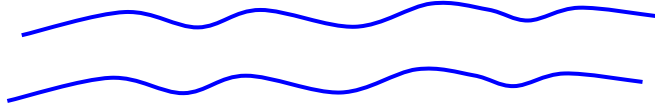


Southeast Florida Utility Council



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May 28, 2008

**VIA TELEFACSIMILE (561) 682-5215
AND MAIL**

Jesus Rodríguez
Lead Water Conservation Officer
South Florida Water Management District
Post Office Box 24680,
West Palm Beach, FL 33416-4680

Re: SFWMD District-Wide Year-Round Water Conservation Rule

Dear Mr. Rodriguez:

Please accept this letter as the consensus comments of the Southeast Florida Utility Council (“SEFLUC”) with respect to the South Florida Water Management District’s (“SFWMD”) proposed revisions to Florida Administrative Code Chapter 40E-24 (“Rule”).

As you know, SEFLUC is an unincorporated association composed of 35 water utilities located in the Lower East Coast within Miami-Dade, Broward, Palm Beach, Martin and Monroe counties. One of its functions is to provide a forum for presenting consensus views of our industry with regard to proposed government regulations that affect their interests, such as the Rule.

At present, SEFLUC’s member utilities supply approximately 805 million gallons a day of potable water on an annual average basis to nearly 5 million persons. It is projected that by 2025 the member utilities will be supplying approximately 1,086 million gallons a day to over 6.5 million persons. SEFLUC’s entire member utilities hold water use permits issued by the District to serve the public. A large portion of SEFLUC’s customers are residential water users, who will be regulated by the proposed rule.

SEFLUC strongly supports the goals of water conservation and sustainable water use. SEFLUC, however, has a number of specific concerns with certain provisions of the proposed Rule as being contrary to these goals. SEFLUC believes

that further modifications are needed to enhance water conservation and sustainability. The draft of the Rule dated May 15, 2008 (“May 15 draft”) offers steps in the right direction by beginning to address utilities’ concerns regarding the use of reclaimed water and alternative water supplies. However, SEFLUC believes the May 15 draft remains materially deficient as discussed below. SEFLUC further believes that the substantial impacts on the public that will attend the adoption of this Rule merit a more deliberate and interactive process, and accordingly SEFLUC strongly urges the District take as much time as necessary to craft a sensible Rule without rushing to meet any perceived deadline for adoption.

As currently written, the May 15 draft will undermine the *2005-2006 Lower East Coast Water Supply Plan Update* (“LEC Plan”) and the recently adopted Water Availability Rule, as well as conflict with DEP statutory and rule making authority over wastewater disposal and reclaimed water use. Upon adoption of the LEC Plan, local governments, water users, and utilities are required, within 18 months, to prepare 10-year water supply plans as well as modify specific portions of their Comprehensive Plans for submission to the SFWMD and the Department of Community Affairs. The due date for these submissions is August 15, 2008, and most of these 10 Year Plans have either been completed and/or are in the final stages of completion. With the water restrictions proposed by the Rule, the demands listed for each of the Utilities in the LEC Plan would no longer be valid. Utilities have spent years of planning and millions of dollars updating Water Master Plans in preparation for the development of the ten-year water facility work plans and Comp Plan amendments, and many have spent millions of dollars constructing infrastructure systems in accordance with the LEC Plan. Neither the information contained in these facility work plans nor the information contained in the LEC Plan will be accurate if this rule proceeds as written.

At the workshops conducted on the proposed rule, SFWMD staff acknowledged these problems, but the only relief they offered was reopening each utility’s consumptive use permit to allow variances for reuse regulation. This defeats the purpose of rule making, which is to create a uniformly applicable regulatory regime that works in most if not all circumstances - not a rule that requires variances for each utility it applies to. This process will be extremely time consuming and onerous for utilities and SFWMD staff, and result in a hodgepodge of uneven application. Variances should be the limited exception and not the general rule. There must be coordination among all of the SFWMD water policies and DEP wastewater policies to make a successful and implementable rule.

