
 - (e) An analysis of the impact on <u>small businesses</u> as defined by s. 288.703, and an analysis of the impact on <u>small counties and small cities</u> as defined in s. 120.52.
 - (f) Any additional information that the agency determines may be useful.
 - (g) In the statement or revised statement, whichever applies, a <u>description</u> of any regulatory alternatives (Assess any Lower Cost Regulatory Alts. Can accept LCRA or reject but clarify why/revise SERC).
- (3) If the adverse impact or regulatory costs of the rule exceed any of the criteria established in paragraph (2)(a) [i.e., > \$ 1 M within 5 yrs post], the rule shall be submitted to the President of the Senate and Speaker of the House of Representatives no later than 30 days prior to the next regular legislative session, and the rule may not take effect until it is ratified by the Legislature.

Office of Fiscal Accountability and Regulatory Reform SERC Template

- OFARR template basically follows statutory elements:
 - Includes instructions/& examples of indicators to assess impacts. (explain, describe methods etc.)
- For complicated SERC, template can be used as Executive Summary
- Include summaries of rule & rationale up front to aid reviewers
- Use of tables, figures and appendices (within template) to answer questions / justify reasonable estimates.

{AGENCY NAME} Statement Of Estimated Regulatory Costs (SERC)

Division:	?			
Board:	?			
Rule Number:				
Rule Description: Contact Person:				
Contact Person.				
Please remen	nber to analyze	the impact of the rul	e. NOT the stat	tute, when
		mpleting this form.		
growth, private-se	ctor job creation	or indirectly, have an n or employment, or te within 5 years after	r private-sector	investment in
1. Is the rule lik	kely to reduce pe	rsonal income?	☐ Yes	□ No
2. Is the rule like	ely to reduce tota	al non-farm employme	nt? 🗌 Yes	□ No
3. Is the rule like	ely to reduce priv	vate housing starts?	☐ Yes	□ No
4. Is the rule like	ely to reduce visi	itors to Florida?	Yes	□ No
5. Is the rule like	ely to reduce wa	ges or salaries?	Yes	□ No
6. Is the rule like	ely to reduce pro	perty income?	☐ Yes	□ No
Explanation:				
		ered "Yes," presume the d the rule must be s		
competitiveness, in with persons doin	ncluding the abiliting business in o sess of \$1 mil	or indirectly, have an ty of persons doing but other states or dome lion in the aggrega	usiness in the st estic markets,	tate to compete productivity, or
1. Is the ru business?	le likely to raise	the price of goods o	or services prov	ided by Florida
2. Is the rumarkets?	ule likely to add	d regulation that is n	not present in o	other states or





SERCs - Data / Information Sources

Some Data Sources Used in Analyses:

- Regulatory Permitting Databases ePermitting system and other databases maintained by District
- Florida Department of Economic Opportunity Agency for Workforce Innovation – Quarterly Census of Employment & Wages
- U.S. Department of Commerce (BEA)
- U.S. Department of Labor, BLS
- U.S. Census
- Regional / Area Surveys
- Basin reports / Special Studies
- GIS information coverage / land use and parcel databases (Property Tax Assessor's Office etc.)
- Other data relevant to SERC..research..



