



July 2, 2020

VIA EMAIL

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Ms. Steffany Olson
Science Supervisor
Everglades Policy and Coordination Division
South Florida Water Management District
P.O. Box 24680
West Palm Beach, FL 33406

RE: Comments on draft Amendments to Chapter 40E-61, Florida Administrative Code, Works of the District Basins

Dear Ms. Olson:

The City of St. Cloud, Toho Water Authority, Orange County Utilities, Polk County Utilities, and Reedy Creek Improvement District ("STOPR Group") appreciate the opportunity to review and comment on the draft amendments to Chapter 40E-61, Florida Administrative Code, Works of the District Basins ("Rule").

The STOPR Group has significant concerns regarding the current draft of the Rule, which we believe can be cured with changes suggested in this letter:

- **The STOPR Group recommends elimination of Part I.** Section 85 of House Bill 5003, which is now Chapter 2020-114, Laws of Florida ("Section 85"), restricts the Rule amendments to implementing water quality monitoring for entities that do not implement Best Management Practices ("BMPs"). As such, the STOPR Group requests the District withdraw Part I.
- **The legislative mandate implemented through Part II should be achieved without creating a new permit program.** The District can adopt a rule to provide for a water quality monitoring plan without a new permit program. The Florida Department of Environmental Protection ("FDEP") has successfully implemented a parallel monitoring plan rule without a permitting component. We recommend the District adopt a monitoring plan rule without a permitting component.
- **The Rule should exempt entities that are already regulated.** Consistent with statutory direction, the Rule should recognize and exempt from Part II certain landowners with permits that already address water quality under other regulatory programs. The Rule needs to exempt those permittees from this program because those permits provide protection for the environment and a means to comply with the BMPs.



To address these significant overarching concerns, we recommend the following changes to the draft amendments to the Rule:

- 1) Remove Part I from 40E-61.
- 2) Limit the scope of Part II of 40E-61 to the implementation of a water quality monitoring plan. The District should follow the lead of FDEP under Rule 62-307.200 F.A.C., and adopt a similar rule. This would also avoid duplication.
- 3) Modify Part II to recognize and exclude sources already governed under permits that address water quality under other regulatory programs such as the National Pollutant Discharge Elimination System ("NPDES") program, the Environmental Resource Permit ("ERP") program, and FDEP water, stormwater, wastewater, reclaimed water, and solid waste permits.

The above concerns and proposed remedies are explained in greater detail below together with our other requested changes. The STOPR Group encourages the District to use this letter for its evaluation of our detailed comments, but we have included a condensed summary version of the comments in **Attachment 1** for the convenience of the reviewers to identify where the comments apply.

Chapter 40E-61.020 - Scope

Rule 40E-61.020 sets out the scope for the entire Rule and includes a subsection (3) that states: "The rules in this chapter describe landowner permitting requirements. All lands within the Northern Everglades watersheds must comply with the provisions of this chapter." Based on this statement, both parts of the Rule appear to be made to apply to all landowners within the BMAP. However, the Rule includes requirements within Part I that do not appear to be directed toward landowners. Part II also fails to recognize and exempt certain land owners who hold permits that address water quality under other regulatory programs.

As a result of the above-mentioned discrepancies, Part I could be interpreted to be made applicable to all landowners. Indeed, Part I appears to provide for the District to develop requirements to be imposed on landowners based on data generated by the District. We recommend the District limit the scope of the Rule to the development of a water quality monitoring program for nonpoint source dischargers that are not implementing BMPs under an appropriate BMAP or permitted under another regulatory program.

Chapter 40E-61.030 – Definitions:

The terms "non-point source discharge" and "non-point source discharger" should be added to the definitions and the term "pollutant" should be revised as shown below.

- (1) "Pollutant" means, for the purposes of this chapter, a constituent ~~monitored by the District in surface water runoff, contributing to an impaired water body identified in a BMAP for which a TMDL has been established in the BMAP where the parcel to be monitored is located.~~



Part I

We recommend the District not proceed with rulemaking for Part I of the Rule. Section 85 constrains the 40E-61 rulemaking to procedures to implement a specifically described water quality monitoring program as provided below:

In order to implement Specific Appropriation 2934 1620 of the 2020-2021 General Appropriations Act and to provide a unified procedure to verify implementation of water quality monitoring pursuant to s. 403.067(7)(d)2.a., Florida Statutes, the rulemaking required by s. 373.4595(3)(b)21., (4)(b)8., and (4)(d)8., Florida Statutes, are limited to procedures to implement water quality monitoring required in lieu of implementation of best management practices or other measures and replace existing rule 40E-61, Florida Administrative Code.

It is important to review the sections referenced in Section 85 in order to have a frame of reference, not just for Part I but also for Part II (later discussed). The first cited section (adopted in 2016) relates to the Lake Okeechobee BMAP and states:

The district shall revise chapter 40E-61, Florida Administrative Code, to be consistent with this section and s. 403.067; provide for a monitoring program for nonpoint source dischargers required to monitor water quality by s. 403.067; and provide for the results of such monitoring to be reported to the coordinating agencies. (373.4595(3)(b)21.)

The second cited section relates to the Caloosahatchee BMAP and states:

The district shall initiate rulemaking to provide for a monitoring program for nonpoint source dischargers required to monitor water quality pursuant to s. 403.067(7)(b)2. g. or (c)3. The results of such monitoring must be reported to the coordinating agencies. (373.4595(4)(b)8.)

The third cited section relates to the St. Lucie River BMAP and reads the same as the quoted section for the Caloosahatchee BMAP. The water quality monitoring program that each of those three provisions requires be implemented is found in section 403.067(7)(d)2. a., F.S., which states:

2. No later than January 1, 2017:
 - a. The Department, in consultation with the Water Management Districts and the Department of Agriculture and Consumer Services, shall initiate rulemaking to adopt procedures to verify implementation of water quality monitoring required in lieu of implementation of best management practices or other measures pursuant to sub-subparagraph (b)2. g.

The section referenced above provides:

A nonpoint source discharger included in a basin management action plan must demonstrate compliance with the pollutant reductions established under subsection (6) by implementing the appropriate best management practices established pursuant to paragraph (c) or conducting water quality monitoring prescribed by the department or a water management



district. A nonpoint source discharger may, in accordance with department rules, supplement the implementation of best management practices with water quality credit trades in order to demonstrate compliance with the pollutant reductions established under subsection (6). (403.067(7)(b)2. g.)

Thus, the Rule is to be limited to the implementation of a water quality monitoring program for those nonpoint source dischargers who do not implement BMPs. This conclusion is borne out not just based on Section 85, but it is also supported by the existing laws cited in Section 85 that are quoted above.

Without abandoning our recommendation to remove Part I from the Rule, we provide specific comments as to certain portions of it below. The District has indicated in its transmittal letter, where it acknowledges Section 85, that there may be other means of accomplishing the objectives of Part I. As the District moves forward to accomplish its objectives through other means, we request it take into consideration these comments.

- 1) In Part I of the Rule, the District has launched its own program of water quality monitoring, in which it "has determined that data collected at sites described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., are representative of hydrology, water quality, and stormwater runoff volume." (Rule 40E-61.100) The District intends to use this data for a list of objectives including identifying areas where water quality problems have been detected and determine whether additional source controls are needed. (Rule 40E-61.100(3)(b)) However, we caution against global predetermination of the adequacy of collected data to determine representative conditions. The data collected must stand on its own merits and be subject to scientific inquiry and challenge. At this stage, it has not been demonstrated that the proposed data is representative spatially, temporally, or of land uses and hydrologic conditions. Any further implementation of Part I in any form should not include such an assertion. Additionally, adoption of such a program by rule would mean that any amendments to the program would also need to be adopted by rule. The establishment of the monitoring program should be open to stakeholder review and involvement to assure the data collected is representative of land uses and conditions within the BMAP.
- 2) The assessment methods to determine a Priority Targeted Restoration Area ("PTRA") are not well-defined, may not encompass all data and information necessary to make such a determination, and may also not take into consideration the roles of the other Coordinating Agencies. The identification of Petra's appears to be solely implemented by the District in consultation with the FDEP. Due to the critical nature of this task, the identification of PTRAs should be open to stakeholder review and involvement to assure the data, means, and methods used to develop PTRAs reasonably represent the land uses and hydrology of specific areas of the BMAP. The evaluation of the effectiveness of specific projects and BMPs, determination of additional data collection, evaluations, studies, and modeling, and identification and evaluation of alternate technologies and the design of improved programs and projects to enhance source control should also be open to stakeholder review and involvement.



"Source controls" remains largely an undefined term in the Rule. The undefined nature of the term as used in the Rule creates the implication that the term means both activities that the District or other state agency will fund through the BMAP and also a project or projects that will be required of regulated entities. This term should be defined and clarified to specify that it does not extend to requiring source control projects from the regulated community, including local governments.