Moreover, a number of SEFLUC’s member utilities have received legal opinions that the proposed rule exceeds the grant of statutory authority contained in Chapter 373, which would make the Rule vulnerable to legal challenge and potentially embroiled in lengthy litigation. As has been related to us, under Section 373.171, a Water Management District’s grant of rulemaking authority only

extends to implementing regulatory programs, which it has been directed or authorized by the Legislature to implement. Those programs are consumptive use permitting under Chapter 373, Part II and the Water Shortage authority under 373.175 and 373.246. The consumptive use permitting program does not provide authority for issuance of the rule as it applies only to permitted users, and the water emergency statutes only apply during emergency situation and not to permanent situations.

Additionally, even if the consumptive use permitting program could be interpreted to apply to non-permitted utility customers or self-supply users, the proposed rule would still exceed SFWMD's authority because Section 373.227, F.S., governs conservation vis-à-vis consumptive use permits and elements of the proposed rule are in conflict with the statute. In part, Section 373.227 provides "the overall water conservation goal of the state is to prevent and reduce wasteful, uneconomical, impractical, or unreasonable use of water resources." However, while the May 15 draft purports to conserve water, there is no explanation of where this excess water will be stored or how it will otherwise be used. Even during the severe water restrictions of 2007, large volumes of fresh water were discharged to tide because there was a lack of storage capacity.

Under the proposed rule, during times when there could be an abundance of water which may have to be released to tide, utility customers will be prohibited from irrigating their landscape which provides water to recharge aquifers. The end result will be even more wasteful disposal of water. In essence, the Rule will result in a worse situation than it was designed to prevent, the non-sustainable waste of water. The Rule as presently proposed is inconsistent with the Board's mandate to use water more than once. In order to maximize the goals of the water conservation statute, SFWMD must act consistently with Section 373.227(4) and leave the goal-based conservation planning to the individual utilities as part of an application for a consumptive use permit.

Finally, we have been advised that the proposed rule exceeds the SFWMD's legal authority under the water shortage permitting program because Sections 373.175 and 373.246 both envision an emergency resource related event such as a drought or some other resource problem as triggering the need for declaration of temporary water shortage restrictions. The proposed rule will apply year-round regardless of whether there are drought conditions or flood conditions and regardless of whether there are resource problems. Further, staff and the Governing Board have indicated the purpose of the rule is not to deal with any specific water resource event, but instead to change the public's basic attitude towards excessive water use. While a laudable goal that SEFLUC supports, this goal is not set forth in the statutes identified, and thus could not form the basis of a ruling making.

SEFLUC has prepared the following suggested changes to the Year-Round Water Conservation Rule that it would like SFWMD to consider as part of the current rulemaking process. Explanations of SEFLUC's proposed changes are contained below and are followed by underline and strike-through amendments based upon the SFWMD's May 15 draft.

Reclaimed Water Irrigation

Rule 40E-24.201(1) exempts landscape irrigation accomplished using reclaimed water from the two-day-a-week restriction, but prohibits reclaimed water irrigation between 10:00 am and 4:00 pm. This limitation should be removed as conflicting with DEP regulatory authority and many of SEFLUC utility members' DEP wastewater disposal permit requirements. Further, SEFLUC believes that every incentive should be given to customers to encourage use of reclaimed water instead of potable water for irrigation. Allowing some minor reclaimed water reuse during daylight hours is a small impact when weighed against the benefit of encouraging reclaimed water reuse.

The proposed rule is far more restrictive than how other water management districts handle reclaimed water irrigation. For example, St. Johns River Water Management District ("SJRWMD") Rule 40C-2.042(2)(a)(7) allows reclaimed water irrigation anytime without restriction. Similarly, Southwest Florida Water Management District ("SWFWMD") Rule 40D-22.201(3)(h) allows reclaimed water irrigation anytime with only voluntary conservation suggested for the hours of 10:00 am and 4:00 pm.

SEFLUC has further been advised that an attempt by the District to regulate use of reclaimed water would run afoul of existing court precedents. We have been pointed to a District Court of Appeal ruling in *Southwest Florida Water Management District v. Charlotte County*, 774 So.2d 903 (Fla. 2d DCA 2001) for the proposition that the governing body of a county has the power to regulate reclaimed water use under Section 125.01(1)(k)(1), Florida Statutes, which the District could not interfere with. Apparently, the court's holding was based on the fact that the proposed rule there did not limit a county's power to provide and regulate reclaimed water, but merely required applicants to investigate the feasibility of using reclaimed water and use it where "economically, environmentally and technically feasible," as a condition of obtaining a water use permit. The proposed Rule would cross the line identified by the Second District Court of Appeal in the *Southwest Florida* case.

