



# **Presentation to the Rivers Coalition on the U.S. Sugar challenge to the Lake Okeechobee drawdown**

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Photo by Mark Renz

# Everglades Law Center

**A not-for-profit law firm that represents environmental organizations and individuals fighting for the public interest in environmental and land use matters.**

**Our mission is to advocate, negotiate, and when necessary, litigate to protect and restore the South Florida ecosystem.**

**Founded in 1995, have achieved a number of important and precedent setting victories - prevention of EAA mining, relocation of Scripps Research Institute, successful challenges of multiple developments in violation of local plans.**

**Counsel to many environmental groups working on Everglades restoration.**

# **United States Sugar Corporation vs. Lieutenant General Todd T. Semonite, Colonel Andrew Kelly, and the United States Army Corps of Engineers**

Filed August 1 2019

Federal District Court, Southern  
District of Florida

Judge Rodney Smith

Case No: 9:19-cv-81086-RS



# Background

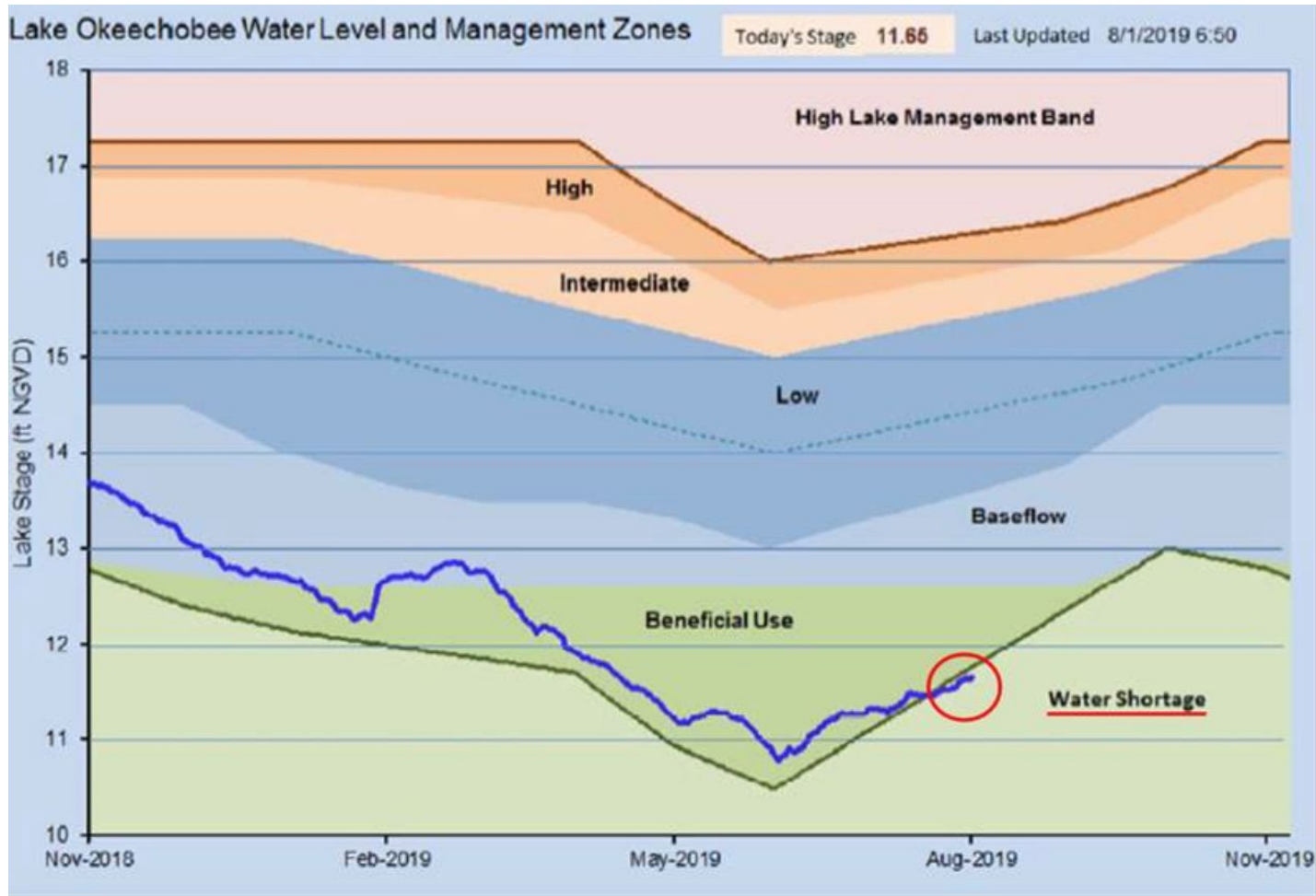
Corps decided in late 2018 to use “Additional Operational Flexibility” within the LORS 2008 Regulation Schedule to make water releases to lower the Lake.