Source controls are part of the Lake Okeechobee Watershed Construction Project as set forth in section 373.4595(3)(a)1. b.(IX):

Provide for additional source controls needed to enhance performance of the Lake Okeechobee Watershed Construction Project facilities. Such additional source controls shall be incorporated into the Lake Okeechobee Basin Management Action Plan pursuant to paragraph (b).

But any such source controls must be provided as part of the BMAP, not the Rule; otherwise the BMAP process would be circumvented. The identification and implementation of new projects and programs to improve water quality in the regional system should also be open to stakeholder review and involvement.

In the transmittal letter for the Rule, the District indicates that if Part I is not included in the Rule, there may be other means of accomplishing the objectives of Part I. We presume this would be as part of the interagency agreement described in s. 373.4595(3)(b), F.S.:

The coordinating agencies shall develop an interagency agreement pursuant to ss. 373.046 and 373.406(5) which is consistent with the Department taking the lead on water quality protection measures through the Lake Okeechobee Basin Management Action Plan adopted pursuant to s. 403.067; the district taking the lead on hydrologic improvements pursuant to paragraph (a); and the Department of Agriculture and Consumer Services taking the lead on agricultural interim measures, best management practices, and other measures adopted pursuant to s. 403.067. The interagency agreement must specify how best management practices for nonagricultural nonpoint sources are developed and how all best management practices are implemented and verified consistent with s. 403.067 and this section and must address measures to be taken by the coordinating agencies during any best management practices reevaluation performed pursuant to subparagraphs 5. and 10. The department shall use best professional judgment in making the initial determination of best management practice effectiveness. The coordinating agencies may develop an intergovernmental agreement with local governments to implement nonagricultural nonpoint source best management practices within their respective geographic boundaries. The coordinating agencies shall facilitate the application of federal programs that offer opportunities for water quality treatment, including preservation, restoration, or creation of wetlands on agricultural lands.

The details outlined in the statute for the required interagency agreement are the more appropriate means for implementing those objectives from Part I that properly carry forward the legislative intent.



Part II

The statutory references above provide for adoption of a rule to approve monitoring plans that allow certain unpermitted nonpoint source dischargers to demonstrate compliance with state water quality standards addressed by the BMAPs. If the discharger collecting data under this program cannot meet state water quality standards, it must be reported to the Coordinating Agency with jurisdiction. That agency may require entities who cannot demonstrate compliance with state water quality standards to implement BMPs in accordance with the BMAP. There is no independent authority to impose on-site allocations under the Rule.

The Legislature did not provide for the creation of a new permitting program, but rather called for development of a rule that would require implementation of a water quality monitoring plan akin to what the FDEP did in Rule 62-307.200, F.A.C., which is not a permit program, but is nonetheless enforceable. The Rule should be modeled after that program and possibly even adopted by reference instead of creating a new program.

The Rule should state with clarity who should be exempt from its requirements. Section 403.067(7)(b), F.S., titled "Total maximum daily load implementation," sets out the process and authority for the implementation of TMDLs. This section says in pertinent part:

2. For a basin management action plan adopted pursuant to paragraph (a), any management strategies and pollutant reduction requirements associated with a pollutant of concern for which a total maximum daily load has been developed, including effluent limits set forth for a discharger subject to NPDES permitting, if any, must be included in a timely manner in subsequent NPDES permits or permit modifications for that discharger.

...

- b. For holders of NPDES municipal separate storm sewer system permits and other stormwater sources, implementation of a total maximum daily load or basin management action plan must be achieved, to the maximum extent practicable, through the use of best management practices or other management measures.

...

- f. For nonagricultural pollutant sources not subject to NPDES permitting but permitted pursuant to other state, regional, or local water quality programs, the pollutant reduction actions adopted in a basin management action plan must be implemented to the maximum extent practicable as part of those permitting programs.

Under the above-quoted provisions, this new program would not be made applicable to holders of NPDES permits or other nonagricultural nonpoint sources already permitted under state, regional or local water quality programs such as ERPs or FDEP stormwater, wastewater, reclaimed water, and solid waste permits, which already meet or will be required to meet requirements set forth in those permits. The Rule needs to exempt those permittees from this program because those permits provide protection for the



environment and a means to comply with the BMAPs. The exemptions should be listed in the scope or other introductory provision of the Rule. The Rule also needs to be conformed to eliminate those provisions that step beyond a monitoring program, including removing any references to creating a new permitting program.

Under the limiting conditions of the Rule 40E-61.280, the District sets out authority to impose such special conditions "as necessary to ensure that the permitted discharge will be consistent with the overall objectives of the District and will not be harmful to the water resources of the District." The Rule's function should be limited to assessment in connection with the TMDL and should not be broadly implemented to serve the "overall objectives of the District" or protect the "water resources of the District." Limiting condition (d) entails requirements that should be handled through the ERP process and should be removed from the Rule. Although the District includes a hold harmless provision in its other permits that involve use of District works, this is a different situation (monitoring on private lands) and this rule should not include a hold harmless provision under limiting condition (h); it is unnecessary and should be removed from the Rule.

The Rule 40E-61.290 also includes the follow language:

"(2) When water quality problems are demonstrated based on data collected under a permitted WQMP or District collected data, the permittee shall implement appropriate rule-adopted BMPs or other measures as established under the applicable BMAP."

We recommend that the remedy for a discharger who can't meet water quality criteria be as stated in Sections 373.4595 and 403.067, F.S. We note in addition that the Rule does not indicate how a water quality "problem" will be demonstrated, nor what criteria should be applied to determine if there is a "problem," resulting in a vague and inappropriate standard. For these reasons, this provision should be removed from the Rule.

Appendix B – Permittee Water Quality Monitoring Plan Criteria

Appendix B of the Rule sets out Permittee Water Quality Monitoring Plan ("WQMP") Criteria. The Appendix provides that the WQMP must include monitoring of pollutants of concern in the BMAPs. While this is correct, the BMAPs don't all have the same pollutants of concern and the Rule should limit itself to those pollutants for which the TMDL has been established in the particular BMAP where the property is located (e.g., total phosphorus for the Lake Okeechobee Watershed BMAP). In this regard, "pollutant" needs to be defined according to its purpose, not as more broadly suggested in the Rule.

The number of collection sites and frequency of collection provided for in the WQMP criteria are not well defined, costly, and potentially impractical for a landowner to implement. It is impractical, burdensome and costly to require all non-point source discharges to perform the following tasks required by Appendix B:



- Contract with a Florida-registered Professional Engineer to estimate flowrates, particularly sheetflow.
 - o Comment: The monitoring should be limited to the primary discharge locations through structures and landowners should be permitted to estimate flows based on approved calculation methods.
- Collect data to develop representative conditions that encompass “typical seasonal conditions”.
 - o Comment: No definition of “typical seasonal conditions” is provided. Florida weather rarely exhibits “average” or typical weather conditions. This condition needs to be better defined with regard to the frequency of data collected during and the duration of this baseline or representative condition.
- Perform a statistical analysis to determine the number of data necessary to represent annual pollutant levels.
 - o Comment: The Rule should be limited to requiring implementing of a monitoring plan for unpermitted entities that choose not to implement BMPs. It is recommended this requirement be removed.
- Perform an uncertainty analysis.
 - o Comment: The Rule should be limited to requiring implementing of a monitoring plan for unpermitted entities that choose not to implement BMPs, and does not need to include methods to account for uncertainty. It is recommended this requirement be removed.

Appendix B also states "The permit will specify the water quality target, specific to the permitted lands, that must be achieved at the offsite discharge location." We were not able to identify the District's authority to implement this requirement and request this statement be removed.

We appreciate the District's consideration of the STOPR Group's comments. If you have any questions or would like to discuss any of the comments further, please feel free to contact us.

Submitted on behalf of the STOPR Group:

By:

Todd P. Swingle, P.E.
Executive Director
Toho Water Authority

cc: Drew Bartlett, SFWMD
John Mitnik, P.E., SFWMD
Jennifer Reynolds, SFWMD
Adam Blalock, FDEP
Edward Smith, FDEP
Christina Coger, FDEP



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ATTACHMENT 1



**Draft Amendments to Chapter 40E-61, F.A.C.
STOPR Group Review Comments:**

The body of the letter accompanying this attachment sets forth the STOPR Group's detailed comments with regard to the proposed amendments to Chapter 40E-61E ("Rule"). The STOPR Group encourages the District to use the letter in its review of our detailed comments, but we have included a condensed summary version of the comments in this attachment for the convenience of the reviewers to identify where the comments apply. Please note that tables from the appendices have not been included below.

**INTRODUCTION TO CHAPTER 40E-61
Northern Everglades Basins**

Dear Stakeholders:

The Northern Everglades and Estuaries Protection Program ([373.4595, Florida Statutes](#)) directs the Florida Department of Environmental Protection, the Florida Department of Agriculture and Consumer Services, and the South Florida Water Management District to work together to reduce pollutants and achieve water quality standards in the Lake Okeechobee, St. Lucie River, and Caloosahatchee River watersheds through Basin Management Action Plans and the Total Maximum Daily Loads program ([403.067, Florida Statutes](#)).

