



Reply To: swalker@llw-law.com

November 2, 2020

Ms. Toni Edwards
Senior Scientist, Coastal Ecosystems Section
South Florida Water Management District
tedwards@sfwmd.gov

Re: **Seminole Tribe of Florida’s Public Comments on the Proposed Rules for the
EAA Reservoir Water Reservation**

Dear Ms. Edwards:

On behalf of the Seminole Tribe of Florida (Seminole Tribe), please accept these public comments on the Proposed Rules amending Florida Administrative Code Rules 40E-2 and 40E-10 published on October 10, 2020, in the Florida Administrative Register by the South Florida Water Management District (SFWMD). The Seminole Tribe has participated in the rule development process for the Everglades Agricultural Area (EAA) Reservoir Water Reservation Rules (Proposed Rules) since it began and submitted comments to the SFWMD on August 25, 2020, on the last draft of the Rules. Since SFWMD has made no substantive changes to the Proposed Rules, the comments now submitted remain largely the same, with a few additions, as the Seminole Tribe’s concerns expressed in its August 25, comments. Please note, that these comments include a proposal for an alternative approach to the SFWMD’s regulatory objective that the Seminole Tribe believes is less costly on those regulated under the Proposed Rules, while substantially accomplishing the SFWMD’s statutory objective.

The Seminole Tribe is a federally recognized tribe pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended. The Seminole Tribe’s access to water is secured by the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida and the South Florida Water Management District (Water Rights Compact), which has been codified in both federal and Florida law. Seminole Indian Land Claims Act of 1987, Pub. L. No. 100-228 (1987); Ch. 87-292, Laws of Fla. (H.B. No. 1472). The Seminole Tribe’s Brighton, Big Cypress, and

JACKSONVILLE
245 Riverside Ave., Suite 510
Jacksonville, Florida 32202
T: 904.353.6410
F: 904.353.7619

ST. PETERSBURG
100 Second Ave., South
Suite 501-S
St. Petersburg, Florida 33701
T: 727.245.0820
F: 727.290.4057

TALLAHASSEE
315 South Calhoun St., Suite 830
Tallahassee, Florida 32301
T: 850.222.5702
F: 850.224.9242

TAMPA
301 West Platt St.
Suite 364
Tampa, Florida 33606
T: 813.775.2331

WEST PALM BEACH
515 North Flagler Dr., Suite 1500
West Palm Beach, Florida 33401
T: 561.640.0820
F: 561.640.8202

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Hollywood Reservations, as well as the Coconut Creek Trust Lands, all rely on the Central and Southern Florida Project for Flood Control and Other Purposes (C&SF Project) either directly or indirectly for water supply and flood protection. In addition, a great portion of the Seminole Tribe's history and culture is directly tied to the Everglades and the greater south Florida region.

The Proposed Rules would reserve from allocation for consumptive uses substantial amounts of water from the C&SF System, which will impact water supply planning as well as day-to-day operational decisions that are critical to the Seminole Tribe's water resources. In addition, the water is being reserved to benefit the Everglades system, which potentially impacts the Seminole Tribe's historic and cultural resources. Although the water reservations will not apply to the Seminole Tribe under the Water Rights Compact unless the Seminole Tribe were to specifically incorporate it into the Criteria Manual, the Tribe's water supply depends upon the availability of the shared resource in the regional system. Any action by the SFWMD which would diminish the available supply substantially affects the Seminole Tribe. Thus, the Proposed Rules substantially affect the Seminole Tribe's interests.