Lake had experienced several years of high water, harmful algae blooms, significantly decreased vegetation.

Estuaries had experienced multiple years of high level regulatory releases and extensive harmful algae bloom conditions.

Purpose of drawdown was to benefit Lake and estuary ecology and prevent discharge of waters to estuaries with harmful algae blooms.

# 2018-2019 Lake Stage



# 2008 LORS

## Part C: Establish Allowable Lake Okeechobee Releases to the Water Conservation Areas

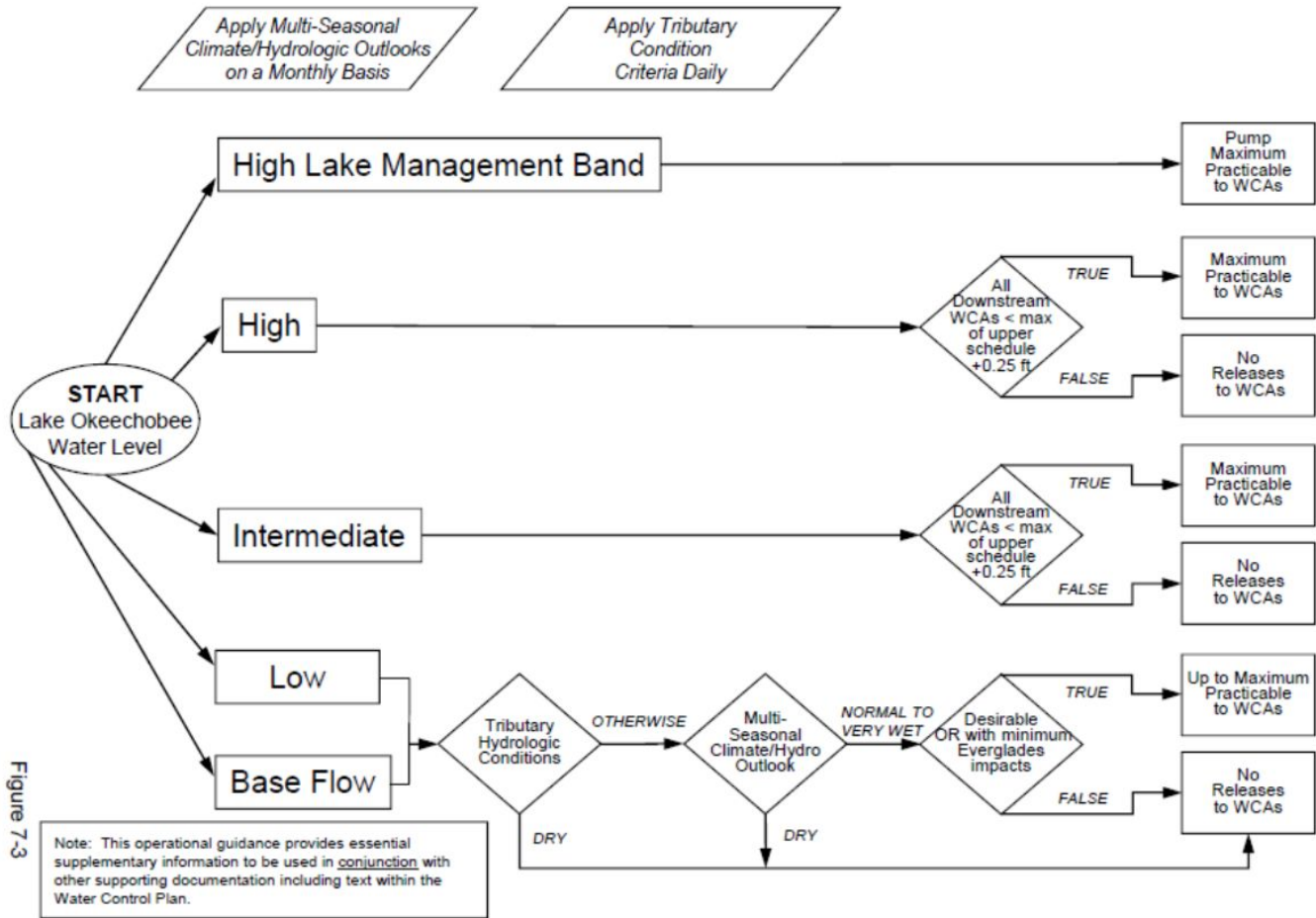


Figure 7-3

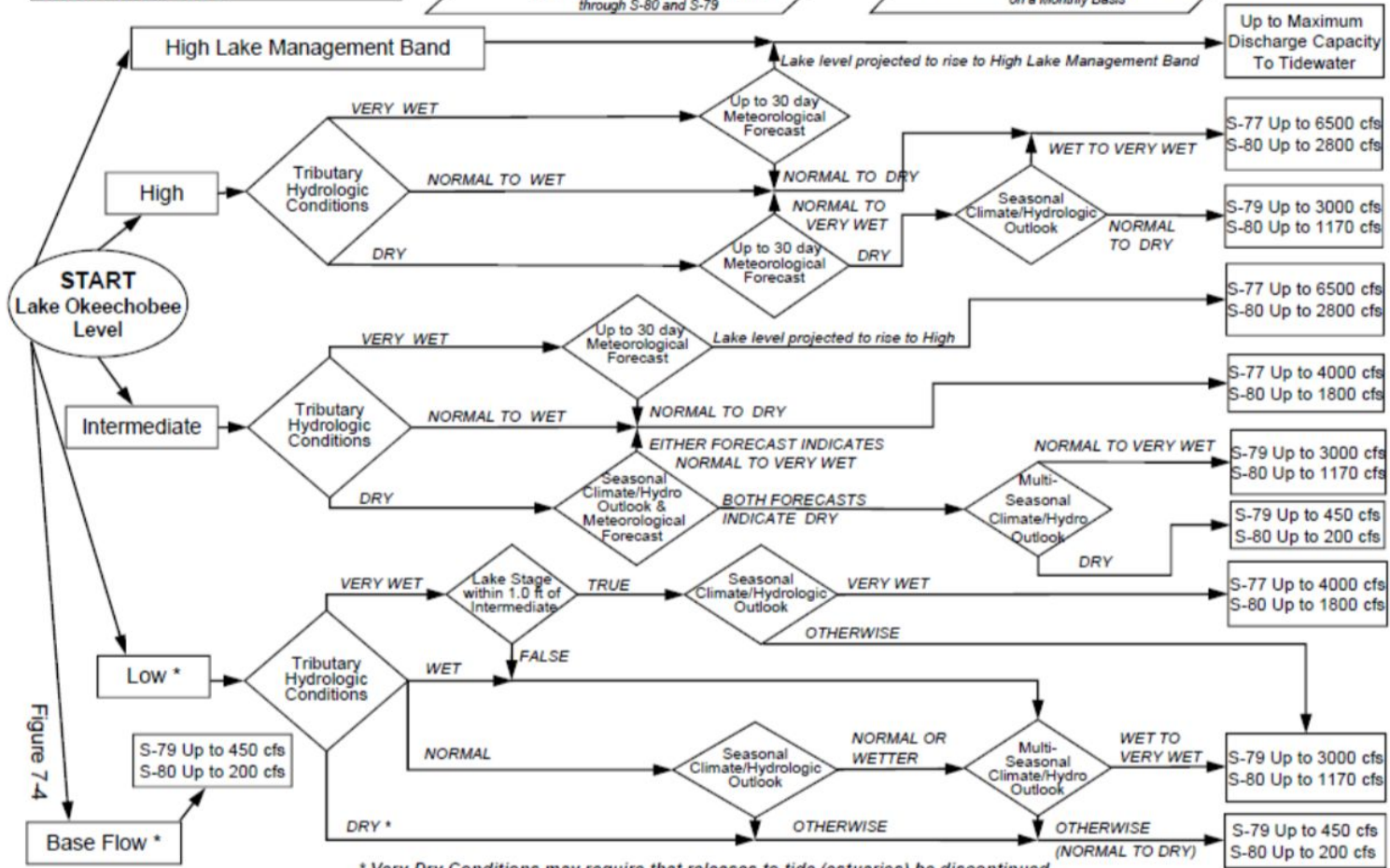
# 2008 LORS

## Part D: Establish Allowable Lake Okeechobee Releases to Tide (Estuaries)

Note: This operational guidance provides essential supplementary information to be used in conjunction with other supporting documentation including text within the Water Control Plan.

When conducting Base Flow releases, flows can be distributed East and West up to 650 cfs as needed to minimize impacts or provide benefits through S-80 and S-79

Apply Meteorological Forecasts on a Weekly Basis; apply Seasonal and Multi-Seasonal Climate/Hydrologic Outlooks on a Monthly Basis



\* Very Dry Conditions may require that releases to tide (estuaries) be discontinued

Figure 7-4

# U.S. Sugar's main claims:



- The Corps failed to adequately analyze the effects of its decision to lower the Lake.
