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 Caloosahatchee River (C-43) West Basin Storage Reservoir Project

March 29, 2012 – 10:00 A.M. South Florida Water Management District Lower West Coast Service Center 2301 McGregor Boulevard Fort Myers, FL 33901

- 1. Introductions
- 2. Recap of Water Reservation for the C-43 Reservoir
- 3. Status of Development of Draft Technical Document to Support Rule
- 4. Overview of Statement of Estimated Regulatory Costs
- 5. Summary of Public Comments Received
- 6. Update on Rule Language
- 7. Additional Public Comments

THIS WORKSHOP IS OPEN TO THE PUBLIC

<u>COMMENTS ON THE DRAFT RULE LANGUAGE ARE REQUESTED TO BE SUBMITTED WITHIN</u> <u>THE NEXT THREE (3) WEEKS:</u>

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: <u>http://sfwmd.websitetoolbox.com/</u>



Water Reservation for the Caloosahatchee River (C-43) West Basin Storage Reservoir

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

The PIR states:

• "...all water made available by the project is provided to the natural system." Annex C, Section C.2.3, September 2007

Draft Rule Language states:

• "All surface water contained within and released via operation from the Caloosahatchee River (C-43) West Basin Storage Reservoir is reserved from allocation." (40E-10.041 (4)(a)), Dated February 24, 2012

District's Objective in Rulemaking

• District intends to maximize its operational flexibility to provide benefits to the estuary.

Consistency Between PIR and Proposed Rule

• Federal process:

- Planning Level Evaluation based on certain assumptions and project performance measures
 - Lake Okeechobee Regulation Schedule
 - Estuary performance measures
 - Initial Operating Regime
- Several of the planning level assumptions are no longer current – WSE versus LORS 2008

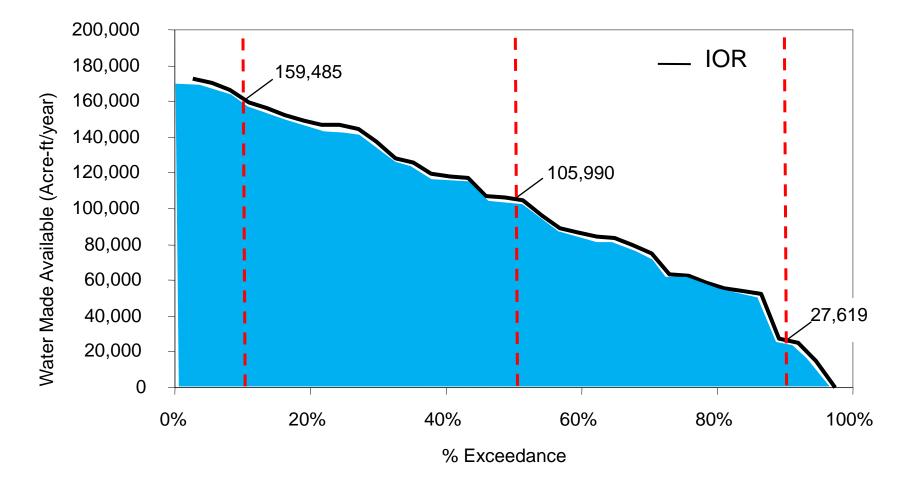
Consistency and Status of Draft Document to Support the Rule

State Process:

• All of the water in reservoir will always be reserved for the protection of fish and wildlife.

- Using planning level evaluations for rulemaking can have unintended consequences
 - Draft document to support the rule

Variability of water made available by the project for the Initial Operating Regime (IOR)



Recap of Water Reservation

- Water reservation will protect all water within the C-43 Reservoir – (170,000 ac-ft of storage volume)
- Reservation will protect project water once constructed/operated (prospective reservation)
- Water reservation will involve maximum flexibility in the operating schedule to provide the greatest benefits to the estuary.