State law adopted in 2016 directed the District to revise Rule 40E-61. Since that time, both state and local governments have implemented actions to reduce harmful pollutants and improve water quality, but more work remains. District staff presented rule concepts in November 2019 to the public at five workshops throughout the District's jurisdiction after the District's Governing Board authorized rule development to update the 40E-61 Rule. Staff used this important public input from workshops in addition to comments submitted directly to staff to develop the attached draft rule text for additional public review.

The draft rules are crafted in two parts that describe the following District actions as one of three Coordinating Agencies (with the Florida Departments of Environmental Protection and Agriculture and Consumer Services):

- (1) The District processes for collecting and assessing data to identify necessary projects, actions, and programs to improve the quality, quantity, timing, and distribution of water in the Northern Everglades watersheds; and
- (2) The permitting requirement for those landowners who conduct water quality monitoring in lieu of implementing Best Management Practices.

Public and stakeholder engagement remains a critical component of drafting this rule and improving water quality for the Northern Everglades and Estuaries. The District seeks the public's feedback on the draft



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rule through workshops that will be announced for May and June 2020 and through the submission of written comments at the District's rulemaking website <https://www.sfwmd.gov/doing-business-with-us/rules>.

During the 2020 regular lawmaking session, the Florida Legislature passed the [Clean Waterways Act](#) which included additional authorities and practices to improve water quality. The Legislature also passed [Section 85 of House Bill 5003](#) which appears to limit the 40E-61 rulemaking to the contents of Part II of this draft. However, that does not necessarily mean the contents of Part I cannot be implemented through other means. The full results of the 2020 Session are pending, but the District wanted to make the public aware of those potential legislative changes as they consider their comments on both parts of the draft rule.

Section 85 of House Bill 5003 ("Section 85"), now Chapter 2020-114, Laws of Florida, restricts the Rule amendments to a water quality monitoring program for entities that do not implement Best Management Practices ("BMPs"). Part I should be removed from the Rule.

We rely on your engagement on this draft rule and all the other important work the District is doing.
Thank you,

Your Team at the South Florida Water Management District



**CHAPTER 40E-61
Northern Everglades Basins**

40E61.010 Policy and Purpose.

(1) The State of Florida enacted the Northern Everglades and Estuaries Protection Program (NEEPP) to protect and restore surface water resources and achieve and maintain compliance with water quality standards in the Lake Okeechobee watershed, the Caloosahatchee River watershed, and the St. Lucie River watershed (collectively the Northern Everglades watersheds), and downstream receiving waters through phased, comprehensive, and innovative protection programs, which include long-term solutions based upon the total maximum daily loads (TMDLs) established by Florida Department of Environmental Protection (FDEP) in accordance with Section 403.067, Florida Statutes (F.S.).

(2) NEEPP requires watershed protection programs to improve the quality, quantity, timing, and distribution of water in the northern Everglades ecosystem. The programs are comprised of research and monitoring, development and implementation of best management practices (BMPs), refinement of existing regulations, and structural and nonstructural projects, including public works. The programs include Basin Management Action Plans (BMAPs) to address reduction of pollutant loading to achieve TMDLs. The BMAPs take into consideration Watershed Protection Plans developed by the South Florida Water Management District (District).

(3) The rules in this chapter establish criteria to ensure the District's ability to carry out the objectives of the legislative declarations of policy in Sections 373.016 and 403.067 F.S.; the state water policy in Chapter 62-40, Florida Administrative Code (F.A.C.); and NEEPP in Section 373.4595, F.S., including directives for the District to:

- (a) Complete a Watershed Protection Plan, which includes a Watershed Construction Project strategy and a Research and Water Quality Monitoring Program, for each of the Northern Everglades watersheds and provide for 5-year updates;
- (b) Implement a monitoring program within each of the Northern Everglades watersheds;
- (c) Conduct monitoring at representative sites to verify the effectiveness of nonpoint source BMPs;
- (d) Provide for a monitoring program for nonpoint source dischargers that are required to monitor water quality under Section 403.067, F.S., and provide for the results of such monitoring to be reported to the FDEP and the Florida Department of Agriculture and Consumer Services (FDACS); and
- (e) Institute a reevaluation of rule-adopted BMPs or other measures where water quality problems have been demonstrated despite the appropriate implementation, operation, and maintenance of these activities.

(4) This chapter is consistent with and supports the directives under NEEPP, Section 403.067, F.S., and the BMAPs by ensuring the availability of appropriate surface water quality data and providing scientific data-driven methods and approaches to prioritize areas of focus and inform decisions for reducing pollutant loadings to receiving waterbodies.



Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS.

History—New.

40E-61.020 Scope.

(1) The effective date of this chapter is _____.

(2) This chapter describes District processes for collecting and assessing data to identify necessary projects, actions, and programs to improve the quality, quantity, timing, and distribution of water in the Northern Everglades watersheds. District assessments will address the reduction of BMAP-targeted pollutant loads in the Northern Everglades watersheds. This chapter describes methods and criteria for characterizing pollutant sources and recommending and expediting tailored pollutant reduction activities in areas the District identifies as having the greatest potential for impact by:

The District should limit the scope of the Rule to the development of a water quality monitoring program for nonpoint source dischargers that are not implementing BMPs under an appropriate BMAP or permitted under another regulatory program.

- (a) Implementing monitoring networks to measure stormwater runoff volume and pollutant levels, identify pollutant sources, and quantify their relative contributions within and from each of the Northern Everglades watersheds;
- (b) Prioritizing areas to evaluate water quality and quantity data to ensure the appropriate projects and programs are implemented, expedite the implementation of appropriate water resource restoration and protection projects and programs, ensure reasonable progress is made toward achieving pollutant level targets, and consider alternative nutrient reduction technologies;
- (c) Conducting studies to support the District's science-based adaptive management recommendations for updates to Watershed Protection Plans which support BMAPs; and
- (d) Collecting and assessing data from representative monitoring sites to verify the effectiveness of nonpoint source BMPs, interim measures, and projects.

(3) The rules in this chapter describe landowner permitting requirements. All lands within the Northern Everglades watersheds must comply with the provisions of this chapter.

Paragraph (3) indicates that the Rule applies to all landowners within one of the Northern Everglades Basin Management Action Plans. This finding does not recognize statutory directives that provide for BMAP implementation through existing permit programs. The District should limit the scope of the Rule to the development of a water quality monitoring program for nonpoint source dischargers that are not implementing BMPs under an appropriate BMAP or permitted under another regulatory program.

*Rulemaking Authority 373.044, 373.113, 373.4595FS. Law Implemented 373.4595, 403.067 FS. History—
New 11-1-89, Amended 10-*

1-06, .



40E-61.030 Definitions.

The terms “non-point source discharge” and “non-point source discharger” should be added to the definitions and the term “pollutant” should be revised as shown below.

When used in this chapter:

(2) “Basin Management Action Plan” or “BMAP” means FDEP’s comprehensive set of strategies developed for restoring impaired waters by reducing pollutant loadings to meet the allowable loadings established in a Total Maximum Daily Load.

(3) “Caloosahatchee River watershed” means the Caloosahatchee River, its tributaries, its estuary, and the area within which surface water flow is directed or drains, naturally or by constructed works, to the river, its tributaries, or its estuary.

(4) “Coordinating Agencies” means the Florida Department of Environmental Protection, the Florida Department of Agriculture and Consumer Services, and the South Florida Water Management District.

(5) “Lake Okeechobee watershed” means Lake Okeechobee, its tributaries, and the area within which surface water flow is directed or drains, naturally or by constructed works, to the lake or its tributaries.

(6) “Northern Everglades watersheds” means the combined areas of the Lake Okeechobee watershed, Caloosahatchee River watershed and St. Lucie River watershed.

(7) “Parcel” means total contiguous land area such as a tract or plot under single ownership, typically consistent with county tax identification numbers.

(8) “Pollutant” means, for the purposes of this chapter, a **constituent monitored by the District in surface water runoff, contributing to an impaired water body identified in a BMAP for which a TMDL has been established in the BMAP where the parcel to be monitored is located.**

(9) “St. Lucie River watershed” means the St. Lucie River, its tributaries, its estuary, and the area within which surface water flow is directed or drains, naturally or by constructed works to the river, its tributaries, or its estuary.

(10) “Total Maximum Daily Load” or “TMDL” means the water quality targets designed to address verified impairments for specific pollutants.

(11) “Watershed Protection Plan” or “WPP” means the plan specific to each of the watersheds consisting of the Watershed Construction Project, which includes projects and programs to improve the watershed’s hydrology and water quality, and the Research and Water Quality Monitoring Program.