- The Corps should have prepared a new or supplemental Environmental Impact Statement to update the 2008 Regulation Schedule prior to making the releases.
- Releasing water and lowering the Lake without preparing an EIS and analyzing the full effects of that release of water, violated the National Environmental Policy Act (“NEPA”)

# Sugar claims, “Releases significantly and adversely affected the quality of the human environment.”

- Public health and safety - navigation, hurricane evacuation routes, safety threats to boaters getting stranded in a low Lake
- Threat of peat fires and saltwater intrusion
- “Highly controversial effects, including wasting water” as evidenced by public comments in opposition to lower Lake levels
- “Unknown risks” arising from not knowing how low the Lake will fall.
- Setting a harmful precedent of operating “outside” of the regulation schedule for months at a time
- Effects on cultural and historic resources
- Impacts on endangered species - Everglade snail kite
- Potential state law MFL violation if below 11 feet for more than 80 days .
- “Impermissibly created and implemented a new and rogue Lake regulation schedule”, without preparing a new EIS.



# Administrative Procedures Act

Under the APA, the reviewing court “shall ... hold unlawful and set aside agency action, findings, or conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A) and (D).

# National Environmental Policy Act

NEPA is a procedural statute that does not dictate an outcome but requires federal agencies, like the Corps, to analyze and examine the environmental impacts of its actions by identifying and fully evaluating all environmental, social and economic effects of a proposed action.



Photo by Patrick Cowan

# What the Corps did:

Issued 2 Memoranda for the Record (October 2018 and February 2009) justifying their decision to lower the Lake under their existing NEPA authority.



REPLY TO  
ATTENTION OF

CESAJ-PD-ES (ER 200-2-2)

DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
701 San Marco Boulevard  
JACKSONVILLE, FLORIDA 32207-8175

FEB 22 2019

MEMORANDUM FOR RECORD

SUBJECT: Lake Okeechobee Regulation Schedule Additional Operational Flexibility  
Justification and National Environmental Policy Act Coverage Determination

## 1.0 INTRODUCTION:

The purpose of this Memorandum for the Record (MFR) is to document the National Environmental Policy Act (NEPA) compliance for the Jacksonville District, U.S. Army Corps of Engineers (USACE) decision to use additional operational flexibility (AOF) within the 2008 Lake Okeechobee Regulation Schedule (LORS) water control plan for Lake Okeechobee. This action is being implemented to help allow the estuaries to recover from several years of ecologically harmful extremes (both low and high) in