The Seminole Tribe appreciates the importance of the EAA Reservoir in achieving the greater goal of Everglades restoration and a reduction of harmful discharges to the northern estuaries. It also understands the urgency that the SFWMD and many stakeholders feel in wanting to get the project built and operational. In its haste to complete this rulemaking, however, SFWMD cannot lose sight of its responsibilities to all water users who currently rely on the regional system, especially the Seminole Tribe, with whom SFWMD shares a unique relationship and responsibility. Given the number of assumptions SFWMD must necessarily make at this stage of Comprehensive Everglades Restoration Program (CERP) implementation and changing Lake Okeechobee regulation schedules, the Seminole Tribe urges SFWMD to proceed cautiously and conservatively when reserving water in such a complex system so far in advance of the time in which the water will become available for the natural system.

As explained in greater detail below, the Proposed Rules are far too aggressive in the amount of water they potentially reserve. At this time, the Seminole Tribe thinks it would be more prudent to reserve only what is minimally required to secure a project partnership agreement (PPA) with the U.S. Army Corps of Engineers (USACE) so that construction on the EAA Reservoir may proceed as planned. An uncapped water reservation such as SFWMD now proposes is an overly aggressive approach so far ahead of when the EAA Reservoir will become operational that it will subject the Seminole Tribe's water rights to greater uncertainty. It also increases the risk of man-made drought, and potentially limits the Seminole Tribe's ability to develop its Brighton and Big Cypress Reservations. By not placing an upper limit on the reserved water, the Proposed Rules will also increase the amount of resources the Seminole Tribe will expend engaging in and analyzing any project that could send water to, or demand water from, the EAA

Reservoir and in potentially having to develop more expensive alternative sources of water. Furthermore, by erroneously including 825,000 average annual acre-feet number in the Proposed Rules, SFWMD creates an expectation that that much water will be sent south each year, significantly reducing the flexibility that the USACE and SFWMD have to manage and allocate water resources during dry periods. Thus, it is the Seminole Tribe's position that SFWMD amend the Draft Rule to cap the amount of water reserved at this time to only the amount necessary to secure the PPA, equal to 370,000 average-annual acre-feet and delete reference to the 825,000 figure in the Proposed Rules.

- 1. An uncapped, preemptive water reservation increases uncertainty and regulatory costs, SFWMD should cap the Proposed Rules to reserve no more than the average annual amount of additional water that the EAA Reservoir will make available to the environment as identified in the EAA Reservoir Final Environmental Impact Statement and Project Implementation Report.**

SFWMD's stated purpose for enacting the Proposed Rules now, rather than later, is to enable it to enter into a PPA with the USACE to begin construction on the EAA A-2 Reservoir. Prior to entering into such an agreement for CERP projects, SFWMD must allocate or reserve the additional water supply that the EAA Reservoir project is expected to make available to the natural system as identified in the EAA Reservoir Final Environmental Impact Statement and Project Implementation Report (FEIS/PIR). According to the EAA Reservoir FEIS/PIR, the original Central Everglades Planning Project (CEPP), authorized in 2014, would provide an additional 210,000 acre-feet of water on an average annual basis to the Everglades. The EAA Reservoir Project, which modified CEPP by adding to it the EAA A-2 Reservoir and stormwater treatment area, would direct an additional annual average of 160,000 acre-feet to the Everglades. The total amount of water SFWMD is required to reserve in order to enter into the PPA with the USACE, therefore, is 370,000 acre-feet on an average-annual basis.

The Proposed Rules, however, do not reserve a specific amount of water. They simply reserve all water flowing through three of the EAA Reservoir structures, the S-624, S-625, and S-626 structures. Moreover, the Proposed Rules place no upper bound on the amount of water that can flow through these structures, but instead state that SFWMD modeling indicates that 825,000 average-annual acre-feet of water, over twice what is required to secure the PPA, may be conveyed through these structures and therefore reserved. This figure was derived from modeling that was based on the 2008 Lake Okeechobee Regulation Schedule (LORS 08) and the Draft Operating Manual included in the EAA Reservoir FEIS/PIR. Yet by the time the EAA Reservoir becomes operational there will be a new Lake operating schedule in place, and, as the EAA Reservoir FEIS/PIR and Draft Operating Manual acknowledge, the Draft Operating Manual for the EAA Reservoir will likely have changed over the course of the P&E phase of

project implementation. Thus, not only does the 825,000 figure go far beyond what SFWMD is required to reserve for the PPA, it is not a reliable estimate of how much water will actually flow through those structures once they become operational. Thus, the Proposed Rules neither contain any meaningful constraint or guiding parameters in how much water will be set aside, nor do they have a rational relation to the amount of water needed to secure the PPA with the USACE.

