



## **Basics of Florida Water Law and Water Use Permitting for Utilities**

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The permitting of water use can be a complicated and confusing process. This is especially true for public water supply utilities. Water, whether from the surface or the ground, is quickly becoming a scarce natural resource. As a result, regulations governing the use of water have become more restrictive, and as a result, compliance is becoming more expensive. If it has been some time since a utility obtained its last water use permit approval, there could be considerable new rules and regulations that must be addressed when it is time to renew.

This article provides a basic-level summary of Florida water law for utility water use permits, and the water use permitting process. The article references a hypothetical municipal utility (City) in South Florida looking to obtain a consumptive use (water use) permit from the South Florida Water Management District (SFWMD). However, many of the issues discussed will apply to water utilities throughout the State.

### **Introduction to Florida Law and Water Use Permitting**

In Florida, there is no property right to withdraw water. All water withdrawals are considered a consumptive use of water and Chapter 373, Florida Statutes, requires consumptive uses of water to be permitted through the regional water management districts. Any water allocated by a permit from a water management district is not a permanent allocation – the permits expire and are subject to renewal conditions. The renewal process may require as much detail and analysis, or more, as that required to obtain the original permit.

A consumptive use of water is broadly defined as any use of water that reduces the supply from which it is withdrawn or diverted. A consumptive use permit allows the permit holder to withdraw a specified amount of water from the ground, a canal, a lake or a river. A consumptive use permit is typically issued for twenty (20) years provided that the applicant provides sufficient data to demonstrate that the permit conditions will be met for the full duration of the permit. Otherwise, the water management district may issue the permit for a shorter duration that reflects the period for which the permit conditions will be met.

Recently, there has been pressure on the water management districts to consider longer-term water use permits, such as 30 years, that provide utilities a greater level of certainty for financing and long-term planning purposes. In 2013, the Florida Legislature responded. SB 364 (2013) creates longer duration permits for alternative water supplies (AWS). The Bill requires issuance of a permit duration of at least 30, and possibly as long as 37 years, for an AWS project. Strengthening water conservation efforts, the Bill prohibits the WMDs from reducing the AWS allocation during the 10-year compliance review, unless

a reduction is needed to address adverse environmental impacts or interference with existing legal users. Importantly, a permit authorizing the use of non-brackish groundwater supplies or non-alternative water supplies, in addition to an AWS, may not enjoy the longer duration process of this Bill.

### **Permit Conditions**

All applications for water use are reviewed under a “three-pronged” test outlined in Chapter 373, Florida Statutes. The first “prong” deals with the nature of the proposed use. The applicant must demonstrate that the use is “reasonable and beneficial”. This standard requires the prevention of wasteful or excessive uses of water and a demonstration by the applicant requiring water conservation, urban demand management, and high-efficiency irrigation systems in addition to the use of the lowest quality of water for the intended purpose. The second “prong” requires the applicant to demonstrate that the use is consistent with the public interest. Under this provision, impacts to the resources of the State, including environmental, navigation, consistency with minimum flows and levels from the water source, and public recreation, must be evaluated. The third “prong” of the permit evaluation requires the applicant to assure that the use will not result in adverse impacts to existing legal users. Existing legal users are defined as those authorized under a valid permit or are otherwise exempt.

In addition to the statutory conditions, the rules found in Chapter 40 of the Florida Administrative Code (“F.A.C.”) contain conditions which must be met before a permit will be issued or renewed by the SFWMD. The conditions include that the proposed water use:

- Will not cause harmful saline intrusion;
- Will not harm offsite land uses;
- Will not cause harm to wetlands or other surface waters; and
- Will not cause pollution of the water resources.

These conditions are met through the submittal of technical data and analysis provided by an environmental consultant, such as an engineer or hydrogeologist.

### **Data Submitted**

As part of the permit application process, a utility will generally hire an outside consultant to prepare the application. More sophisticated utilities may be able to process the application in-house. As part of the application, the utility must submit certain data and analysis prior to permit issuance. This data and analysis includes:

- The quantity and source of the water requested;
- The location of the water source;
- The location of the wells (for groundwater) or points of withdrawal (for surface water);
- What the water will be used for;
- Water conservation and recycling plans;
- Past pumpage records; and
- Projected population data for the next 20 years.

