

**BEFORE THE GOVERNING BOARD OF THE
SOUTH FLORIDA WATER MANAGEMENT DISTRICT**

IN THE MATTER OF:

SFWMD Case No. _____

Petition of CONSERVANCY OF
SOUTHWEST FLORIDA and RALF
BROOKES to amend Rule 40E-8.221(2)
and Rule 40E-8.421(2) Fla. Admin. Code

**PETITION FOR RULEMAKING TO AMEND THE CALOOSAHATCHEE MFL RULE
AND RECOVERY STRATEGY**

1. Pursuant to Section 120.54(7)(a) Fla. Stat. Petitioners respectfully request the Governing Board of the South Florida Water Management District, hereinafter “the District” or (“SFWMD”) exercise its rulemaking authority to amend Rule 40E-8.221(2) and Rule 40E-8.421(2), Fla. Admin. Code.

2. The name and address of the Agency are:

South Florida Water Management District
3305 Gun Club Road
West Palm Beach, Florida 33406

3. The names and addresses of the Petitioners are:

Conservancy of Southwest Florida
1450 Merrihue Drive
Naples, FL 34102

Ralf Brookes
1217 East Cape Coral Parkway, Suite 107
Cape Coral, FL 33904

Petitioners may be reached through their undersigned counsel.

4. The name, address and telephone number of the Petitioners’ legal representative is:

Marcy I. LaHart, P.A.
4804 SW 45th Street
Gainesville, FL 32608
Telephone No.: (352) 224-5699

5. The rules Petitioners request SFWMD to amend are Rule 40E-8.221(2), Fla. Admin. Code (hereinafter “Caloosahatchee MFL Rule”) and Rule 40E-8.421(2) Fla. Admin. Code, the MFL Recovery Strategy for the Caloosahatchee River.
6. The Caloosahatchee MFL Rule establishes the "Minimum Flow and Level" (MFL) for the Caloosahatchee River. Specifically the rule states:

A minimum mean monthly flow of 300 CFS is necessary to maintain sufficient salinities at S-79 in order to prevent a MFL exceedance. A MFL exceedance occurs during a 365 day period, when: (a) A 30-day average salinity concentration exceeds 10 parts per thousand at the Ft. Myers salinity station (measured at 20% of the total river depth from the water surface at a location of latitude 263907.260, longitude 815209.296; or (b) A single, daily average salinity exceeds a concentration of 20 parts per thousand at the Ft. Myers salinity station. Exceedance of either paragraph (a) or (b), for two consecutive years is a violation of the MFL.

7. The recovery strategy for the Caloosahatchee is contained in Rule 40E-4.821(2), Fla. Admin. Code. Specifically the rule states:

(2) The Everglades, Lake Okeechobee, and the Caloosahatchee River.
(a) The Everglades, Lake Okeechobee and Caloosahatchee River have experienced or are projected to experience MFL violations. As a result, the LEC Plan and the LWC Plan contain approved recovery strategies, pursuant to Section 373.0421, F.S. Included in these recovery and prevention strategies is the CERP.
(b) MFLs within the Everglades, Lake Okeechobee, and the Caloosahatchee River, that are part of or served by the C&SF Project, will not be achieved immediately upon adoption of this rule largely because of the lack of adequate regional storage, including U.S. Army Corps of Engineers’ regulation schedule effects, or ineffective water drainage and distribution infrastructure. Although not all locations within the Everglades are currently in violation of the proposed MFL, the Everglades, as a whole, is subject to a recovery strategy. The LEC Plan identifies the structural and non-structural remedies necessary for the recovery of MFL water bodies. These structural and non-structural remedies are also intended to restore the Everglades, Lake Okeechobee and the Caloosahatchee River above the MFLs, through Chapter 373, F.S., authorities of the District.
(c) The projected long-term restoration of flows and levels in the Everglades resulting from implementation of the LEC Plan and the CERP is documented in the LEC Plan, and are intended to more closely approximate “pre-drainage” conditions. The planned components include implementing consumptive use and

water shortage programs, removing conveyance limitations, implementing revised C&SF Project operational programs, storing additional freshwater, reserving water for the protection of fish and wildlife, and developing alternative sources for water supply. These components will be implemented over the next 20 years, resulting in a phased restoration of the affected areas.