Section 373.470(3)(c), Florida Statutes, requires the SFWMD to reserve the additional water supply resulting from the EAA Reservoir's construction, as identified in the EAA Reservoir FEIS/PIR. As mentioned above, the FEIS/PIR identifies a total of 370,000 average annual acre-feet of water that will be made available and reserved for the environment. Annex B of the EAA Reservoir FEIS/PIR includes a table, Table 7-3, that distinguishes this additional water from the water that would be available for the environment without the EAA Reservoir, i.e. the future without condition. Section 7.2 of Annex B states that, to meet the requirements of Section 373.470(3)(c), Florida Statutes, "the water made available by the project will be protected using the State of Florida's reservation or allocation authority under State law as identified in Table 7-3." CEPP PACER Annex B at 7-7. Thus, the extent to which the Proposed Rules reserve more water than the 370,000 acre-feet identified in the EAA Reservoir FEIS/PIR, it amounts to an enlargement, modification, or contravention of the implementing laws from which SFWMD derives its rulemaking authority.

The lack of constraints in the Proposed Rules is even more concerning when it is considered in the context of the current trend in the operation of Lake Okeechobee: to send as much water south during the dry season as possible. The 2020 Planned Deviation to the 2008 Lake Okeechobee Regulation Schedule (LORS 08) (Planned Deviation), which was approved earlier this year, allows the USACE to send substantially more water south than LORS 08 currently allows. The modeling the USACE provided with the Environmental Assessment (EA) for the Planned Deviation shows this strategy will increase the incidence of water supply cutbacks.

The Planned Deviation concerns the Seminole Tribe because its Brighton and Big Cypress Reservations rely heavily on Lake Okeechobee for water deliveries, which are most needed during the dry season precisely when water is most scarce. Even more concerning, the USACE is receiving pressure to incorporate this operational regime into the Lake Okeechobee System Operating Manual (LOSOM), which is currently under development. These operations are especially concerning for Brighton Reservation, since once water leaves Lake Okeechobee, there is no way to bring it back north for the Reservation's benefit if needed. This effectively removes that water from the water-supply pie. Without a cap or any other constraint limiting the maximum water reserved under the Proposed Rules, SFWMD is creating what amounts to a large, unchecked drain in Lake Okeechobee that threatens the Seminole Tribe's access to water.

The above concerns illustrate another issue created by the Proposed Rules' lack of constraints on the amount of water they reserve, it increases costs on the Seminole Tribe and other regulated stakeholders. As explained above, once water is sent south to the EAA Reservoir from Lake Okeechobee, it is effectively lost to Brighton Reservation as a source for its water supply needs. Similarly, under the Proposed Rules water sent through the S-624, S-625, and S-626 structures, will be lost as a source of water for Big Cypress Reservation. Because there is no limit to the amount of water reserved under the Proposed Rules, it creates additional risk that a combination of political pressure and CERP projects will cause significantly more water to flow through those structures and be taken out of the water supply picture. For example, the DMSTA model is in the process of being updated to determine how much more water can be sent south into the Everglades. While sending more water into the Everglades is a laudable goal and one the Seminole Tribe supports, without some reasonable limitation on the amount of additional water directed to the Everglades there is a risk that we will send water at the cost of south Florida's water supply. Absent some meaningful constraint within the Proposed Rules, the Seminole Tribe will have to expend more resources to follow every project and update of an operating manual that could potentially send more water through the EAA Reservoir or create increased demand from the EAA Reservoir. Also, this may force the Seminole Tribe to spend more money to develop more costly water supply options in order to fully develop their reservations. If SFWMD inserts limiting language into the Proposed Rules, that would reduce the importance of those other planning efforts with respect to their potential risk to inadvertently harm the Seminole Tribe's water supply.