### **Water Conservation**

In addition to the technical data submitted with the permit application, the utility is required to develop and implement a Water Conservation Plan. The Plan must include a timetable outlining the implementation of each element or phase. At a minimum, the Water Conservation Plan must include:

- Restricted irrigation hours for lawn and ornamental irrigation;
- Adoption of an Ordinance by the City requiring installation of ultra-low volume plumbing fixtures for all new construction;
- Adoption of water conservation-based rate structures;
- Implementation of leak detection programs by utilities with unaccounted-for water losses of greater than 10 %;
- Adoption of an Ordinance by the City requiring new automatic lawn sprinkler systems to install and operate a rain sensor device or automatic switch;
- Water conservation public education programs; and
- An analysis of the economic, environmental and technical feasibility of making reclaimed water available.

### **10-Year Work Plan**

The Florida Legislature strengthened the coordination of water supply and land use planning in Florida. Local government must now develop and adopt a minimum 10-year Water Supply Facility Work Plan to address their future water supply needs, water supply sources and the building of all required public, private and regional facilities needed to serve existing and new development. The City must incorporate into its comprehensive plan local government water supply projects selected from those listed in the SFWMD Lower East Coast Water Supply Plan or propose to the SFWMD alternative water supply options sufficient to meet the City's future needs.

Additionally, in its Evaluation & Appraisal Reports (EARs), the City must address the extent to which the water supply projects listed in their 10-year Water Supply Facility Work Plan have been implemented.

### **Rules Restricting Water Use**

In addition to the water use permitting criteria In Southeast Florida, the SFWMD considers the Regional Water Availability Rule during its review of the utility water use permit applications. The Regional Water Availability Rule prohibits additional direct or indirect withdrawals from the regional waterbodies by uses located within the Lower East Coast of Florida urban areas. The public interest basis for the rule includes assurance that water supply will exist for Everglades restoration. For permit renewals, the applicant must demonstrate that its historic use meets criteria for issuance and the permit may not be renewed for the original permitted quantity. This historic or "base case" is determined by maximum withdrawal for twelve consecutive months during 5 year period before April 1, 2006.

Utilities outside of Lower East Coast of Florida may not have to worry about the Regional Water Availability Rule, but other rules may limit withdrawals from the water source, such as Water Use Caution Areas and Areas of Water Resource Concern.

### **Permitting Consistency (CUP Con)**

The rule changes continue. The Florida Department of Environmental Protection (FDEP) and the water management district are undertaking a rulemaking effort to address consistency among each of the water managers. The goal of this initiative is to create equity for water use permit applicants statewide by providing a consistent and streamlined application and review process for each of the water management districts. The individual water management district's water use permitting rules, while all developed under the authority of Ch. 373, Florida Statutes, are inconsistent. Some of the differences are based on unique physical and natural characteristics, while others result from development of separate rules and procedures over time. This has resulted in confusion for the regulated public, particularly along the border areas of the districts, and inequitable treatment of similar applicants in different districts. Additionally, the development of separate procedures and rules is costly and inefficient.

FDEP has separated the issues to be address as part of the consistency review into tiers based on complexity and the estimated time needed for solution development. For additional information further describing these tiers and their respective subject matters, please see FDEP's website.

### **Conclusion**

A SFWMD consumptive use permit quantifies and legally protects the applicant's water rights. The applicant must meet an extensive list of criteria to receive its permit renewal. Data and analysis must be submitted as part of the application that provides assurances that the numerous permit conditions found within the statutes and administrative rules are met. Additionally, the City must adopt ordinances relating to water conservation and amend its comprehensive plan to include targeted water supply projects. As a result, there are significant budgetary and long-term planning decisions that a utility, and its local government board, must account for when starting the process for obtaining or renewing its water use permit. Also, as can be shown with the CUP Consistency process, the regulations are constantly evolving, so it is important for the regulated utility to stay current on the rules.