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*

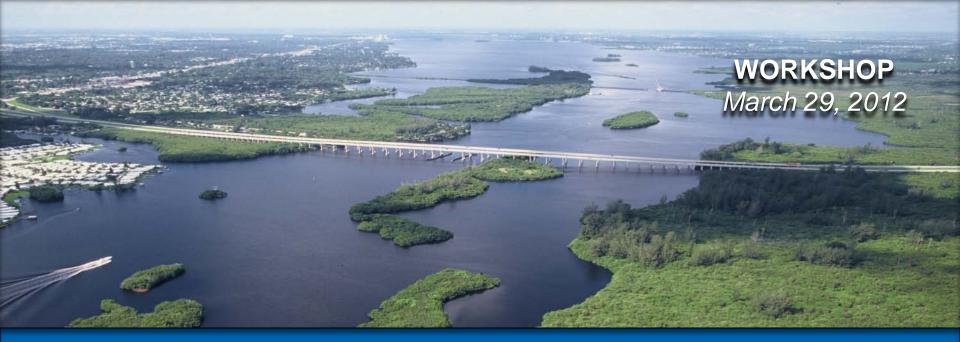


Discussion / Questions?

Workshop: Water Reservation for the Caloosahatchee River (C-43) West Basin Storage Reservoir

Don Medellin

Principal Scientist Coastal Ecosystems, Applied Sciences Bureau



Water Reservation for the Caloosahatchee River (C-43) West Basin Storage Reservoir

Statements of Estimated Regulatory Costs (SERCs)

Ian Miller

Lead Economist Intergovernmental Coordination

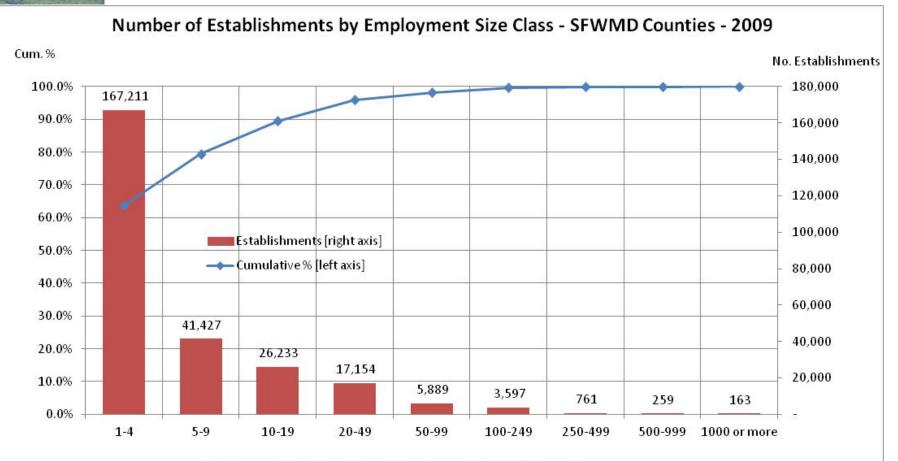


SERCs – Background & Purpose

- Part of agency Rulemaking activities
 - → Florida Statutes: Chapter 120 Administrative Procedure Act
 - 120.54 Rulemaking
 - →120.541 Statement of Estimated Regulatory Cost
- Ex: 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.



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 – 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 – Elements

- F.S. 120.541
- 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 small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined in s. 120.52.
 - (f) <u>Any additional information</u> that the agency determines may be useful.
 - (g) In the statement or revised statement, whichever applies, a description of any regulatory alternatives (Can accept LCRA or reject but clarify why/revise SERC).
- If the adverse impact or regulatory costs of the rule exceed any of the (3) 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:	

Please remember to analyze the impact of the rule, NOT the statute, when completing this form.

A. Is the rule likely to, directly or indirectly, have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of \$1 million in the aggregate within 5 years after the implementation of the rule?

 Is the rule likely to reduce personal income? 	Yes	No No
2. Is the rule likely to reduce total non-farm employment?	Yes	No No
3. Is the rule likely to reduce private housing starts?	Yes	No No
4. Is the rule likely to reduce visitors to Florida?	Yes	No No
5. Is the rule likely to reduce wages or salaries?	Yes	No No
6. Is the rule likely to reduce property income?	Yes	No No

Explanation:

If any of these questions are answered "Yes," presume that there is a likely and adverse impact in excess of \$1 million, and the rule must be submitted to the legislature for ratification.

