September 14, 2012

VIA Email

CUPCON@dep.state.fl.us

Re: **Comments on Consumptive Use Consistency (CUPCon) Rule Development**

To Whom It May Concern:

I am writing on behalf of the Southeast Florida Utility Council (SEFLUC) regarding the CUPCon rule development currently being undertaken by the Florida Department of Environmental Protection (FDEP) and the five water management districts. As you are aware, SEFLUC is an unincorporated association composed of 35 water utilities located in the Upper and Lower East Coast of the South Florida Water Management District (SFWMD) within Miami-Dade, Broward, Palm Beach, Martin and Monroe Counties. SEFLUC's member utilities supply approximately 805 million gallons per day of potable water to nearly five million citizens of the State of Florida. It is projected that by 2025 the member utilities will supply nearly one billion gallons per day of potable water to over six million Floridians.

SEFLUC would like to thank FDEP and the South Florida Water Management District (SFWMD) for pursuing this rulemaking. Streamlining of the consumptive use permitting process, while still providing for protection of the water resources, has been one of the primary goals of SEFLUC and its membership. We appreciate the opportunity to offer comments in response to the proposed rule language and presentations made by FDEP and SFWMD at the recent rule development workshops held on August 21, 22 and 23.

The comments we offer in this letter are organized according to the topics identified in the presentations and handouts provided by FDEP and SFWMD at the workshops. We have deliberately refrained from providing specific rule language in this letter because we understand you intend to prepare a draft rule for further input at future workshops. If that is not the case, please let us know.

1. Chapter 62-40 (Water Resource Implementation Rule)

1.1. Reclaimed Water

1.1.1. CUP Consistency with Statutory Amendments

In the 2012 session, the Florida Legislature adopted amendments to Section 373.019(17), Florida Statutes, which state, "Reclaimed water is not subject to regulation

pursuant to s. 373.175 or part II of this chapter until it has been discharged into waters as defined in s. 403.031(13)" and Section 373.250(3)(c), Florida Statutes, which state "a water management district may neither specify any user to whom the reuse utility must provide reclaimed water nor restrict the use of reclaimed water provided by a reuse utility to a customer in a permit or, unless requested by the reuse utility, in a water shortage or water shortage emergency order." However, we note the proposed amendments to Chapter 62-40 do not specifically address these statutory changes. We believe a number of existing consumptive use permits will need to be modified to achieve consistency with these statutory changes. We recommend that Chapter 62-40 be amended to provide specific guidance on how these existing permits should be modified. If possible, we would suggest the use of letter modifications by the water management districts to achieve uniform compliance with the Sections 373.019(17) and 373.250, as was done by SFWMD with regard to the transition from five to ten year compliance reports.

1.1.2. Definition of "Reuse Utility"

The 2012 revisions to Sections 373.019(17) and 373.250(3)(c), Florida Statutes use the term "reuse utility," when discussing the authority of FDEP and SFWMD to regulate the use of reclaimed water under Part II, Chapter 373 and Section 373.175. However, the term "reuse utility" is not defined by statute or rule. In our opinion it would be very helpful to define exactly what is meant by this term as part of the current CUPCon rule development.

1.1.3. Impact Offset

1.1.3.1. Allocation of Offsets

The proposed revisions to Chapter 62-40 should be broadened so that impact offsets are allocated on a basin-wide basis in a manner similar to the allocation of pollution reduction credits or mitigation bank credits under other impact offset programs administered by FDEP and the water management districts. Rule amendments should be adopted that provide a process for the establishment of standard impact offset associated with a given reduction in water use within the specified surface or groundwater basin. The amount of offset recognized by a water management district should not be solely determined on a case-by-case basis as this will leave a permit applicant unsure as to the amount of offsets a given quantity of reclaimed water will create until the consumptive use permit is applied for and received by the applicant. However, upon determining the amount of standard impact offset, the rule should allow water management districts to consider additional information from utilities on a case-by-case basis to allow for adjustments to the standard impact offset amount. In sum, a standard method for allocating offsets on a basin-wide basis in a clear and transparent manner along with consideration of utilities unique circumstances on a case-by-case basis will create a positive incentive among reuse utilities to utilize reclaimed water to avoid harm to the water resource.