(d) The District, as the U.S. Army Corps of Engineers' local sponsor of the C&SF Project, is charged with implementing the CERP, in accordance with the Water Resources Development Act of 2000 (WRDA), Title VI entitled "Comprehensive Everglades Restoration," and in accordance with State law. Assurances regarding water availability for consumptive uses and protection of natural systems are set forth in WRDA, Chapter 373, F.S., CERP and the LEC Plan, which will be followed by the District in implementing this chapter. Additional quantities of water for both consumptive uses and the natural systems made available from the CERP and other water resource development projects will be documented and protected on a project basis. For project components implemented under CERP, the additional quantity, distribution and timing of delivery of water that is made available for the natural system for consumptive use, will be identified consistent with purposes of the CERP. Under State law, water reservations and water allocations to consumptive uses will be utilized to protect water availability for the intended purposes.

BACKGROUND

Caloosahatchee MFL

8. MFLs are established to protect water resources from significant harm resulting from permitted water withdrawals. The District is statutorily mandated to establish MFLs pursuant to Section 373.042(2), Fla. Stat.
9. A minimum flow is statutorily defined as the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area and requires that "the minimum flow and minimum water level shall be calculated by the department and the governing board using the best information available." Further, Section 373.0421(3) Fla. Stat. mandates that "minimum flows and levels shall be reevaluated periodically and revised as needed."
10. Similarly, Rule 40E-8.011(3) Fla. Admin. Code provides that MFLs are "based on existing best available information, and will be periodically reviewed, at least every five

years, based on new information and changing water resource conditions. Revisions to established MFLs will be peer reviewed as required by Section 373.042, F.S., prior to rule adoption."

11. An MFL was adopted for the Caloosahatchee in September of 2001.
12. Peer review of the Caloosahatchee MFL Rule conducted prior to its adoption revealed significant problems in the development of the minimum flow for the Caloosahatchee River. (Final Review Report, Caloosahatchee Minimum Flow Peer Review Panel submitted to South Florida Water Management District, November 27, 2000) Among the shortcomings noted by the peer review panel are that a single species approach was utilized, (the minimum flow was based entirely upon protection of *Vallisneria americana*,) without any basis to conclude that a minimum flow designed to protect *Vallisneria* is adequate to protect other important resources such as zooplankton, oysters, blue crabs and other species of submerged aquatic vegetation.
13. The peer review panel suggested that the minimum flow should include consideration of harm to the lower Caloosahatchee Estuary and Charlotte Harbor ecosystem and consideration of the potential for harm to the upper reaches of the Caloosahatchee River.

Other criticisms from the peer review panel are that the model upon which the Caloosahatchee minimum flow was adopted is "extremely limited and has numerous weaknesses" and that the recovery strategy is "vague and unclear."
14. Recognizing the questionable basis for setting the minimum flow for the Caloosahatchee River at 300 cfs, (the peer review report states that "[t]here is reasonable doubt as to whether the minimum flow target of 300 cfs is appropriate", and noted that previous District studies recommended flows in the range of 300-800 cfs), Rule 40E-4.8011(3)

specifically requires that "the minimum flow criteria for the Caloosahatchee River in subsection 40E-8.221(2), Fla. Admin. Code, shall be reviewed within one year of the effective date of this rule, September 10, 2001, and amended, as necessary, based on best available information." A subsequent District study (Caloosahatchee MFL 2002 Status Update Report) conceded that releases of 300 cfs at S-79 from Lake Okeechobee may not produce the desired salinity in the estuary if these releases are made during dry period, and recognized that additional downstream tidal basin inflows of 200 cfs would be needed to achieve target salinity levels. Almost nine years later the MFL has not been amended, and the source of the additional tidal basin inflows needed to protect sea grass beds during dry periods remains unidentified.

15. Although extensive beds of the submerged grass *Vallisneria americana* were present in the river prior to 2000, the beds have been largely absent from the river during the past decade. The scarcity of this grass is attributed to drought conditions and high salinities in the upper river. (Stevens et al. 2010. Mainstream and Backwater Fish Assemblages in the Tidal Caloosahatchee River: Implications for Freshwater Inflow Studies, Estuaries and Coasts 33:1216-1224.) Primary ecological functions such as forage and nursery habitat do not rebound quickly.
16. Subsequent information indicates that the minimum flow for the Caloosahatchee is inadequate to prevent significant harm. The Final Project Implementation Report for the C-43 West Basin Storage Reservoir (September 2007)¹ concludes that "a flow distribution that provides flows below 450 cfs at S-79 will not achieve the protection

¹ The proposed C-43 reservoir is the component of the Comprehensive Everglades Restoration Plan (CERP) intended to make more water storage available upstream of the Caloosahatchee River.

defined in the MFL (SFWMD 2000 and 2002) rule."

