



January 30, 2020

Colonel Andrew Kelly
Jacksonville District Commander
U.S. Army Corps of Engineers Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232-0019

Re: Southeast Florida Utility Council Comments – LOSOM, WRDA 2000 Savings Clause

Dear Colonel Kelly,

The Southeast Florida Utility Council (SEFLUC) represents potable water providers throughout South Florida serving over six million people. SEFLUC's mission is to provide a communications, networking, and support structure to allow member utilities to continue to provide superior-quality water supply and wastewater management services to their customers in a cost-effective manner. SEFLUC members rely on the operation of the regional water management system to maintain groundwater levels and control saltwater intrusion so they can meet the water needs of a growing population and economic base. SEFLUC's members have been active participants in the Lake Okeechobee System Operating Manual (LOSOM) 2022 process to date, and SEFLUC and its members previously submitted comments to the Corps during the LOSOM scoping comment period.

SEFLUC shares the goals of all stakeholders for the development of a system operating manual that will integrate Lake Okeechobee operations within the overall framework and multi-purpose objectives of the Central and Southern Florida Project (Project), the Comprehensive Everglades Restoration Plan (CERP), and water supply planning pertaining to the Lower East Coast (LEC).

The preservation of existing legal sources of water is a bedrock foundation for implementation of CERP, which has been acknowledged by Congress, the Corps, the State of Florida, and SFWMD before, during and after the enactment of WRDA 2000 and other Federal and State law and regulation. Issues of direct concern for SEFLUC members are listed below and further elaborated on in this letter:

- WRDA 2000 and CERP were adopted based on the clear understanding existing legal sources of water would be maintained and SFWMD would continue to implement water supply planning and regulation as reflected in the WRDA 2000 Savings Clause
- Under the Savings Clause, any aspect of the Project that implements CERP is subject to the requirements of the Savings Clause
- Corps regulations and actions regarding Lake Okeechobee confirm the Savings Clause applies to LOSOM
- The Corps has stated CERP projects like the C-43 Caloosahatchee West Basin Storage Reservoir, C-44 Reservoir and Stormwater Treatment Area, and Central Everglades Planning Project (CEPP) are a critical consideration in the LOSOM process

- Florida law likewise requires the quantity of water available to existing legal users must not be diminished by implementation of project components so as to adversely impact existing legal users
- The Florida Legislature and SFWMD has made it clear the preservation of existing sources of water must be maintained throughout the Project, including operational modifications

Thus, failure to apply the Savings Clause in the LOSOM process is contrary to both Federal and State law, and contrary to sound public policy regarding the responsible management of the South Florida ecosystem and water supply and will directly impact SEFLUC members.

As indicated in our prior written comments on LOSOM 2022 scoping, one of our critical concerns in this process is the interlinking of the Project, CERP, and the South Florida Water Management District's (SFWMD) water supply regulation and planning efforts for the LEC. Of particular importance is Section 601(h)(5) of the Water Resources Development Act of 2000 (WRDA), the Savings Clause, which guarantees the preservation of existing legal authorized water supplies in existence at the time of the Act, as well as the provision of water supplies to meet future demands through the implementation of those projects identified within WRDA 2000 and implementing documents.

At a recent meet of the LOSOM Project Delivery Team, Corps staff indicated they do not consider the water supply guarantees of the WRDA 2000 Savings Clause are applicable to the current LOSOM development process, because LOSOM is not a CERP project. We believe failure to incorporate the requirements of the Savings Clause in the development of LOSOM would be contrary to the requirements of existing Federal and State law and regulation.

Federal Law Requires Application of the WRDA 2000 Savings Clause to LOSOM 2022

A review of the history of the Project and CERP demonstrates how the Savings Clause must be applied to LOSOM as the operation of Lake Okeechobee is inextricably linked with the Project and CERP and thus the Savings Clause.

WRDA 2000 Section 601(h)(5) provides in relevant part that "Until a new source of water supply of comparable quantity and quality as that available on the date of enactment of this Act is available to replace the water to be lost as a result of implementation of the Plan, the Secretary and the non-Federal sponsor shall not eliminate or transfer existing legal sources of water, including those for...an agricultural or urban water supply..." The plain language of the Savings Clause does not limit its application to only new CERP projects but to any activities implementing CERP that are part of the Project. On the contrary, WRDA 2000 Section 601(b)(1)(A) makes it clear CERP is a framework for all future modifications and operational changes to the Project.