SFWMD points to the fact that it can amend these water reservations, once implemented, as reason to not be concerned about an overly aggressive reservation. This assurance does not allay the concerns of the Seminole Tribe. Once created, there are procedural hurdles that create disincentives for this kind of reservation to be amended. The CERP Programmatic Regulations, for instance, require an amendment of the PPA for any change in a water reservation. In addition, project operating manuals must be made consistent with the water reservation. Thus, dialing back an overly aggressive water reservation would implicate both the PPA and the operating manual for the EAA Reservoir, which will create a large disincentive to adjust the reservation and constrain SFWMD's ability to later correct a mistake included in the Proposed Rules now. That is why it is far better to create a more conservative reservation now, rather than try to correct a mistake later on that severely impacts south Florida's water supply.

Given the preceding, the Seminole Tribe asks the SFWMD to take a more conservative approach to this water reservation. SFWMD should amend the Proposed Rules to place an upper annual limit of 370,000 acre-feet of water on the water reservation. This is what the law requires and it accomplishes SFWMD's goal to allow it to enter into a PPA with the USACE to continue construction on the EAA Reservoir while creating relatively lower regulatory costs for affected

stakeholders. Once the EAA Reservoir is built, the SFWMD will have much more information about its operations and the changes in the rest of the C&SF system, and it will be in a much better position to revise the water reservation, if it looks like the system can send more water to the Everglades.

The Seminole Tribe offers the following proposed alternative language for subsection 40E-10.061(3)(a) of the Proposed Rules, which substantially achieves the SFWMD's regulatory objective without overcommitting south Florida's limited water resources at this time:

- (a) All surface water released, via operation, from the EAA Reservoir that is directed to the Lower East Coast Everglades Waterbodies through Structures S-624, S-625, and S-626 (see Figure 3-6) up to 370,000 acre-feet, annually, is reserved from allocation.

2. It is uncertain how SFWMD will distinguish water released through the EAA Reservoir that is reserved from allocation and water it mixes with downstream that is not reserved.

The EAA Reservoir is not the last stop for reserved water discharged from the S-624, S-625, and S-626 structures before it enters the Everglades. It must first flow through numerous other structures along the way where it will mix with other water that is not reserved and upon which numerous stakeholders, including the Seminole Tribe's Big Cypress Reservation, its Hollywood Reservation, and the Coconut Creek Trust Lands, rely for their water supply. It is not clear how SFWMD plans to track or apportion this mixed water. This information becomes especially important during droughts when the C&SF Project does not contain enough water to meet all the needs of the system and SFWMD must make operational decisions that determine who gets the limited available water.

Absent clear guidelines or standards for the operation of the EAA Reservoir, especially during dry periods, there exists the potential for severe, unaccounted-for impacts to the Seminole Tribe's water supply for the areas mentioned above. These uncertainties only underscore the importance of taking a more conservative approach to this water reservation. While the Everglades may be able to receive an additional 825,000 acre-feet of water annually once CEPP and the EAA Reservoir are fully operational, the C&SF System will not have the ability to reliably send that water to the Everglades system for years to come. In the interim, any number of conditions could change that would result in potential impacts to water supply, exacerbated by the unconstrained water reservation. Thus, including a reasonable constraint in the Proposed Rules now is more prudent and provides greater flexibility in the system to accommodate uncertainty in operations, while still substantially accomplishing SFWMD's objectives.