(12) “Water Quality Monitoring Plan” or “WQMP” means a permittee’s approved plan to implement monitoring, as described in Appendix B, “Permittee Water Quality Monitoring Plan Criteria,” incorporated by reference in Rule 40E-61.040(4) F.A.C., to verify that discharges from permitted lands comply with state water quality standards.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.



40E-61.040 Forms, Instructions, and References.

- (1) South Florida Water Management District Form XXXX, dated [To be determined] [<http://www.flrules.org/Gateway/reference.asp?No=Ref-TBD>], entitled "Application for Individual Permittee Water Quality Monitoring in the Northern Everglades watersheds."
- (2) "South Florida Water Management District Guidebook for Preparing an Application for Individual Permittee Water Quality Monitoring pursuant to Chapter 40E-61, Florida Administrative Code," dated [To be determined], [<http://www.flrules.org/Gateway/reference.asp?No=Ref-TBD>].
- (3) "Appendix A – Watershed Data Sources and Assessments" dated [To be determined], [<http://www.flrules.org/Gateway/reference.asp?No=Ref-TBD>]
- (4) "Appendix B – Permittee Water Quality Monitoring Plan Criteria," dated [To be determined], [<http://www.flrules.org/Gateway/reference.asp?No=Ref-TBD>]

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.

PART I: Watershed Assessments for Protection Plan Updates:

The District should not proceed with rulemaking for Part I of the Rule. Section 85 constrains the 40E-61 rulemaking to procedures to implement a specifically described water quality monitoring program as provided below:

In order to implement Specific Appropriation 2934 1620 of the 2020-2021 General Appropriations Act and to provide a unified procedure to verify implementation of water quality monitoring pursuant to s. 403.067(7)(d)2.a., Florida Statutes, the rulemaking required by s. 373.4595(3)(b)21., (4)(b)8., and (4)(d)8., Florida Statutes, are limited to procedures to implement water quality monitoring required in lieu of implementation of best management practices or other measures and replace existing rule 40E-61, Florida Administrative Code.

Thus, the Rule is to be limited to the implementation of a water quality monitoring program for those nonpoint source dischargers who do not implement BMPs.

Without abandoning our recommendation to remove Part I from the Rule, we provide specific comments as to certain portions of it below. The District has indicated in its transmittal letter, where it acknowledges Section 85, that there may be other means of accomplishing the objectives of Part I. As the District moves forward to accomplish its objectives through other means, we request it take into consideration these comments.

40E-61.100 Assessments.

The rules in this Part describe the watershed monitoring and assessment process for updating the WPPs. The WPPs, which provide the basis for the BMAPs, are developed and updated by the District to identify additional measures needed to increase the certainty that the overall objectives for improving water quality and quantity are met. WPP updates are based on the most current available information and recommendations.

(1) Monitoring watershed runoff and assessing the data are the primary methods for identifying pollutant sources, relative contributions, activities potentially impacting contributions, parameters for



design of implemented measures, and the effectiveness of activities, projects, and programs. The District will utilize data collected in the following manner:

- (a) The District will collect data at monitored sites described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C. The District has determined that data collected at sites described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., are representative of hydrology, water quality, and stormwater runoff volume.

In Part I of the Rule, the District has launched its own program of water quality monitoring, in which it "has determined that data collected at sites described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., are representative of hydrology, water quality, and stormwater runoff volume." (Rule 40E-61.100) The District intends to use this data for a list of objectives including identifying areas where water quality problems have been detected and determine whether additional source controls are needed. (Rule 40E-61.100(3)(b)) However, we caution against global predetermination of the adequacy of collected data to determine representative conditions. The data collected must stand on its own merits and be subject to scientific inquiry and challenge. At this stage, it has not been demonstrated that the proposed data is representative spatially, temporally, or of land uses and hydrologic conditions. Any further implementation of Part I in any form should not include such an assertion. Additionally, adoption of such a program by rule would mean that any amendments to the program would also need to be adopted by rule. The establishment of the monitoring program should be open to stakeholder review and involvement to assure the data collected is representative of land uses and conditions within the BMAP.

- (b) Samples collected will be analyzed for total phosphorus, ortho-phosphate, total nitrogen, ammonium, and nitrite/nitrate.
- (c) The District may consider data from other monitoring sites if the District determines the monitoring methods and data meet the criteria specified in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C.

(2) Priority Targeted Restoration Areas (PTRAs) are identified by the District, in consultation with FDEP. PTRAs are areas with demonstrated water quality issues based on Targeted Restoration Area designations in a BMAP, coupled with monitoring data collected by the District as described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., or data from other sources that meet the District's criteria specified in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C. For identifying PTRAs, the District will consider the BMAP-targeted pollutant(s), an area's load contribution, average pollutant concentrations, area runoff, data trends, potential for impact to the impaired water body, and other relevant information.

The assessment methods to determine a Priority Targeted Restoration Area ("PTRA") are not well defined and may not encompass all data and information necessary to make such a determination. The identification of PTRAs appears to be solely implemented under the Rule by the District in consultation with the FDEP. Due to the critical nature of this task, the identification of PTRAs should be open to stakeholder review and involvement to assure the data, means, and methods used to develop PTRAs reasonably represent the land uses and hydrology of specific areas of the BMAP.

- (3) The District will conduct a detailed assessment of PTRAs as follows:



- (a) The District shall consider the data collected and information described in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., and the results shall be the basis for recommendations provided to the Coordinating Agencies and included in the District's updates to the Watershed Protection Plan(s). Recommendations resulting from the District's detailed assessments will include nutrient or other pollutant reduction activities consistent with the BMAPs, including new or refined programs and projects.
- (b) District detailed assessments will:
1. Evaluate available water quality data that meets the criteria outlined in Appendix A, incorporated by reference in Rule 40E-61.040(3), F.A.C., concerning pollutants identified in the BMAPs;
 2. Identify source(s) of pollutants and their relative contribution to pollutant levels in discharges to the Northern Everglades watersheds;
 3. Identify the dominant mechanisms and factors impacting pollutant levels in the PTRA, to ensure appropriately designed and located water treatment and storage facilities, and to assess whether additional source controls are needed to enhance performance of the WPP facilities;
 4. Consider current water management practices within the PTRA for tailored structural and operational improvements as needed;
 5. Evaluate the effectiveness of completed projects;
 6. Identify areas where water quality problems from nonpoint sources have been detected or demonstrated, despite the appropriate implementation, operation, and maintenance of rule-adopted BMPs or other measures;
 7. Evaluate the effectiveness of rule-adopted nonpoint source BMPs and other measures;
 8. Evaluate the feasibility of alternative nutrient reduction technologies;
 9. Identify gaps in monitoring and modeling and where optimization is needed;
 10. Identify scientific studies and research necessary to support the design of improved programs; and
 11. Measure subsequent changes to water quality resulting from implemented District recommendations for source controls, projects, and programs.

The evaluation of the effectiveness of specific projects and BMPs, determination of additional data collection, evaluations, studies, and modeling, and identification and evaluation of alternate technologies and the design of improved programs and projects to enhance source controls should be undertaken through the BMAP pursuant to an interagency agreement consistent with the responsibilities of the Coordinating Agencies as provided in s. 373.4595(3)(b), F.S., and should also be open to stakeholder review and involvement.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.



40E-61.110 Assessment Findings.

The success of strategies described under the BMAPs relies on implementing a combination of effective source controls to the maximum extent practicable together with regional watershed projects. The District will identify source control activities and watershed projects based on the dominant factors determined by the District to be influencing pollutant levels in a PTRA, as shown in the District's detailed assessment. Activities and projects will focus on additional measures needed to increase the certainty that the overall objectives of the BMAPs will be met. Activities and projects may include modifications to existing facilities, new facilities, and additional source controls needed to improve water quality in the regional system and enhance performance of existing facilities.

(1) Watershed projects may include:

- (a) Refinements to existing projects to optimize performance;
- (b) New projects based on dominant factors affecting water quality in a PTRA; and
- (c) Subregional and regional structural, nonstructural, and operational improvements of public or private stormwater management systems.

(2) Source control programs may include:

- (a) Instituting a reevaluation of the BMPs and other measures implemented within a PTRA at the time of the detailed assessment. The District will consult with the Coordinating Agencies to collect information associated with the BMP implementation, the frequency and methods for BMP implementation verification, the results of the verifications, the content of BMP manuals, and water quality monitoring network optimization needs. The District shall provide the scientific and technical basis for identifying this activity.
- (b) Implementing programs to enhance source controls that target water management to minimize the entry and transport of pollutants to the regional system, including structural, nonstructural, and operational improvements of public or private secondary and tertiary stormwater management systems.

"Source controls" remains largely an undefined term in the Rule. The undefined nature of the term as used in the Rule creates the implication that the term means both activities that the District or other state agency will fund through the BMAP and also a project or projects that will be required of regulated persons. This term should be defined and clarified to specify that it does not extend to requiring source control projects from the regulated community, including local governments.