Other Alternative Water Supplies

While the May 15 draft provides additional supplemental reclaimed water exemption opportunities, it fails to provide these same exemptions for other statutorily defined alternative water supplies (“AWS”), such as desalinated water or stormwater. We have seen no resource based explanation or rationale for the Rule to discriminate among alternative water supplies. Further, treating alternative water supplies the same as traditional water supplies conflicts with the District’s long standing policy of investment in alternative water supplies as a “drought proof” alternative for utility customers. On behalf of the public, SEFLUC utilities have invested millions of dollars to implement this District policy. We will have a hard time explaining to the public that these investments were for naught because the District changed its mind.

SEFLUC requests that SFWMD exempt all alternative water supply sources including desalinated sources, reclaimed water sources and supplemented/blended reclaimed water sources from year-round water conservation restrictions.

Two-Day a Week Irrigation Restrictions

SEFLUC is concerned with the Rule’s restriction of landscape irrigation to two (2) days a week instead of three (3) days a week. We have not seen any research or science based data that demonstrates whether and how much water would be saved by restricting irrigation to 2 days a week instead of 3 days a week. Water distribution systems have been designed and sized for seven (7) day a week irrigation, peak demands and fire flows. Two day a week irrigation will increase the amount of time the water sits in the water mains losing chlorine residual and stagnating, thus increasing the need to dump water on the ground to flush the systems. This is a year round issue for all utilities with the warm waters, which can be verified by the DEP and local health departments. Anecdotally, SEFLUC utilities have seen that customers will use more water on the 2 days of week they are allowed to water than they would if they had 3 days a week to irrigate.

SFWMD needs to provide additional scientific data demonstrating that a year-round 2-day-a-week restriction allows enough water to maintain landscapes in South Florida. SFWMD references a University of Florida IFAS publication as supporting the 2-day-a-week watering restriction. However, references are made throughout regarding the need for 3-day-a-week watering as a sustainable minimum. Limiting landscape irrigation to 3 days a week, as opposed to 2, is necessary for maintenance of the distribution system water quality, horticultural integrity, local government flexibility, and common sense conservation during ‘normal’ conditions.

We have grave concerns that 2-day-a-week irrigation would eliminate the first two phases of the water shortage plan contained in Chapter 40E-21, F.A.C. If

that is done, then, when a drought occurs and the water shortage plan is implemented, there little room remaining to cut back on water use. The unintended consequence of this Rule could be a more dire and drastic water resource emergency and public property damage when a drought does occur.

SEFLUC suggests the following amendments to Chapter 40E-24:

40E-24.011 Policy and Purpose.

No Change.

40E-24.101 Definitions.

When used in this chapter:

(1) –(12) No Change.

(13) “Reclaimed Water” means wastewater that has received at least secondary treatment and basic disinfection and is reused after flowing out of a wastewater treatment facility as defined by Rule 62-40.210, F.A.C., and includes systems which may or may not be supplemented from another water source, such as alternative water supplies, groundwater, surface water, or some other water source during peak demand periods by a public or private utility for the purpose of increasing supply.

~~(14) “Supplemented reclaimed water” and “blended reclaimed water” means reclaimed water which has been commingled with potable water, groundwater, surface water, or some other traditional source by a public or private utility for the purpose of increasing supply.~~

(14)(15) “User” means any person, individual, firm, association, organization, partnership, business trust, corporation, company, agent, employee or other legal entity whether natural or artificial, the United States of America, and the State and all political subdivisions, regions, districts, municipalities, and public agencies thereof, which directly or indirectly takes water from the water resource, including uses from private or public utility systems, uses under water use permits issued pursuant to Chapter 40E-2 or 40E-20, F.A.C., or uses from individual wells or pumps.

(15)(16) “Wasteful and unnecessary” means allowing water to be dispersed without any practical purpose to the water use; for example, excessive landscape irrigation, leaving an unattended hose on a driveway with water flowing, allowing water to be dispersed in a grossly inefficient manner, regardless of the type of water use; for example, allowing landscape irrigation water to unnecessarily fall onto pavement, sidewalks and other impervious surfaces; allowing water flow through a broken or malfunctioning water delivery or landscape irrigation system.