3. SFWMD analysis on potential impacts to water supply caused by the Proposed Rule is not reliable or sufficient.

The analysis included in the Technical Document for the Proposed Rules only analyzes potential impacts caused to existing legal users who withdraw surface water from the Miami and North New River Canals. Even the upstream analysis appears to have been limited to a smaller sub-basin of the Lake Okeechobee Service Area (LOSA) consisting of the area immediately south of Lake Okeechobee between the Miami and North New River Canals. The analysis relies almost completely on the fact that the current LOSA Restricted Allocation Area rules restrict new allocations or increases to conclude that the Proposed Rules will not impact existing legal users. These LOSA Restricted Allocation Area rules do not apply to the Seminole Tribe and its water uses. The SFWMD's reliance on a restricted allocation rule to effectively cap water supply demand indefinitely and then, evidently, reserve all additional water in the system in the Proposed Rules could cripple the Seminole Tribe's development potential for Brighton and Big Cypress Reservations unless other water reservations are secured for these Tribal Reservation lands. This comes at a time when the Seminole Tribe is working with SFWMD to amend its work plan to account for future growth potential on the Reservations and the attendant increases in surface water supply needs. This is yet another reason why SFWMD should not rush to reserve more water than is necessary so far in advance of the system's actual ability to deliver it. At the very least, SFWMD must provide better documentation as to how it plans to preserve the Seminole Tribe's water rights, which include both the Seminole Tribe's present and future surface water demands. If SFWMD does not, the consequences for Brighton and Big Cypress Reservations could be significant.

Compounding the issue, the modeling performed by SFWMD was based on LORS 08 and it does not appear to have evaluated the potential impacts to Brighton's water supply that the 2020 Planned Deviation or something similar incorporated into LOSOM could have. SFWMD must perform a complete and thorough analysis of the Proposed Rules' potential impacts to all users of Lake Okeechobee water, including the Seminole Tribe, in the context of a different Lake schedule that allows the USACE to send greater amounts of water south when the Lake is in water supply operations.

The lack of clear guidelines, standards, or constraints in the Proposed Rules regarding how operational decisions for the EAA Reservoir will be made is especially concerning during times of drought. For example, the Draft Operating Manual for the EAA Reservoir prohibits water supply discharges when the Reservoir stage is below 8 feet. One could easily imagine a situation during a dry period where there is a large demand on the C&SF Project from the Seminole Tribe, agriculture, municipalities, and the environment and water is being pumped through the EAA Reservoir as fast as it can, so it creates a sink for more water to be sent from Lake

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Okeechobee to meet the needs of the Everglades. At that point, the decisions made by the USACE and SFWMD are of critical importance, because if the EAA Reservoir is below 8 feet or does not otherwise meet the requirements for water supply discharges, all the water sent into the Reservoir will be lost for supply. The harms from mismanagement of water supply can have a long lag time before being manifested, and are not easy to evaluate in the moment. These decisions need to be guided by standards that are developed with a clear picture of the operational paradigm under which they will be made to best avoid making critical mistakes in the management of our water supply. That is why it is critical to take a conservative approach when creating a water reservation so far in advance of the time when it will be utilized and with so much uncertainty in the operations of an incredibly complex system.

In summary, given the number of assumptions SFWMD has had to make, the uncertainties that lie ahead in the implementation of CERP, and coupled with the speed with which this rule development is proceeding, SFWMD should take a cautious, conservative approach. As expressed above, the Seminole Tribe is very concerned that Proposed Rules would substantially commit SFWMD well beyond what is justifiably necessary to enter into a PPA with the USACE for the EAA Reservoir Project. Therefore, the Seminole Tribe respectfully requests that you scale this effort back to the minimum needed to meet the PPA requirements.

Thank you for the opportunity to provide these comments.

Sincerely,

Stephen A. Walker

SAW/kss

- c. Jim Shore, Esquire – Seminole Tribe of Florida
Paul Backhouse Ph. D – Seminole Tribe of Florida
Stacy Myers – Seminole Tribe of Florida
Armando Ramirez - SFWMD