Source controls are part of the Lake Okeechobee Watershed Construction Project, as set forth in s. 373.4595(3)(a)1.b.(IX):

Provide for additional source controls needed to enhance performance of the Lake Okeechobee Watershed Construction Project facilities. Such additional source controls shall be incorporated into the Lake Okeechobee Basin Management Action Plan pursuant to paragraph (b)

But any such source controls must be provided as part of the Lake Okeechobee BMAP, not the Rule; otherwise the BMAP process would be circumvented. The identification and implementation of new



projects and programs to improve water quality in the regional system should also be open to stakeholder review and involvement.

The statutory provision quoted below sets the process for the Coordinating Agencies. See s. 373.4595(3)(b), F.S.:

The coordinating agencies shall develop an interagency agreement pursuant to ss. 373.046 and 373.406(5) which is consistent with the department taking the lead on water quality protection measures through the Lake Okeechobee Basin Management Action Plan adopted pursuant to s. 403.067; the district taking the lead on hydrologic improvements pursuant to paragraph (a); and the Department of Agriculture and Consumer Services taking the lead on agricultural interim measures, best management practices, and other measures adopted pursuant to s. 403.067. The interagency agreement must specify how best management practices for nonagricultural nonpoint sources are developed and how all best management practices are implemented and verified consistent with s. 403.067 and this section and must address measures to be taken by the coordinating agencies during any best management practice reevaluation performed pursuant to subparagraphs 5. and 10. The department shall use best professional judgment in making the initial determination of best management practice effectiveness. The coordinating agencies may develop an intergovernmental agreement with local governments to implement nonagricultural nonpoint source best management practices within their respective geographic boundaries. The coordinating agencies shall facilitate the application of federal programs that offer opportunities for water quality treatment, including preservation, restoration, or creation of wetlands on agricultural lands.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.

40E-61.120 Reporting and Accountability.

The District should participate in the BMAP process as provided by statute.

(1) The District shall annually:

- (a) Publish a report with the detailed assessment findings and identified activities and projects, and incorporate them into the Watershed Protection Plan updates, as the District deems appropriate. The report shall also include water quality trends for pollutants in each PTRAs; the implementation status of each activity or project identified in Rule 40E-61.110 F.A.C.; and an assessment of whether their implementation has caused changes in water quality trends.
- (b) Update a public webpage to track its assessment findings, assessments, activities, projects, and outcomes.
- (c) Hold a public meeting to discuss the progress of programs, projects, and other actions and the resulting water quality trends.

(2) If a watershed project identified by the District pursuant to Rule 40E-61.110(1) F.A.C., or a source control program identified by the District pursuant to Rule 40E-61.110(2)(b) F.A.C., is incorporated into a BMAP and is not meeting its timeframe for implementation, the District shall convene a public



meeting with the Coordinating Agencies within the boundary of the applicable geographic area (i.e. PTRAs, watershed, or basin) to discuss the obstacles to implementation, seek public input, and refine District findings to ensure a project or program progresses to achieve water quality improvement.

(3) If a reevaluation of BMPs identified by the District pursuant to Rule 40E-61.110(2)(a) F.A.C., is incorporated into a BMAP and is not meeting its timeframe for reevaluation, the District will hold a public meeting with the Coordinating Agencies to discuss the progress of the reevaluation, seek public input, and refine District findings, which may include actions to:

- (a) Adjust frequency of onsite inspections in a PTRAs;
- (b) Verify that all required BMPs are being implemented within a PTRAs, properly and optimally, by reviewing records and through field observations as applicable;
- (c) Institute BMP plans with an emphasis on implementing specific rule-adopted BMPs or other measures that are responsive to the District's assessment results identifying the dominant factors affecting pollutant loads in a PTRAs (For example, water management BMPs or cost-shared, enhanced source controls to address discharge volumes and transport of pollutants.);
- (d) Review BMP manuals to identify opportunities for optimizing the selection of BMPs, implementation methods, and documentation of implementation;
- (e) Propose revisions to BMP manuals and amendments to the rule-adopted BMPs to include more specific requirements relative to optimizing BMP effectiveness if the assessment concludes that results within the PTRAs are typical of a larger scale problem; and
- (f) Recommend additional monitoring of discharges to identify dominant factors affecting water quality if needed to tailor the BMPs implemented.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.

PART II:

Implementation of Individual Landowner Requirements 40E-61.200 Implementation of Individual Landowner Requirements.

Sections 373.4595(3)(b)21., (4)(b)8., and (4)(d)8., Florida Statutes, provide for adoption of a rule to approve monitoring plans that allow certain unpermitted nonpoint source dischargers to demonstrate compliance with state water quality standards addressed by the BMAPs. If the discharger collecting data under this program cannot meet state water quality standards, it must be reported to the Coordinating Agency with jurisdiction. Those agencies may require entities who cannot demonstrate compliance to implement BMPs in accordance with the BMAP. There is no independent authority to impose on-site allocations under the Rule. Provisions for on-site allocations should be removed from the Rule.

The Legislature authorized a water quality monitoring program akin to what the FDEP did in Rule 62-307.200, F.A.C., which is not a permit program, but is nonetheless enforceable. The Rule should be modeled after that program and possibly even adopt it by reference instead of creating a new program.



The Rule fails to state with clarity who should be exempt from these requirements. Section 403.067(7)(b), F.S., titled "Total maximum daily load implementation" sets out the process and authority for the implementation of TMDLs. This section says in pertinent part:

2. For a basin management action plan adopted pursuant to paragraph (a), any management strategies and pollutant reduction requirements associated with a pollutant of concern for which a total maximum daily load has been developed, including effluent limits set forth for a discharger subject to NPDES permitting, if any, must be included in a timely manner in subsequent NPDES permits or permit modifications for that discharger.

...

b. For holders of NPDES municipal separate storm sewer system permits and other stormwater sources, implementation of a total maximum daily load or basin management action plan must be achieved, to the maximum extent practicable, through the use of best management practices or other management measures.

...

f. For nonagricultural pollutant sources not subject to NPDES permitting but permitted pursuant to other state, regional, or local water quality programs, the pollutant reduction actions adopted in a basin management action plan must be implemented to the maximum extent practicable as part of those permitting programs.

Thus, this new permit program would not be made applicable to holders of NPDES permits or other nonagricultural nonpoint sources already permitted under state, regional or local water quality programs such as ERPs or FDEP water, wastewater, reclaimed water, and solid waste permits, which already meet or will be required to meet requirements set forth in those permits. The Rule needs to exempt those permittees from this program at the very beginning of the Rule. The Rule also needs to be conformed to eliminate those provisions that step beyond a monitoring program, including removing any references to creating a new permitting program.

(1) A nonpoint source discharger that discharges to, or within the Northern Everglades watersheds, and is not implementing BMPs as required under a BMAP, must obtain an Individual Permit for an approved Water Quality Monitoring Plan (WQMP). All references to implementing a new permitting program should be removed. See comments above regarding exempting entities covered by other permits.

(2) All lands located within a BMAP are presumed to discharge surface water runoff into the Northern Everglades watersheds. Lands for which a landowner contests this presumption may submit evidence demonstrating that the land does not discharge surface water runoff into the Northern Everglades watersheds. At a minimum, the landowner's evidence must include the location of the lands in relation to the watershed, a description and site plan for stormwater drainage, applicable hydrologic boundaries, and information described under Rule 40E-61.220, F.A.C. The District will review the evidence submitted and other information available to the District and issue a written statement of final determination within 90 days of the submittal date. Part II should exempt landowners with NPDES permits or other nonagricultural nonpoint sources already permitted under state, regional or local water quality programs such as ERPs or FDEP stormwater, wastewater, reclaimed water, and solid waste permits, which already meet or will be required to meet requirements set forth in those permits.



Those permits provide protection for the environment and a means to comply with the BMAPs. The exemptions should be listed in the scope or other introductory provision of the Rule.

(3) An entity in compliance with the permit(s) set forth in the Everglades Program under Chapter 40E-63, F.A.C. may elect to use that permit in lieu of the requirements of this Part.

(4) Applications for initial Individual Permits must be received by the District within 90 days of the effective date of the adoption of this Chapter. Subsequently, applications must be received by the District within 90 days of the date of written notification by a Coordinating Agency of the requirement to implement BMPs or monitor. **All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.**

(5) The procedures specified in Rules 40E-1.602 and 40E-603, F.A.C., shall apply to applications for Individual Permits required by this Chapter. **All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.**

(6) Lake Okeechobee Drainage Basin Works of the District Permits issued prior to the effective date of this chapter are rescinded.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented – 373.4595, 403.067 FS. History—New.

40E-61.210 Delegation.