Except as modified by this section, the Plan is approved as a **framework for modifications and operational changes to the Central and Southern Florida Control Project** that are needed to restore, preserve and protect the South Florida ecosystem **while providing for other water related needs of the region, including water supply and flood protection.** The Plan shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and

human environment described in the Plan, and required pursuant to this section, for as long as the project is authorized

(Emphasis added).

Subsequent regulations implementing CERP confirm the scope of the Savings Clause. Section 601(h)(3) of WRDA 2000 requires the Corps to adopt programmatic regulations which “ensure that the goals and purposes of [CERP] are achieved.” In 2003, the Corps adopted those CERP programmatic regulations in 33 C.F.R. Part 385.

Per 33 C.F.R. § 385.2(a), the Corps’ programmatic regulations requirements apply “to **all activities conducted to implement** the Comprehensive Everglades Restoration Plan.” Emphasis added. Since Lake Okeechobee is operated in part to implement CERP, it is subject to the programmatic regulation requirements. For example, the Corp contends the Lake Okeechobee Regulation Schedule 2008 (LORS) is the baseline for LOSOM review and adoption, a position with which we strongly disagree. LORS 2008 was only meant to be an interim regulation schedule not lasting more than three years. Section 7-03 of LORS 2008 specifically states, “the Corps expects to operate under the 2008 LORS until the earlier of (1) implementation of a new Lake Okeechobee Regulation Schedule as a component of the system-wide operating plan **to accommodate the CERP Band 1 projects** and the State of Florida’s fast-track Acceler8 projects, or (2) completion of HHD seepage berm construction or equivalent dike repairs for reaches 1, 2 and 3.” Now, what is being contemplated is a new Lake Okeechobee Regulation Schedule as a component of the CERP system-wide operating plan. .

Given the fact the Corps specifically intended the LORS operating schedule to be replaced by a regulation schedule subject to CERP, we respectfully submit it cannot be reasonably argued that LOSOM does not fall under the requirements of the programmatic regulations in 33 C.F.R. Part 385. In fact, in the LOSOM process itself, the Corps has explicitly stated the LOSOM effort will take into consideration the Kissimmee River Restoration Project, as well as the CERP C-43 West Basin Storage Reservoir, the C-44 Reservoir and Stormwater Treatment Area, and the Central Everglades Planning Project (CEPP) South further confirming that LOSOM will in part implement CERP.

The programmatic regulations adopted in 33 C.F.R. Part 385 make it clear the Savings Clause is applicable to the adoption of a new system operating manual (SOM) for projects which are used to implement CERP, such as Lake Okeechobee. 33 C.F.R. 385.28(a)(1) states “The Corps of Engineers and the non-Federal sponsor shall...develop Operating Manuals to ensure that the goals and purposes of the Plan are achieved.”

33 C.F.R. 385.28(a)(6), goes on to provide Operating Manuals shall (i) be consistent with the goals and purposes of the Plan...[and] (vi) Be consistent with the reservation or allocation of water for the natural system **and the savings clause provisions** contained in the Project Implementation Report and the Project Cooperation Agreement and the provisions of Secs. 385.35(b), 385.36 and 385.37 and reflect the operational criteria used in the identification of the appropriate quantity, timing and distribution of water dedicated and managed for the natural system.” Therefore, in addition to the Savings Clause itself, the Corps has adopted its own regulations which make it clear the savings clause must be applied to the development of Operating Manuals.

In other words beyond the clear requirements of the Savings Clause itself, (1) WRDA 2000 requires the adoption of programmatic regulations, (2) the Corps' adopted programmatic regulations are applicable to any activities that implement CERP, (3) Lake Okeechobee's regulation schedules explicitly implement CERP and thus are subject to the Corps' programmatic regulation requirements, and (4) the programmatic regulations require application of the savings clause provisions through adopted operating manuals.

NEPA and State Law Requires Application of Florida's Equivalent of the WRDA 2000 Savings Clause to LOSOM 2022

In addition to the requirements of Federal law and regulations, the NEPA process also requires the Corps take into consideration the requirements of State law. The Corps regulations provide the NEPA evaluation must consider "whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27.