1.1.3.2. Existing Impact Offsets

In our opinion, it makes no sense to exclude all existing reclaimed water impact offsets a priority unless they are specifically recognized in an existing permit. SEFLUC is aware of a

number of existing permits, such as the Orlando Utilities Commission and Palm Beach County, that were issued based on consideration of the impact of reclaimed water reuse on surface or groundwater withdrawals either through recharge or augmentation of the aquifer or surface water bodies or through reduction of the need for new or increased surface or groundwater withdrawals. However, in many cases, these de facto offsets are not explicitly referenced in the consumptive use permit. To summarily exclude these offsets from consideration by water management districts is neither fair nor reasonable. In our opinion, a better course of action would be to create an offset program that recognizes and quantifies both existing and new reclaimed water offsets. Thus, we recommend modifying Chapter 62-40 to eliminate the prohibition against consideration of existing reclaimed water offsets.

1.1.3.3. Required Application of Impact Offsets by WMDs

The proposed amendment to 62-40.410(10), Florida Administrative Code provides that the water management districts should "consider" the applicability of a proposed impact offset in the issuance of a consumptive use permit. Use of the word "consider" implies that a water management district could acknowledge, but ultimately reject the application of a reclaimed water offset. We don't believe this is consistent with the legislative intent. SEFLUC believes the new law intended that the rule amendment adopted by FDEP "require" the application of a reclaimed water offset.

1.1.4. Substitution Credits

1.1.4.1. Definition of "Resource-Limited"

The draft rule developed by FDEP provides that reuse substitution credits are only available, when reclaimed water is used to replace an existing permitted use of water in a "resource-limited" area. The proposed does not define a "resource limited area." We believe a uniform definition is needed in order to ensure consistency among all the water management districts.

If you agree with our suggestion to adopt a uniform definition of a "resource limited" area in Chapter 62-40, we would recommend that the term be defined as any area, where the withdrawal of ground or surface water is limited by rule, order or water management district practice. The term should not be reserved for only those areas designated by rule such as Lower East Coast Everglades Waterbodies, where new or increased withdrawals are limited by the regional water availability rule. A "resource limited" area should be defined broadly enough to include any area regardless of size, where new or increased water uses are restricted by a water reservation, a minimum flow or level (MFL) or a condition for issuance. Even a single 0.5 acre wetland standing at the brink of environmental harm can create an area in which new or increases uses of water are not permitted by virtue of the conditions for issuance. In sum, it is our opinion that any time water withdrawals are not permitted because of harm to the water resource, then substitution credits should be allowed.

Finally, in order to avoid future debates with the water management districts over what constitutes a resource limited area during future rulemaking, the FDEP rule should identify

certain areas that everyone acknowledges are clearly resource limited under existing rules and practices. For example, no one can reasonably argue that new or increased surface or ground water withdrawals from the Lower East Everglades Waterbodies are resource limited. SFWMD's regional water availability rule limits new or increased withdrawals within this area to a certain quantity of water that was being withdrawn prior to April 2006. Thus, this area should be identified in the FDEP rule.

1.1.4.2. Substitution Credits for Existing Uses

As with impact offsets, existing de facto substitution credits should be recognized even if they are not specifically authorized in a consumptive use permit. Substitution credits have been used informally for many years by the water management districts to support existing consumptive uses of water. A process should be created within Rule 62-40.410 for converting these de facto credits to recognized credits under the new rule provisions. The lack of recognition of existing substitution credits appears to penalize existing water users, which have provided reclaimed water to third parties for the purpose of reducing or eliminating their dependency on surface or groundwater sources. Additionally, summarily rejecting consideration of existing substitution credits will have the unintended consequences of delaying new reclaimed water projects until such time as a recognized system of substitution credits is adopted by the water management districts so that the allocation of reclaimed water to a specific user is not wasted.