(1) The District's Governing Board delegates to and appoints the Division Director responsible for implementing the Northern Everglades Basins Program under this chapter to review and take final action on applications for permits issued under Chapter 40E-61, F.A.C.

(2) If the District intends to deny an application for permit under this Part, the applicant may request review by the Governing Board prior to final action. The applicant must make this request within 7 days of receiving notice of the intended denial.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History—New.

40E-61.220 Content of Application for Individual Permits.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

The application shall include:

(1) Date and signature of the applicant(s) submitting the application, and the name of the owner(s) of all parcels included in the permit application;

(2) Form XXX entitled "Application for Individual Permittee Water Quality Monitoring in the Northern Everglades watersheds," or the equivalent electronic permitting application (e.g. ePermitting) tool, completed in accordance with the "South Florida Water Management District Guidebook for Preparing an Application for Individual Permittee Water Quality Monitoring pursuant to Chapter 40E-61,



Florida Administrative Code,” incorporated by reference in Rule 40E-61.040(1) and (2), F.A.C., respectively;

(3) Permit application processing fee pursuant to Rule 40E-61.230, F.A.C.;

(4) General description, site plan, and map of the application area, including a clear delineation of the boundaries and acreage contained in the permit application and associated county parcel tax identification numbers and acreages; surface water system layout and drainage features showing direction of flow, surface water flow onto the property from other landowners, areas or points of surface water flow off-site; and available data on existing water quality;

(5) A WQMP as described in the “Guidebook for Preparing an Application for an Individual Permit in the Northern Everglades watersheds”, incorporated by reference in Rule 40E-61.040(1) and (2), F.A.C., respectively;

(6) A list of all District permits for the application area and their status;

(7) All the information necessary to satisfy the conditions for issuance for Individual Permits as described in Rule 40E-61.240,

F.A.C.; and

(8) Applications to modify or renew Individual Permits must contain the same information as required for a new Individual Permit.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.230 Permit Application Processing Fee.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

A permit processing fee shall be paid to the District at the time a permit application is filed pursuant to Rule 40E-61.200, F.A.C. The fee for an application for a new, modified, transferred, or renewed Individual Permit under this Part is \$150. An application shall remain incomplete until the proper fee has been paid.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.240 Conditions for Issuance for Individual Permits.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

In order to obtain and comply with an Individual Permit under this Part, an applicant must satisfy all of the following conditions:

(1) Submit and implement a WQMP pursuant to the “South Florida Water Management District Guidebook for Preparing an Application for Individual Permittee Water Quality Monitoring pursuant to



Chapter 40E-61, Florida Administrative Code” and Appendix B “Permittee Water Quality Monitoring Plan Criteria,” incorporated by reference in Rule 40E-61.040(2) and (4), F.A.C., that provides reasonable assurance the data collected represents stormwater runoff water quality, and

- (2) Comply with all applicable Limiting Conditions under Rule 40E-61.280, F.A.C.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.250 Duration of Permits.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

(1) Unless revoked, initial Individual Permits issued under this chapter expire 5 years from the effective date of this Chapter. All subsequent new and existing permits and permit renewals expire 5 years from the previous expiration date such that permits, depending on when they are issued within the 5-year cycle, may be valid for less than 5 years, but no longer than 5 years.

- (2) Permit expiration will not be affected by permit transfer or modification.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.260 Modification.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

A permit modification will be required for any changes to the permit conditions or approved WQMP. A permittee may apply for a modification to a permit issued under this Part by written application using the same criteria as new applications unless the permit has expired or has been otherwise revoked or suspended. The District shall not modify a permit unless the permit is in compliance with all applicable permit conditions. Modifications will be evaluated based on the criteria in effect at the time the application to modify is submitted. The same review time and informational requirements that apply to new permit applications shall apply to all applications to modify an existing valid permit.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.270 Transfer.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

A permittee with a valid permit under this Part, must notify the District in writing within 30 days of a change in ownership or control of the land or onsite works covered by the permit, and shall request that the permit be voided or complete a permit transfer form as a co- applicant with the new owner. A permit is not transferred until the District approves the transfer. The permittee remains responsible for the



requirements of the permit until the District transfers or voids the permit at the request of the permittee. If an application for permit transfer is not received within 30 days of a change in ownership, the permit will become nontransferable and voided and the new owner will be required to apply for a new permit. The District will transfer the permit if:

- (1) The permit transfer application is complete, including payment of the transfer application fee pursuant to Rule 40E-61.230, F.A.C.;
- (2) The land uses, onsite practices and operations, total acreage, and approved plans remain the same;
- (3) The permittee is in compliance with all conditions of the permit; and
- (4) No changes or additions to the permit and limiting conditions are requested. Changes and additions will require a permit modification in accordance with Rule 40E-61.260, F.A.C., under which a change in ownership may be addressed concurrently.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.

40E-61.280 Limiting Conditions.

All references to implementing a new permitting program should be removed and replaced with a process for requiring and approving a water quality monitoring plan for unpermitted entities that choose not to implement BMPs.

The District shall impose on any Individual Permit granted under this Part such special conditions as necessary to ensure that the permitted discharge will be consistent with the overall objectives of the District and will not be harmful to the water resources of the District.

The Rule's function should be limited to assessment in connection with the TMDL and should not be broadly implemented to serve the "overall objectives of the District" or protect the "water resources of the District." This statement should be deleted.

(1) In addition to special conditions, the following conditions shall be attached to all Individual Permits. The term 'Plan' in the following conditions refers to the WQMP.

- (a) The permittee shall implement all elements and requirements of the approved Plan according to schedule, including documentation of implementation, operation, and rationale where applicable. The Plan must be implemented within 180 days of issuance of the permit.
- (b) The permittee shall allow District staff and designated agents reasonable access to the permitted property at any time to verify compliance with the permit, monitor water quality, and collect data, as applicable. The District will provide advance notice at least 48 hours prior to a site visit.
- (c) The lands within the permit fall within the Northern Everglades watersheds. The permitted discharge must not cause adverse water quality impacts to receiving waters or adjacent lands regulated pursuant to Chapter 373, F.S.; cause adverse environmental impacts; and be inconsistent with the State Water Policy, Chapter 62-40, F.A.C. If the District determines that the permitted lands are contributing to a violation of state water



quality standards, the District will notify the permittee(s) in writing that additional measures are required pursuant to Rule 40E-61.290, F.A.C. **This provision includes evaluating compliance with water quality standards and should be removed from the Rule. The Rule should be limited to requiring implementing of a monitoring plan for unpermitted entities that choose not to implement BMPs.**

- (d) The surface water management system shall be effectively operated and maintained in accordance with the Environmental Resource/Surface Water Management Permit, if applicable. The permittee shall notify the District by electronic mail or in writing within 30 days after any changes to the surface water management system, permitted area acreage, or land use. A land use change is described as any change that may affect the permitted Plan or the pollutant loads in offsite discharges. **For an existing ERP holder, this should be handled through the ERP process and not under this rule. As such, this provision should be removed from the Rule.**
- (e) The permit does not relieve the permittee of the responsibility to comply with all laws or regulations applicable to use of or discharges from the land.
- (f) The permit does not convey to the permittee any property right nor any rights or privileges other than those specified in the permit.
- (g) This permit does not relieve the permittee from liability from harm or injury to human health or welfare; animal, plant or aquatic life; or property.
- (h) The permittee shall hold the District harmless from any and all damages, claims, or liabilities that may arise by reason of the discharge authorized by the permit. **A hold harmless provision is unnecessary. Any conditions not linked specifically to monitoring should be deleted.**
- (i) Legal entities responsible for implementing a Plan submitted on behalf of more than one landowner under an Individual Permit shall remain viable and capable of performing their responsibilities required by permits issued pursuant to Chapter 40E-61, F.A.C.
- (j) The permittee shall submit any proposed modifications to the Plan for District review and prior approval. The permittee shall continue to implement the permitted Plan under an existing permit until receiving District approval for the modification.
- (k) The permittee shall notify the District by electronic mail or in writing within 30 days of a change in ownership or control of the land or onsite works covered by the permit, and shall request that the permit be voided or complete the permit transfer form as a co-applicant with the new owner. The permittee remains responsible for the requirements of the permit until the District transfers or voids the permit. If an application for permit transfer is not received within 30 days of a change in ownership, the permit will become nontransferable and voided.
- (l) If the District determines that any permittee within a permit is not complying with the specific terms and conditions of the permit, the District will implement enforcement proceedings against the permittee. For permits issued to more than one landowner, each landowner is a co-permittee and is jointly and severally liable for implementing the



- requirements of the permit. This includes non-compliance with permit conditions caused by lessees or operators that are not co-permittees.
- (m) Permittee shall submit the data collected in accordance with the approved Plan monthly in a District-approved electronic format no later than 60 days from the last day of the sampling period being reported.
 - (n) The District will provide at least a one-week notice to the permittee of its intent to conduct a Quality Assurance (QA) field audit of sample collection procedures. The District will also provide the results of the QA field audit to the permittee.
 - (o) The permittee's data will be used to assess compliance annually with state water quality standards. The permittee shall submit a water quality monitoring summary report by August 1 each year that includes all of the raw data. When water quality problems are demonstrated as determined by the District, the District will notify permittees of the requirement for remedial actions in accordance with Rule 40E-61.290, F.A.C. **This provision includes evaluating compliance with water quality standards and should be removed from the Rule. The Rule should be limited to requiring and implementing a monitoring plan for unpermitted entities that choose not to implement BMPs.**
 - (p) The monitoring results provided by the permittee shall be shared with the Coordinating Agencies.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History—New.