17. In spite of the fact that the 300 cfs minimum flow codified in the Rule 40E-8.221(2) Fla. Admin. Code is inadequate to prevent significant harm, the District has continued to issue consumptive use permits that reduce the amount of fresh water available to meet the MFL. In fact, in its recently adopted Lake Okeechobee Service Area Rule ("LOSA rule" codified at Section 3.2.1(G) of the Basis of Review for Water Use Permit Applications Within The South Florida Water Management District), the District in one fell swoop gave 20 years water use permits to all existing water uses in the Lake Okeechobee basin, (the headwaters of the Caloosahatchee River), regardless of whether such withdrawal had previously been approved through the consumptive use permitting process or not. The net effect of increasing withdrawals for agricultural and municipal water supply is a reduction in the amount of freshwater available to be delivered to the estuary to meet the MFL.

Caloosahatchee MFL Recovery Strategy

18. The District is required by law to "expeditiously" implement a recovery strategy to ameliorate MFL exceedences. Pursuant to Section 373.0421(2), Fla. Stat.:

If the existing flow or level in a water body is below, or is projected to fall within 20 years below, the applicable minimum flow or level established pursuant to s. 373.042, the department or governing board, as part of the regional water supply plan described in s. 373.0361, shall expeditiously implement a recovery or prevention strategy, which includes the development of additional water supplies and other actions, consistent with the authority granted by this chapter, to: (a) Achieve recovery to the established minimum flow or level as soon as practicable; or (b) Prevent the existing flow or level from falling below the established minimum flow or level.

19. Rule 40E-8.421 (2), Fla. Admin. Code, identifies the Lower East Coast Regional Water

Supply Plan (May 2000) and CERP (Comprehensive Everglades Restoration Plan contained in the 'Final Integrated Feasibility Report and Programmatic Environmental Impact Statement', dated April 1, 1999, as modified by the Water Resources Development Act of 2000) as the recovery strategy for the Caloosahatchee River. In February of 2007, a 2005-2006 LEC Plan Update was approved by the District Governing Board, but the rule has not been amended nor has the recovery strategy been revised to address the amended Lake Okeechobee Regulation Schedule or the impact of the LOSA rule.

20. Further, as the District has realized, CERP implementation is lagging. According to the District's 2005-2006 Update to the Lower East Coast Water Supply Plan, "the overall implementation of the CERP has been slower than anticipated in 2000 due to federal procedural and funding issues. Uncertainty of technology, such as ASR systems, which are a major storage component of the CERP, has lowered the expected availability of new water supplies for urban, agricultural and natural systems needs within the planning horizon of this water supply plan update. Because of the far-reaching scope of the CERP, changes in schedule and performance expectations since 2000 have had a major impact on the assumptions of the 2000 LEC Plan."
21. In spite of the fact that CERP implementation is lagging far behind the timeframes originally contemplated in the regional water supply planning process, no brakes were put on the consumptive use permitting process, no contingency plan has been identified to provide the minimum flow needed to prevent further deterioration of the Caloosahatchee River and its estuary, and the recovery strategy has not been modified by the District to address the inadequacies of the adopted strategy.

PETITIONERS' HAVE A SUBSTANTIAL INTEREST IN PROTECTION AND RESTORATION OF THE CALOOSAHATCHEE RIVER

22. Section 120.54(7)(a), Florida Statutes, provides that a petition to initiate rulemaking may be filed by “any person regulated by an agency or having a substantial interest in any agency rule.”
23. The Conservancy of Southwest Florida is a non-profit corporation organized under the laws of the State of Florida in 1964 and headquartered in Naples, Florida. The Conservancy has more than 6,000 members in Southwest Florida. The mission of the Conservancy is to protect the environment and natural resources of Southwest Florida, including the Caloosahatchee River.
24. A substantial number of members of the Conservancy of Southwest Florida engage in water based recreational activities such as crabbing, fishing, boating, kayaking, canoeing, bird watching and nature observation on the on the Caloosahatchee River and the Caloosahatchee Estuary, which as explained below, is continuing to experience significant harm because of implementation of the Caloosahatchee MFL Rule and the District's failure to expeditiously implement a recovery strategy to prevent repeated exceedences. Accordingly, the Conservancy of Southwest Florida is substantially affected by the Caloosahatchee MFL Rule.
25. Based upon the Caloosahatchee MFL Rule, the District continues to issue consumptive use permits that reduce the amount of fresh water available to meet the MFL even though the condition of the Caloosahatchee River is deteriorating due to inadequate fresh water. The Caloosahatchee MFL Rule allows continued deterioration of the Caloosahatchee River and Caloosahatchee Estuary and therefore substantially affects the Conservancy and its members.