In this case, State law also contains a "savings clause" applicable to LOSOM similar to the Savings Clause of WRDA 2000. Section 373.1501(5)(d), Florida Statutes provides that as local sponsor, SFWMD shall "provide reasonable assurances that the quantity of water available to existing legal users shall not be diminished by implementation of project components so as to adversely impact existing legal users..." Chapter 373, Florida Statutes establishes Florida's legal framework for the permitting of consumptive uses of water. Under this system, the water management districts issue permits creating legal uses of water for specified durations and quantities. These permitted legal water uses are guaranteed protection by both the Savings Clause and Section 373.1501(5)(d), Florida Statutes. Refusal by the Corps to take into consideration the protection of existing legal uses of water in developing LOSOM 2022 therefore would violate both Federal and State requirements, contrary to the requirements of NEPA.

The history of the development and adoption of CERP makes it clear the United States Government and the State of Florida always intended the Project, as modified by CERP, must guarantee the protections granted under Florida law to permitted water users. For example, throughout the Comprehensive Review Study of the Central and Southern Florida Project (Restudy) process, which culminated in WRDA 2000 and CERP, the SFWMD, as Florida's representative, made it clear the state's support of CERP was conditioned on full protection of all existing legal uses of water and the supremacy of Florida water law with regards to the implementation of CERP. The Restudy incorporates as Appendix G SFWMD's February 10, 1999 Letter of Intent as local sponsor. In that letter, SFWMD states: "As the implementation plan crystallizes, several outstanding issues of great importance to the SFWMD and the State of Florida must be adequately addressed," among those issues are "assurances to existing legal users." An attachment to the letter describes in greater detail what these assurances mean:

Assurances to Existing Legal Users

The SFWMD and the Corps should work with all stakeholders to develop appropriate water user assurances to be incorporated as part of the Comprehensive Plan authorizations. These water user assurances should be based on the following principles:

- A. Physical or operational modifications **to the C&SF Project** by the Federal government or the SFWMD **will not interfere with existing legal uses and will not adversely impact existing levels of service for flood management or water use**, consistent with State and Federal law.

- B. Environmental and other water supply initiatives contained in the Restudy shall be implemented through appropriate State (Chapter 373, F.S.) processes.
- C. In its role as local sponsor for the Restudy, **the SFWMD will comply with its responsibilities under State water law** (Chapter 373, F.S.).
- D. **Existing Chapter 373, F.S. authority for the SFWMD to manage and protect the water resources shall be preserved.**

(Emphasis added). State law likewise provides that in authorizing SFWMD as local sponsor, SFWMD is required to assure all components of the Project be “consistent with the balanced policies and purposes of [Chapter 373], specifically s. 373.016.” § 373.1501(2), Fla. Stat. Section 373.016, Florida Statutes provides in relevant part that it is the policy of the State to “promote the availability of sufficient water for all existing and future reasonable-beneficial uses and natural systems.” Therefore, Florida law makes it clear that existing legal uses of water must be preserved for all aspects of the Project, including the operation of Lake Okeechobee as a significant component of Project.

These critical concerns regarding the preservation of existing legal uses of water and the State water permitting system of Chapter 373 were ultimately addressed in part through the inclusion of the Savings Clause in WRDA 2000. Notably, SFWMD’s letter of intent does not limit the protection of existing legal uses of water to CERP projects, but to all “**PHYSICAL OR OPERATIONAL MODIFICATIONS TO THE C&SF PROJECT.**” (Emphasis added). Thus, even if LOSOM 2022 were somehow exempt from the WRDA 2000 Savings Clause, there can be no doubt it is still subject to Florida law.

To ignore the clearly stated intent and application of the Savings Clause through both Federal and State law would be to subvert the protections that were a necessary and critical component of the adoption of CERP and WRDA 2000. Therefore, the Savings Clause and the similar protections afforded to existing legal users of water under Florida law must be strictly applied in the LOSOM process.

Thus, given the above, not only is the application of the Savings Clause through the LOSOM process essential to providing a reliable water supply for the people of the LEC, its application is required by WRDA 2000, the Corps’ own regulations applicable to the adoption of the operating manual for Lake Okeechobee, NEPA, and Florida law. Thank you for your consideration of these comments and our members look forward to continuing to work with you throughout the LOSOM process.

Sincerely,



Todd Hiteshew
Chair, Southeast Florida Utility Council

cc: Drew Bartlett, SFWMD Executive Director
Jennifer Smith, SFWMD Chief of Staff