40E-61.290 Permit Compliance.

The District is authorized to seek any enforcement or corrective action available under Florida law for any permittee(s) out of compliance with the provisions of this Part, pursuant to Chapter 373, F.S., and the rules adopted thereunder. Compliance with the permit includes adherence to the rules under this Part and all permit conditions, such as implementation of the permitted WQMP and timely submittal of required reports.

The Rule's function is to require and implement a water quality monitoring plan for unpermitted entities that choose not to implement BMPs. and is not intended to develop a permitting program with compliance and enforcement. These statements should be deleted.

- (1) If a permittee is determined to be out of compliance with their permit:
 - (a) The permittee will be subject to notification and enforcement actions by the District.
 - (b) All permittees shall respond in writing to a notice of non-compliance from the District, within 30 business days of the date of the notice, and include a plan and schedule for achieving permit compliance within 90 days of the date of the District's notice. An alternate implementation schedule may be approved by the District with justification based on the scope of the proposed activities. The plan may require submittal of a permit modification application as described in Rule 40E-61.260, F.A.C.
- (2) When water quality problems are demonstrated based on data collected under a permitted WQMP or District collected data, the permittee shall implement appropriate rule-adopted



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BMPs or other measures as established under the applicable BMAP. The District may refer the permittee to FDEP for enforcement of the applicable rule-adopted BMPs under the BMAP. In coordination with FDEP's action, the District may void the permit issued under this Part.

The Rule should be limited to requiring and implementing a monitoring plan for unpermitted entities that choose not to implement BMPs. Furthermore, if this provision were included in the Rule, it does not indicate how a water quality "problem" will be demonstrated, nor what criteria should be applied to determine if there is a "problem," resulting in a vague and inappropriate standard. For these reasons, this provision should be removed from the Rule.

Rulemaking Authority 373.044, 373.113, 373.4595 FS. Law Implemented 373.4595, 403.067 FS. History–New.



Chapter 40E-61 Appendix A

Watershed Data Sources and Assessments.

1.0 INTRODUCTION

This appendix describes monitoring networks implemented to reasonably represent water quality in stormwater runoff within the Lake Okeechobee watershed, Caloosahatchee River watershed, and St. Lucie River watershed (collectively the Northern Everglades watersheds), and the South Florida Water Management District's (District) criteria for considering other data sources for the purposes described under this chapter. The District will use the resultant measured data to perform detailed assessments of Priority Targeted Restoration Areas (PTRAs). District assessments will inform decisions and support science-based technical and cost-effective recommendations for pollutant reductions. The recommendations from the assessments will prioritize tailored pollutant reduction activities, programs, projects, and funding opportunities to expeditiously implement interim and long-term solutions to restore and protect the associated impaired water body. District detailed assessments will also evaluate the effectiveness of implemented activities, programs, and projects, and support the District's Watershed Protection Plan recommendations.'

The introduction concludes that the implementation of the monitoring network will reasonably represent water quality in stormwater runoff within the watersheds. The data collected must stand on its own merits and be subject to scientific inquiry and challenge. At this stage, it has not been demonstrated that the proposed data is representative spatially, temporally or of land uses and hydrologic conditions. For these reasons, this statement should not be included in the Rule. As previously noted in the body of the letter, watershed assessments should be undertaken pursuant to the BMAP as provided in the statutes.

2.0 DATA SOURCES

2.1 District Monitoring Networks

The Northern Everglades and Estuaries Protection Program (NEEPP), Section 373.4595, Florida Statutes, requires the District to conduct monitoring at representative sites. Representative sites under this chapter refer to monitoring locations that typify one or more conditions associated with hydrology, water quality in surface water discharges, and quantity (stormwater runoff volume for an area).

Tables A1, A2, and A3 describe the District's monitoring locations by basin, structure name, if applicable, DBHydro database designation, sample collection method, and whether the site is a Level 1 or 2 site. The primary data used for assessing nutrient sources and relative contributions will be from the Level 1 and Level 2 monitoring sites. Changes to the monitoring network, and the basis for such, will be at the discretion of the District and will be reported by the District annually.

It has not been demonstrated that the proposed data is representative spatially, temporally, or of land uses and hydrologic conditions. This needs to be done as part of developing an appropriate monitoring program for this rule, and should be open to stakeholder review and involvement to assure the data collected is representative of land uses and conditions within the BMAP.

Level 1 monitoring sites typically provide data to represent nutrient loads from associated hydrologic areas passing through District structures. These are usually located at the downstream edge of



the hydrologic area, also referred to as a basin, and are at sites where flow and nutrient concentration data are collected.

Level 2 monitoring sites are upstream of Level 1 sites and typically only provide data to represent nutrient concentration of tributary discharges. The District will maintain an appropriate number of Level 2 sites within each watershed upstream of the basin loading stations to provide additional information for PTRAs assessments and recommendations. The appropriate number of sites depends on the size of the area, the levels of pollutants, and the relative priority of demonstrated water quality problems. Sites within each of the Northern Everglades watersheds may be redistributed based on recommendations for optimization. Other Data Sources and Methods

Flowrate is an important consideration in determine nutrient loading. Level 2 sites should include flow monitoring.

2.2 Other Sources and Methods

Sources of District data from networks not described in Section 2.1 “District Monitoring Networks”, estimated data where District measured data are not available, or data from non-District sources may be used at the discretion of the District based on the data meeting the criteria presented in this Appendix. Other sources of data may include the U.S. Army Corps of Engineers, the U.S. Geological Survey (USGS), counties, municipalities, and other entities. The District will report data sources and estimates annually.

For the District to use other data sources, all sample collection, preservation, handling, transport, laboratory analysis, and chain-of-custody documentation must be conducted in accordance with the Florida Department of Environmental Protection Standard Operating Procedures for Field Activities (DEP-SOP-001/01), as defined in Chapter 62-160, Florida Administrative Code (F.A.C.), and the District’s Field Sampling, Field Quality, and Chemistry Laboratory Quality Manuals.

The laboratory that performs the analyses must have the appropriate certification in accordance with the Florida Department of Environmental Protection Standard Operating Procedures and as defined in Chapter 62-160, F.A.C.

Where flow data are collected, discharge flow volume is calculated using equations developed for site specific conditions based on standard engineering flow methods.

Adding other sources at the discretion of the District is not consistent with Chapter 120, F.S.

3.1 PRIORITY TARGET RESTORATION AREA ASSESSMENT

The assessment methods to determine a PTRAs are not well defined and may not encompass all data and information necessary to make such a determination. The identification of PTRAs appears to be solely implemented by the District in consultation with the FDEP. Due to the critical nature of this task, the identification of PTRAs should be open to stakeholder review and involvement to assure the data, means, and methods used to develop PTRAs reasonably represent the land uses and hydrology of specific areas of the BMAP. The Rule should be limited to developing a monitoring plan; therefore, the statement regarding the District establishing PTRAs has been stricken in the Rule language below.

This section provides technical details on elements of the assessment process for PTRAs. ~~The District will establish PTRAs in areas having a relatively higher priority for focused resources.~~ The District will consult with FDEP to establish PTRAs based on an evaluation of TRAs identified in the BMAPs, considering the information indicated in Rule 40E-61.100(2), F.A.C. The results of the District’s detailed assessment



and recommendations for PTRAs will be reported annually and shall be the basis for the District's Watershed Protection Plan updates. Additional details on assessment recommendations and reporting are described in Rules 40E-61.110 and 40E-61.120, F.A.C.

3.2 ASSESSMENT OBJECTIVES

Key objectives in conducting the detailed assessments are:

1. Identify pollutant sources and their relative contributions;
2. Determine the portion of load associated with the different nutrient species, such as dissolved and particulate phosphorus and the organic and inorganic nitrogen fractions;
3. Identify the dominant factors influencing pollutant levels;
4. Assess baseline conditions;
5. Determine project design parameters based on pollutant inflow concentrations and flows to ensure long-term, consistent performance of projects; Assess applicable secondary and tertiary water management practices affecting volume, timing, and distribution of discharges to the regional system;
6. Identify potential sites and projects for water treatment and storage facilities;
7. Improve modeling tools and input to supplement measured data where appropriate; and
8. Optimize the District's monitoring network as needed.