B. Is the rule likely to, directly or indirectly, have an adverse impact on business competitiveness, including the ability of persons doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of \$1 million in the aggregate within 5 years after the implementation of the rule?

 Is the rule likely to raise the price of goods or services provided by Florida business?

Yes No

 Is the rule likely to add regulation that is not present in other states or markets?

🗌 Yes 🗌 No

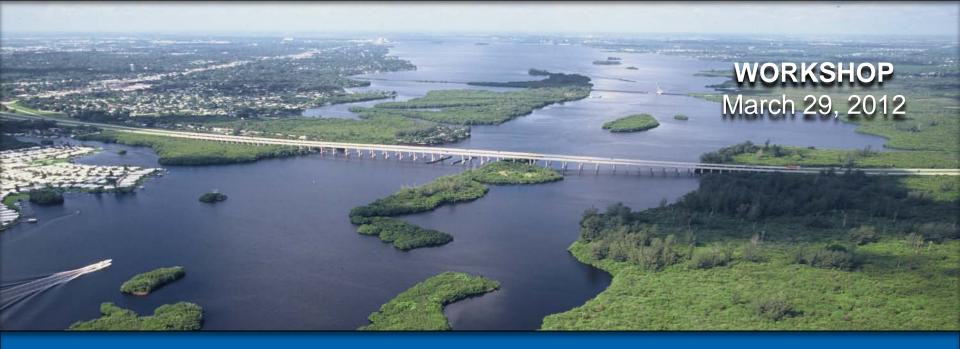
SERCs – Data / Information Sources

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 Timeline / 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



Water Reservation for the Caloosahatchee River (C-43) West Basin Storage Reservoir

Summary of Public Comments Received

Beth Lewis

Senior Specialist Attorney Office of Counsel

Lee County Natural Resources

- Holistic and comprehensive process to assess and quantify new and/or available surface water in the Caloosahatchee River watershed and Lake Okeechobee Watershed necessary to protect endangered species in the Caloosahatchee River Estuary (CRE)
- Prospective reservation should state when reserved quantities will become available and how reserved quantities will be adjusted if amount different than anticipated
- Include aspirational language in rule concerning future needs for CRE
- Clarify apparent conflict concerning existing legal uses in rule language and status of applicants in Basis of Review language
- SERC should include economic impacts of algal blooms and impacts to tourisim/economy on CRE

Conservancy of Southwest Florida

- Need for broader reservation to protect the total amount of water needed for the protection of fish and wildlife in the CRE
- Need for open stakeholder process to address broader reservation
- Need to use best available science to identify the appropriate season flow to fully protect fish and wildlife in the CRE to appropriately measure level of benefit or exclude level of benefit analysis all together
- Clarify timing of when water will be delivered to the CRE and sources of water for the C-43 West Basin Storage Reservoir (Reservoir) through development of operational language in the rule
- Remove proposed rule language finding that presently existing legal uses of water are not contrary to the public interest
- Clarify language in Basis of Review to reflect that permits issued after the rule is adopted but before the Project becomes operational which are deemed to be in the public interest are determined not to use reserved water



Agricultural Interests

- Clarify that the water reservation water body which receives benefits from the Reservoir is the CRE
- Consider revising Figure 2 to make it clear that the water being reserved is water within the Reservoir and not water within the Perimeter Canal, which provides a transfer of the source of water supply for existing legal users
- Remove Figure 4-3 and any language in the rule related to Figure 4-3 because it is not relevant to the goal of the rule which is to reserve all the water in the Reservoir regardless of whether the delivery of water from the Reservoir meets or exceeds this figure.

U.S. Fish and Wildlife Service –J.N. "Ding" Darling National Wildlife Refuge

- Language regarding the District issuing future permits should be included in the water reservation
- District needs to develop a comprehensive water reservation to address the total amount of water for the CRE
- District needs to use the best available science and acknowledge the inadequacy of the 450 cfs target in meeting the dry season needs of the CRE
- Include in the SERC an economic analysis on small businesses that rely on a healthy and functioning CRE
- Allow for adaptive management and periodic reviews of the rule to address the performance of the Reservoir



Florida Department of Environmental Protection

• Revise Figure 3 to include labels and a caption to more clearly show what is being depicted in the figure