1.1.5. Reclaimed Supplementation

We support the adoption of rules formally recognizing the benefits of reclaimed water supplementation. In order to ensure that the benefits of supplementation are fully recognized, the Chapter 62-40, Florida Administrative Code rules adopted by FDEP should make it clear that supplementation of reclaimed water with ground or surface water is recognized as a beneficial use insofar as it makes a greater quantity of reclaimed water available to a greater number of water users than would otherwise be available without supplementation. In addition, the proposed rules should confirm that supplementation of reclaimed water within a resource-limited area may be permittable, even if strictly speaking it involves a new or increase surface or ground water withdrawal, provided the benefits created by the expanded reclaimed water supply outweigh the impacts caused by the supplemental water withdrawal.

2. Permit Types/Thresholds

2.1. General Comments

SEFLUC certainly recognizes and appreciates the need to tailor the requirements of obtaining a consumptive use permit to the size of the proposed use. Obviously, a permit requesting the withdrawal of 500,000 gallons per day should not be subject to the same permitting process as a permit requesting the withdrawal of 5 million gallons a day. However, at the same time we are mindful of the fact that water resources are affected by the cumulative impact of all uses regardless of size. Said another way, ten 500,000 gallon per day withdrawals can impact a sensitive wetland system in the same fashion as one 5

million gallon a day withdrawal. Additionally, it would not be fair to create a permitting system that has the effect of placing the burden of protecting the natural system solely on larger permittees such as SEFLUC's member utilities. Thus, in our opinion whatever permit threshold system is developed by FDEP and the water management districts must carefully balance environmental protection against regulatory streamlining and must not favor one user group at the expense of another user group.

With these principles in mind, SEFLUC has several concerns and questions regarding the proposed no-notice general permit concept proposed by FDEP and the water management districts. We are concerned that the no-notice process will not provide a means of ensuring compliance with the conditions for issuance on both an individual and cumulative basis. We are concerned the no-notice process will in effect transfer overall protection of the water resource to individual permittees such as SEFLUC's membership. Finally, we are concerned the no-notice process will make it impossible to determine which legal uses of water are in existence at the time our members apply for new or modified permits or seek renewal of existing permits. These concerns are discussed in greater detail below.

2.2. No-Notice General Permit Three-Prong Test Compliance

Pursuant to Section 373.223(1), Florida Statutes, FDEP and the water management districts may only issue a consumptive use permit, when the applicant provides reasonable assurance of compliance with the conditions for permit issuance on an individual and cumulative basis. If a no-notice general permittee can simply begin withdrawing water without review and approval by the water management, as long as its permitted use is less than the specified threshold, then we wonder how reasonable assurance is provided that this withdrawal of water in combination with other existing legal uses of water and pending permit applications will comply with the conditions for issuance. Also, since a no-notice permit commences without a written permit or permit conditions, we wonder how the water management district is able to ensure the permittee does not in fact withdraw water in excess of the permitting threshold or that the withdrawal of water by the no-notice permittee does not cause or contribute to environmental harm. Finally, since permit duration is dependent on the length of time the applicant can demonstrate reasonable assurance of compliance with the conditions for issuance, we wonder how the water management district can assign a permit duration to a no-notice permit.

2.3. Effect of No-Notice General Permits on Individual Permit Holders

Similarly, SEFLUC is concerned the issuance of no-notice general permits could have the unintended consequence of obligating the holders of individual permits such as SEFLUC's membership to mitigate water resource impacts caused by the holders of no-notice general permits. Since individual permits are subject to user-specific permit conditions and individualized evaluations of their uses, we are fearful that any adverse water resource impacts detected during the life of the permit will be ascribed by water management district staff to the individual permittee. Since there will not be any water use or monitoring data collected by the no-notice permittees, it will be difficult, if not impossible to quantify the cumulative impact of those uses on the water resource. Also, even if it is

possible to separate out the impact of individual permits from those of no-notice general permits, we are fearful that the mitigation of adverse resource impacts will be placed entirely on the shoulders of individual permittees because the water management districts will not have any means of holding the no-notice permittees accountable for their impacts. Our fears regarding these issues is magnified by the fact that we do not see any rules limiting the obligations of individual permittees to mitigate harm to only those impacts caused by the individual permittee's withdrawal of water.