3.3 DETAILED ASSESSMENT CONSIDERATIONS

In addition to the information described in Rule 40E-61.100(3), F.A.C., the detailed assessment may also consider:

1. Land use;
2. Soil characteristics;
3. Topography;
4. Hydrology including rainfall variability and distinct meteorological events;
5. Land area;
6. Stormwater volume and timing of discharges;
7. Water management, including stormwater system configuration, regional stormwater management operations, landowner impacts via irrigation, and tailwater recovery systems, storage;
8. Secondary and tertiary stormwater management system design and operation;
9. Nutrient inputs;
10. Existing and proposed projects and programs and their effectiveness;
11. Proximity to the receiving water body; and

Other relevant information related to water quality, quantity, timing, and distribution.



Chapter 40E-61 Appendix B –Permittee

Water Quality Monitoring Plan Criteria

1.0 INTRODUCTION

For entities that are required to monitor in accordance with Rule 40E-61.200(2), Florida Administrative Code (F.A.C.), this appendix sets forth the Water Quality Monitoring Plan (WQMP) requirements. It also describes a permittee's reporting requirements and the information needed for the South Florida Water Management District (District) to evaluate compliance with state water quality standards.

2.0 MONITORING REQUIREMENTS

A Permittee is required to demonstrate that discharges from permitted lands comply with state water quality standards for pollutants addressed by Florida Department of Environmental Protection (FDEP)- adopted Basin Management Action Plans (BMAPs). **The intent of this Rule should be to develop a monitoring program, not a permitting program to demonstrate compliance with state water quality standards. This statement should be deleted.** A proposed WQMP that includes the information described herein is expected to provide reasonable assurance that the pollutants of concern in permitted discharges will be accurately represented. Please refer to the "South Florida Water Management District Guidebook for Preparing an Application for Individual Permittee Water Quality Monitoring pursuant to Chapter 40E-61, Florida Administrative Code" (Guidebook) incorporated by reference under Rule 40E- 61.040(2), F.A.C., for additional reference.

2.1 Constituents to be monitored. The WQMP shall include monitoring of the pollutants of concern in the Lake Okeechobee watershed, Caloosahatchee River watershed, and St. Lucie River watershed (collectively the Northern Everglades watersheds) and as indicated in the BMAPs. At a minimum, the permittee will be required to monitor their discharges for total phosphorus, ortho-phosphate, total nitrogen, ammonium, and nitrite/nitrate. Where data collection occurs in tidally influenced locations, specific conductance must be measured at the time of sample collection. Additionally, the applicant may propose supplementary constituents or data, as needed, to ensure data are representative of offsite stormwater runoff relative to pollutants of concern.

The BMAPs do not all have the same pollutants of concern and the Rule should limit itself to those pollutants for which the TMDL has been established in the particular BMAP where the property is located (e.g., total phosphorus for the Lake Okeechobee Watershed BMAP). Establishment of specific limitation by target area, needs to be undertaken as provided in s. 403.067(7)(a)2., F.S., pursuant to the BMAP.

The permit will specify the water quality target, specific to the permitted lands, that must be achieved at the offsite discharge location. Examples of water quality standards that may be used as the basis for targets specific to the permitted lands are included in Tables B2-1, B2-2, B2-3, B2-4, and B2-5.

This is equivalent to setting a load allocation for properties within the BMAP. The intent of the Rule should be to develop a monitoring program. The establishment of water quality targets specific to permitted lands should be removed from the Rule.



The permittee's discharges at the point of discharge from the permitted lands will be required to be less than or equal to a water quality target specific to their permitted lands as noted in the approved WQMP. The permittee may propose an alternate water quality target with technical justification based on the following:

- 1) Adjustment of the measured offsite discharge data to account for assimilation between the offsite discharge location of the permitted lands and the receiving water body where the water quality standard is applied;
- 2) Adjustment of the measured offsite discharge data to account for inflows into the permitted land area from adjacent lands; and
- 3) Pollutant speciation representing natural or background pollutant levels.

2.2 Monitoring locations. The WQMP shall propose a monitoring location or locations to represent all offsite stormwater runoff, including discharges through controlled structures, uncontrolled structures, or sheetflow. The applicant shall submit technical justification for all assumptions.

The number of collection sites required for in the WQMP criteria is open-ended, costly, and potentially impractical for a landowner to implement. Of particular note, it is impractical for many landowners to monitor sheetflow. Monitoring should be limited to the primary discharge locations through structures.

2.3 Pollutant Collection and Analyses Methods. Acceptable sample collection methods will depend on the type of discharge and pollutant being monitored and may be manual grab collection or use of automatic sampling equipment. In general, sample collection, processing, analysis, documentation, and related activities must be conducted in accordance with DEP SOP 001/01 or via alternate methods, if approved by the District. Include in the WQMP specific preservation, compositing (if applicable) and holding times. Collection entities and laboratories shall hold the industry-required standard certifications for the pollutants.

2.4 Flow Estimation. If the District's assessment for a Priority Targeted Restoration Area (PTRA) finds that flow volume is a dominant factor impacting pollutant levels and the District's annual report recommends the need to obtain Individual permittee flow monitoring data, the District shall provide written notification to the permittee within the PTRA to modify their permit to update the WQMP. The updated WQMP shall include methods to collect data to accurately calculate discharge flow volume. The method to determine flow through a structural device or hydrologic feature (sheetflow) must be proposed to the District for approval in a calibration methodology report by a Florida-registered Professional Engineer ("P.E.").

- For operable control structures (physical structures the permittee can operate/manipulate to start and stop discharges such as pumps, gates, or boarded culverts), it is expected that the calibration methodology will be based on field data collection representative of the full range of operating conditions and the development of a flow calibration equation, unless the permittee provides technical justification for an alternative method. The flow calibration equation is used to calculate flow volume during discharge events. Documentation requirements include operation logs indicating discharge start and stop times, water elevation readings upstream of the structure at least twice per day during discharge and at start and stop times, and pump speeds when applicable.



- For other types of discharges, when control structures do not exist or are not sufficient for an actual measurement of data necessary to calculate total runoff such as lands discharging via sheetflow, the calibration methodology may be estimated based on theoretical calculations or models. Selection of the methods for each site shall be proposed by a Florida-registered P.E.

It is impractical to require all non-point source discharges to contract with a Florida-registered Professional Engineer to estimate flowrates, particularly sheetflow. The monitoring should be limited to the primary discharge locations through structures and landowners should be permitted to estimate flows based on approved calculation methods.

3.0 DATA ASSESSMENT AND REPORTING

Data assessment methods appropriate for the permitted lands will be based on site-specific characteristics, applicable pollutants, and the water quality targets to be achieved. Thus, an applicant may propose data assessment methods for District approval. However, the following general criteria shall be met for all proposed methods.

3.1 Evaluation Period. At a minimum, the assessment method shall provide for evaluation and reporting on a water year basis (May 1st of one calendar year to April 30th of the next calendar year).

3.2 Representative Conditions. The datasets for the assessment shall encompass the range of potential conditions affecting pollutant levels in offsite stormwater runoff. These include hydrology (rainfall, flow) and onsite activities. At least one water year representing typical seasonal conditions is expected to be necessary to capture representative conditions for compliance assessment.

This is not well defined and could be burdensome, costly, and impractical for many landowners to implement. In addition, no definition of "typical seasonal conditions" is provided. Florida weather rarely exhibits "average" or typical weather conditions. This condition needs to be better defined with regards to the frequency of data collected during and the duration of this baseline or representative condition.

3.3 Dataset Size. A statistical analysis must be completed to determine the number of data necessary to represent annual pollutant levels.

This may be costly and impractical for many landowners to implement. This requirement should be deleted.

3.4 Uncertainty. Based upon the difference between the water quality target established under the permitted WQMP and the measured permittee data at each water year evaluation, the number of evaluation years to determine compliance with an acceptable degree of certainty may vary. The assessment method must describe how uncertainty will be considered, for example, by including an annual metric triggering immediate implementation of Best Management Practices or other measures adopted by rules, versus metrics that required various water year evaluations to assess compliance.

This requirement is impractical for many landowners. This rule should be limited to developing a water quality monitoring program, and should not require landowners to perform vague and poorly defined calculations and evaluations.

3.5 BMAP Consistency and Feedback. The permittee data assessment method shall consider BMAP assessment methods and pollutant load allocations, as applicable. The method proposed by the permittee must be consistent with BMAP considerations. Compliance assessment periods shall be based on water years.



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This rule should be limited to developing a water quality monitoring program and should not include compliance assessment methods.

3.6 Data Reporting and Assessment Schedule. The permittee shall submit a plan for the electronic submittal of water quality monitoring data on a monthly basis. The submittal must include data collected no later than 60 days from the last day of pollutant concentration collection. By August 1 each year, the permittee shall submit a water quality monitoring summary report which includes all of the raw data.