SERC & Rulemaking Process – Key Submittals

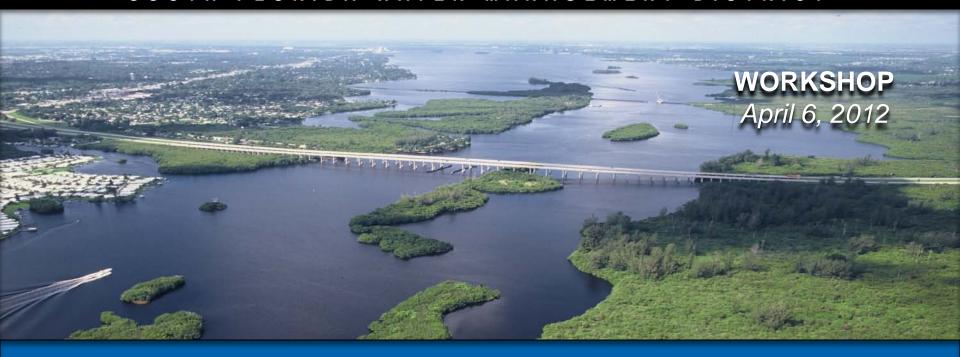
- Determination that SERC is required
- Rule presented to Governing Board for authorization to publish Notice of Rule Development
- Post information on SFWMD website
- Submit Rulemaking Notification of Rule Development to OFARR
 - → Conduct Rule Development Workshops
- Proposed Rule
- DRAFT SERC
- Submit package to Governing Board Coordinator
- Public comment period
- Present rule text at WRAC
- Incorporate WRAC and public comments in revised rule text
- Rule presented to Governing Board to Authorize Publication of the Proposed Rule
- Notice of Proposed Rule (Dept. of State, JAPC, DEP, SBRAC, DEO, interested / affected persons)
- Address any Lower Cost Regulatory Alternatives and revise SERC to include alts or include statement rejecting alts. F.S. 120 (3) (g).
- Submit final rule text and final SERC to Governing Board Coordinator for inclusion in portal
- Rule presented to Governing Board for adoption public hearing



Discussion / Questions?

Water Reservation for the Biscayne Bay Coastal Wetlands Phase I CERP Project Statements of Estimated Regulatory Costs (SERCs)

lan Miller
Lead Economist
Intergovernmental Coordination



Water Reservation for the Biscayne Bay Coastal Wetlands Phase I CERP Project

Summary of Public Comments

Beth Lewis

Senior Specialist Attorney
Office of Counsel



Joint Comments from Audubon of Florida, Biscayne Bay Waterkeeper, Everglades Law Center, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club, Tropical Audubon Society

- Support protection of all existing available canal flows and not just flows diverted by the Phase I Project since flows are necessary to reach environmental targets for Biscayne Bay
- Significant additional flows are needed above and beyond the target identified in the Phase I Project Implementation Report for Biscayne Bay
 - Phase II of the Biscayne Bay Coastal Wetlands Project is needed in a timely manner
- District needs to provide a presentation on how current consumptive users are permitted, monitored and quantified to help stakeholders understand how in particular small users will not be able to access reserved water



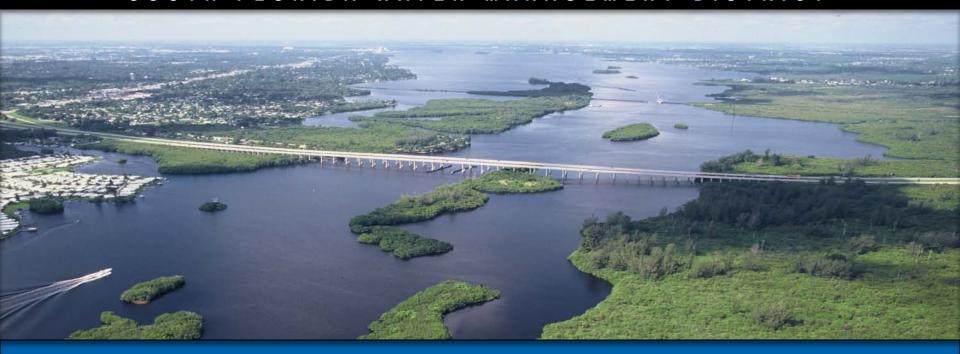
Joint Comments from Audubon of Florida, Biscayne Bay Waterkeeper, Everglades Law Center, National Parks Conservation Association, Natural Resources Defense Council, Sierra Club, Tropical Audubon Society

- Consider creating a water budget for South Dade so that a baseline of existing water consumption can be compared against any potential impacts from future consumptive use permits or operational changes.
- Ensure that water needed for the Bay is protected in the primary, secondary, and tertiary canals as appropriate
- Metric used to monitor existing flows into the Bay should not only include surface water but should also include the cone of influence of groundwater wells
- Revisit the practice of seasonal agricultural canal drawdowns in order to provide additional flows during the dry season to Biscayne Bay



National Park Service – Biscayne National Park

- All water currently flowing into Biscayne Bay should be protected
- Continue efforts to modify operational changes to improve water delivery to the bay, particularly during the dry season
- Continue efforts to find additional water for estuarine condition in dry season



Thank You for Your Participation!