Specific Authority 373.016, 373.044, 373.0831, 373.113, 373.171, 373.227 FS. Law Implemented 373.042, 373.0421, 373.0831, 373.171, 373.223, 373.250, 373.227 FS. History–New 6-12-03, Amended _____.

40E-24.201 Year-Round Landscape Irrigation Measures.

(1) The year-round landscape irrigation measures contained in this chapter are applicable to all users as defined in subsection 40E-24.101(9), F.A.C., including permitted and exempt users under Chapter 40E-2, F.A.C., unless indicated otherwise herein. These measures apply to all water sources, except that landscape irrigation accomplished using ~~100% reclaimed water is subject to only paragraphs 5(a)(1) and 5(d)(1) of this section or other alternative water supplies shall not be restricted except as further restricted by a local government or other reclaimed water provider, as necessary, to promote conservation of these alternative water supplies. All properties irrigating with alternative water supplies should voluntarily conserve such alternative water supplies by not irrigating between the hours of 10:00 a.m. and 4:00 p.m.~~ In addition to the requirements of this section, all permitted users under Chapter 40E-2, F.A.C., are required to maintain compliance with all CUP conditions and terms, including those designed to require the implementation of water conservation practices.

(2) Any restrictions or other measures declared pursuant to Chapter 40E-21, F.A.C., or related Board or Executive Director orders which are more restrictive than a measure contained within this chapter, shall supersede this rule for the duration of the applicable water shortage declaration.

(3) It shall be the duty of each water user to keep informed as to the landscape irrigation measures presented within this chapter, which affect each particular water use.

(4) In addition to the specific measures enumerated below, all wasteful and unnecessary water use as defined in subsection 40E-24.101(10), F.A.C., is prohibited.

(5) The following requirements or exceptions shall apply to all users unless specified otherwise herein:

(a) Irrigation of existing landscaping shall comply with the following provisions:

1. Landscape irrigation shall be prohibited daily between the hours of 10:00 a.m. and 4:00 p.m., except as otherwise provided herein.

2. Even addresses, installations with irrigation systems that irrigate both even and odd addresses within the same zones, including multi-family units and homeowners' associations, and rights-of-way or other locations with no address as defined in subsection 40E-24.101(5), F.A.C., shall accomplish necessary landscape irrigation only on Tuesday, and/or Thursday and/or Sunday.

3. Odd addresses as defined in subsection 40E-24.101(13), F.A.C., shall accomplish necessary landscape irrigation only on Monday, and/or Wednesday and/or Saturday.

~~(b) Landscape irrigation using supplemented reclaimed water which meets one of the conditions listed in paragraphs 5(b)(1) through 5(b)(6), below, shall be subject to the restrictions set forth in paragraph 1. Landscape irrigation which utilizes supplemented reclaimed water that fails to meet the conditions specified below shall be subject to the restrictions set forth in paragraphs 5(e), and 5(d).~~

~~1. The other supply is incidental stormwater runoff that enters a reclaimed water storage pond;~~

~~2. The other supply consists of withdrawals from an un-augmented stormwater system or water recovered from a permitted aquifer storage and recovery (ASR) well that stores seasonal diversions from a surface water body;~~

~~3. The other supply is recovered from a reclaimed water ASR well permitted by the Florida Department of Environmental Protection, including reclaimed ASR well testing authorized in preparation for permit issuance;~~

~~4. The other supply is rainwater collected in a rain barrel, cistern, or other rain harvesting system;~~

~~5. The other supply consists of concentrate, reject water, or other by-products from the treatment of brackish groundwater; or~~

~~6. The reclaimed water provider has demonstrated to the District that the other traditional supply is necessary to achieve full disposal of the reclaimed water.~~

~~(e) Irrigation of existing landscaping which utilizes supplemented reclaimed water and/or water derived from an alternative water source, but not including 100% reclaimed water, shall comply with the following provisions:~~

~~1. Landscape irrigation shall be prohibited daily between the hours of 10:00 a.m. and 4:00 p.m., except as otherwise provided herein.~~