2.4. Recognition of No-Notice General Permits

In conjunction with the development of a no-notice general permit program, the water management districts should also establish a process for identifying and recording each no-notice general permit. Since a no-notice general permit would be considered an existing legal use of water, other permit applicants would have to demonstrate that their proposed use of water would not interfere with their existing legal use. It will be very difficult, if not impossible, for an individual permittee to provide reasonable assurance that its proposed use of water will not interfere with any existing legal use of water, if it does not know which uses of water are in existence.

3. Conditions of Issuance

The proposed uniform conditions for issuance are generally consistent with existing water management district permitting conditions, with the exception of a new condition for issuance regarding consideration of alternative water sources. This new Rule 40X-2.301(2)(f) is not currently found in SFWMD's conditions for issuance. If this rule were to become law, it would require that all permit applicants provide reasonable assurance that a proposed use "draws on alternative water sources to the greatest extent technically, environmentally, and economically feasible." We believe this requirement would be problematic for several reasons.

First, this new criterion would place an undue burden on water uses located in areas which are not resource-limited. We can see where this requirement may be necessary in a resource limited area such the Lower East Coast Everglades Waterbodies. However, in those areas, where traditional water supplies are not limited, we see no reason why permittees should be forced to develop alternative water supply sources. If traditional water sources can be developed without environmental harm, then why should FDEP or the water management districts mandate the development of more expensive sources of supply.

Second, this new criterion would appear to be unnecessary. Another existing permit criterion already requires the use of lower quality sources of water when technically, environmentally, and economically feasible. In our opinion, this criterion would cover most alternative water sources. We cannot conceive of an alternative water supply that would not be of lesser quality than the fresh ground or surface water typically used in the State of Florida.

Third, a blanket requirement regarding use alternative water sources conflicts with Sections 373.019(1) and 373.019(17), Florida Statutes. Section 373.019(1) includes

reclaimed water in the definition of "alternative water supply," yet Section 373.019(17) specifically provides that reclaimed water cannot be regulated under Part II of Chapter 373, Florida Statutes. Therefore, a consumptive use permit applicant cannot be required to use reclaimed water to the greatest extent feasible because such use is expressly forbidden by statute. Since the proposed alternative source consideration contemplated in Rule 40X-2.301(2)(f) includes reclaimed water as an alternative source, it would appear to conflict with Section 373.019(17).

Fourth, the proposed alternate water source condition for issuance would allow the water management districts to force existing water users to utilize all feasible alternative sources, even if the water user has already invested in infrastructure utilizing existing traditional water supplies and is not causing harm to the water resource. This would lead to the stranding of assets already committed to traditional water sources, allow the water management districts to dictate the use of alternative water sources, even in cases where traditional sources are available for use and otherwise meet all the permitting criteria.

4. Public Supply Water Conservation

4.1. Screening By Metered Versus Unmetered

The first level of screening metered versus unmetered water uses is flawed. While we recognize education as an important, basic requirement for all public water supply use class permittees, it is a soft tool and compliance is unmeasured. The rules need to include a concrete plan for conservation among unmetered uses to ensure the burden of conservation does not fall solely on metered uses.

4.2. Screening Per Capita Determination

The screening level per capita "trigger" value should consider the percentage of metered customers, unaccounted water loss, and the amount of reclaimed water use/alternative sources. Otherwise, utilities may improperly categorized as being "over" the screening level per capita and required to implement goal-based water conservation plans when in fact the utility is under screening level per capita and achieving successful conservation.

Additionally, the uniform residential screening per capita determination presented at the CUPCon workshops is based on dividing the finished water used by dwelling units served by the utility by the number of dwelling units served, multiplied by the estimated persons per household. The use of persons per household in determining per capita use is problematic since the number of persons per household varies significantly between utilities, and is influenced by factors beyond the control of the utility, such as land use, zoning, and deed restrictions. Additionally, this method lacks accounting for residential self-supplied irrigation water use (unmetered water use). Instead, the screening per capita standard should be based on daily water use per residential single family dwelling. This is a more equitable method of evaluating conservation, since it eliminates disparate treatment of utilities based on population factors not related to conservation, while still accounting for the most significant aspects of household water use, such as outdoor irrigation.