26. The Conservancy has been a long time advocate for protection and restoration of the Caloosahatchee River. In 2006, the Conservancy successfully co-nominated the Caloosahatchee River as one of the Ten Most Endangered Rivers as designated by American Rivers, Inc.
27. Ralf Brookes is a resident of Lee County who owns a single-family residence with a boat and dock on the Savona Canal on the Caloosahatchee River in Cape Coral, Florida. Ralf Brookes and his family own both a 22' motor boat and a 12' kayak and engage in water based recreational activities such as fishing, boating, kayaking, swimming, bird watching and nature observation on the on the Caloosahatchee River. The Caloosahatchee MFL Rule and recovery strategy allow continued deterioration of the Caloosahatchee River and therefore substantially affects Ralf Brookes as an individual. Ralf Brookes and his family are members of the Conservancy of Southwest Florida, Inc.

WHY RULEMAKING IS NECESSARY

28. Section 373.042 Fla. Stat. defines a minimum flow as the limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area and requires that "the minimum flow and minimum water level shall be calculated by the department and the governing board using the best information available." Further, Section 373.0421(3) Fla. Stat. mandates that "minimum flows and levels shall be reevaluated periodically and revised as needed."
29. Legislative mandates require the District to set science-based MFLs to protect the natural system, and to revise MFLs as better information becomes available. However, the MFL set for the Caloosahatchee is insufficient to protect the Caloosahatchee River and has not been revised even though data indicate that the initial MFL was inadequate to protect the

target resources. Assumptions regarding the impacts of high salinity on *Vallisneria* beds and how quickly the submerged aquatic vegetation will recover from damage caused by inadequate freshwater flows have proven to be false. (Final Caloosahatchee River (C-43) West Basin Storage Reservoir PIR and Final EIS). Accordingly, the MFL must be updated to reflect the better information regarding adverse impacts of periods of high salinity on the Caloosahatchee River.

30. Section 373.0421(2), Fla. Stat. also requires that the District shall expeditiously implement a recovery or prevention strategy for an MFL waterbody. Nothing about CERP implementation has been expeditious, and in fact the plan, including the CERP component intended to provide additional storage upstream of the Caloosahatchee, lags significantly behind the schedule that was anticipated when the "recovery strategy" was adopted.
31. Further, because the Lake Okeechobee operating schedule that was in effect when the "recovery strategy" was adopted has been changed so that Lake Okeechobee is managed at lower levels, even less water is available to meet the MFL. However, the recovery strategy has not been revised to address the significant change in the availability of water from the lake.
32. Finally, the impacts of District's adoption of the LOSA rule and approval of 20 year permits for an unknown quantity of water and its impacts on predicted MFL exceedences have not been quantified or addressed in the recovery strategy.

RELIEF REQUESTED

33. Petitioners respectfully request the Governing Board of the South Florida Water Management District immediately initiate rulemaking to revise the MFL for the

Caloosahatchee River, as required by statute, based upon better scientific information regarding the fresh water needs of the natural system.

34. Petitioners further request that the Governing Board initiate rulemaking to update the recovery strategy for achieving the Caloosahatchee River MFL in order to address delays in CERP implementation, to develop contingency plans for restoration of the river and its estuary in the event that CERP is not implemented or does not achieve its anticipated benefits, and to assess and address the permitted water withdrawals under the LOSA Rule.


Respectfully submitted on this __3rd__ day of September, 2010.



Marcy I LaHart, Esquire
FL Bar No. 0967009
4804 SW 45th Street
Gainesville, FL 32609
Attorney for Petitioners
(352) 224-5699/888-400-1464 (Facsimile)

CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing has been filed by facsimile with the South Florida Water Management District Clerk @ 561-682-6010 to this 3rd day of September, 2010.



Marcy I LaHart, Esquire