~~2. Even addresses, installations with irrigation systems that irrigate both even and odd addresses within the same zones, including multi-family units and homeowners' associations, and rights-of-way or other locations with no address as defined in subsection 40E 24.101(4), F.A.C., may accomplish necessary landscape irrigation only on Tuesday, Thursday, and/or Sunday.~~

~~3. Odd addresses as defined in subsection 40E 24.101(7), F.A.C., may accomplish necessary landscape irrigation only on Monday, Wednesday, and/or Saturday.~~

~~(b)(d) Irrigation of new landscaping shall comply with the following provisions:~~

~~1. Irrigation of new landscaping shall be prohibited daily between the hours of 10:00 a.m. and 4:00 p.m., except as otherwise provided herein.~~

~~2. On the day the new landscaping is installed, the new landscaping may be irrigated once without regard to the normally allowable watering times. Irrigation of the soil immediately prior to the installation of the new landscaping is also allowable without regard to the normal allowable watering days and times.~~

~~3. The sixty-day period begins the day the new landscaping is installed. The new landscaping shall be installed within a reasonable time from the date of purchase, which may be demonstrated with a dated receipt or invoice.~~

~~4. Irrigation of new landscaping which has been in place for thirty (30) days or less shall be accomplished on Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, and/or Sunday.~~

5. Irrigation of new landscaping which has been in place for thirty-one (31) to sixty (60) days shall be accomplished on Monday, Wednesday, Thursday, and/or Saturday.

6. Irrigation of the new landscaping is limited to areas containing the new landscaping only. An entire zone of an irrigation system shall only be utilized for landscape irrigation under this paragraph if the zone in question is for an area that contains at least 50% new landscaping. If a zone contains less than 50% new landscaping, or if the new landscaping is in an area that will not typically be irrigated by an irrigation system, only the individual new plantings are eligible for additional irrigation under this paragraph. Targeted watering may be accomplished by hand watering, or any appropriate method which isolates and waters only the new landscaping.

~~(c)(f)~~ Landscape irrigation systems may be operated during restricted days and/or times for cleaning, ~~and~~ maintenance, and repair purposes with an attendant on site in the area being tested. Landscape irrigation systems may routinely be operated for such purposes no more than once per week, and the run time for any one test should not exceed 10 minutes per zone.

~~(d)(g)~~ Landscape irrigation for the purpose of watering-in fertilizers, insecticides, fungicides and herbicides, where such watering-in is required by the manufacturer, or by federal, state or local law, or best management practices, shall be allowed under the following conditions:

1. Such watering-in shall be limited to one application in the absence of specific alternative instructions from the manufacturer; and

2. Such watering-in shall be accomplished during normally allowable watering days and times unless a professional licensed applicator has posted a temporary sign containing the date of application and the date(s) of needed watering-in activity.

~~(e)(h)~~ Any plant material may be watered using low volume irrigation, micro-irrigation, and low-volume hand watering methods without regard to the watering days or times allowed pursuant to this section.

(f) Use of recycled water from water detention treatment ponds for irrigation is exempt from this Rule provided the ponds are not augmented from any ground or off-site surface water or traditional potable water source.

Specific Authority 373.016, 373.044, 373.0831, 373.113, 373.171, 373.227 FS. Law Implemented 373.042, 373.0421, 373.0831, 373.171, 373.223, 373.250, 373.227 FS. History—New 6-12-03, Amended _____.

40E-24.301 Local Government Option.

No Change.

40E-24.401 Enforcement.

No Change.

Section 40E-24.501 Variances and Waivers.

No Change.

Conclusion

SEFLUC thanks SFWMD for the opportunity to comment on the draft Rule. If you have any questions concerning the suggestions contained herein, please do not hesitate to contact us. We look forward to continuing to work with the SFWMD in developing the proposed rule.

Sincerely,



Hector D. Castro, P.E.
Chairman
On Behalf of the Southeast Florida Utility Council Member Utilities

Electronic copy to:

Eric Buermann, Chairman of the Governing Board, SFWMD
Michael Collins, Chair of WRAC, SFWMD
Shannon Estenoz, Vice Chair of WRAC, SFWMD Board Member from Broward
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SEFLUC Member Utilities