The screening per capita standard should be applied to existing water use based on the average of the past five years of records. However, permit applicants should have flexibility in determining which period of historic water use best characterizes its water use if the past five years are not representative of the utility's current water use. Otherwise, the current proposal may unrealistically force those utilities and utility customers to do more than is actually required by rule.

4.3. Maintaining Conserved Water in the Permit Allocation

The rules adopted by the water management districts should make it clear that any conservation achieved by a utility during the term of the permit shall not be used by the water management district to reduce the permitted water allocation during the 10-year compliance review or to otherwise modify the permit. The rules should also provide guidance to utilities regarding how any demand reduction can be attributed to conservation. Finally, the protection of conserved water in the permit allocation should not be limited to only those utilities that implement a goal-based water conservation plan. This would be unfair to utilities, which do not need to implement such a plan because they have achieved a level of conservation that places them below the screening threshold. Otherwise, the rule would have the unintended consequence of rewarding utilities that have not placed a high value on water conservation and punishing those utilities that have historically achieved a high level of conservation.

4.4. Conservation Permit Extensions

We support the concept of allowing existing permits to be extended based on achievement of substantial conservation. However, this incentive should not be limited to only those utilities, which implement a goal based conservation plan for the reasons stated above in Comment No. 4.3. Also, the rules adopted by the water management districts should allow an existing permit to be extended for as many years as the current permitted allocation can meet the utility's water demands, up to 50 years from the original date of issuance. There is no legal or rational basis for limiting the permit extension that can be achieved through conservation to just 10 years. Finally, any permit extension should be granted via letter modification rather than a full permit renewal or modification of the existing permit and extension should be permissible any time after the mid-point of the then existing permitted duration.

4.5. Priority Funding Consideration

Priority consideration for district funding assistance should not be restricted to only those utilities implementing a goal-based plan. Utilities already achieving conservation success are not required to implement goal-based plans and are therefore disincentivized by not being eligible for priority funding. Otherwise, the screening per capita method is not effective because utilities with demands under the screening level per capita value will still be required to complete a goal-based plan in order to obtain priority funding consideration.

5. Public Water Supply Demands

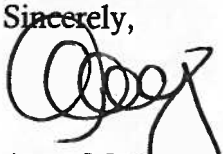
We agree with the proposed concept of using a uniform 1-in-10 level certainty and building on the guidance from the 2008 DEP/water management district memo. For purposes of calculating demand, we recommend the rules incorporate specific standards for calculations. As described above in the screening per capita determination section, demand should be based on the average of the past five years of records. However, permit applicants should have flexibility in determining which period of historic water use best characterizes its water use, if the past five years are not representative of the utility's current water use. Any demand calculations should also include standards to address "transient" populations, such as large malls, universities, hospitals, and seasonal residents. Finally, we also recommend the rules include standards for when metering is required in order to further ensure consistency across the state and successful implementation of the water conservation screening concept.

6. 10-Year Compliance Report

We agree with concept of streamlining the 10-year compliance reporting requirements contemplated in the CUPCon process, and offer these further suggestions regarding compliance reporting process. First, if a consumptive use permit requires periodic submittal of monitoring data or reports, then the 10-year compliance report shall only consist of the previously submitted data and reports. Second, a separate report should only be required, if the permit does not require the periodic submittal of monitoring data or reports. Third, consideration should be given to the development of uniform 10-year compliance reporting and monitoring forms for use when a separate report is required. Fourth, receipt of a 10-year compliance report should not be treated as permitting action requiring notice of receipt of the report or request for additional information. Finally, should review of the 10-year compliance report result in the maintenance of existing permit conditions, this should not be treated as agency action requiring notice or approval by the water management district body responsible for making final decisions concerning consumptive use permit applications.

Thank you for your consideration of these comments. We look forward to continued collaboration between FDEP, the water management districts and stakeholders regarding the further development of the CUPCon rules.

Sincerely,



Anne Murray, Chair
Southeast Florida Utility Council

cc: SEFLUC Membership
Melissa Meeker