# USACE Justification

**Corps analysis concluded that lowering the Lake was within the additional operational flexibility that was built into LORS 2008.**

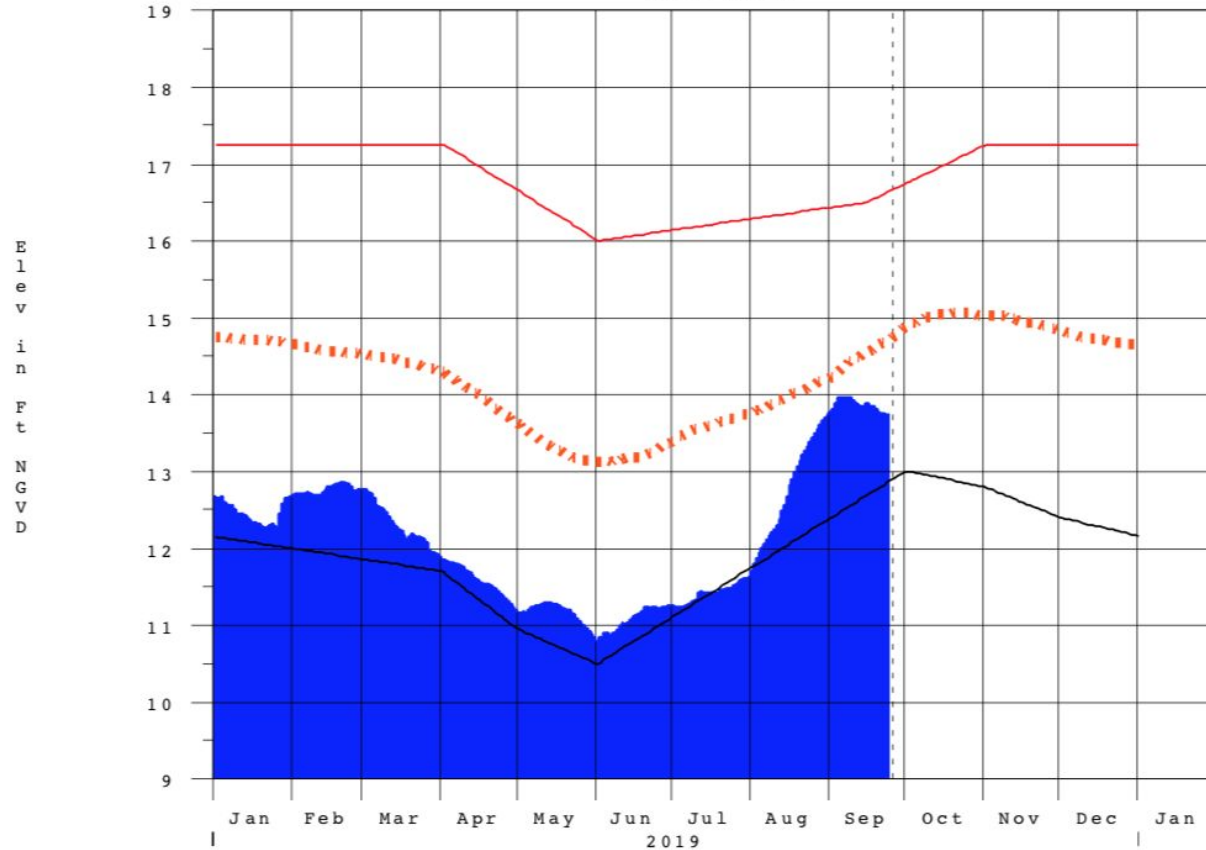
**No new NEPA analysis required.**

**October Memorandum for the Record** - Releases would continue until cumulative releases were 164,600 acre-feet over the normal 2008 Regulation Schedule Part D.

**February Memorandum for the Record** - Releases would not continue beyond the “Water Shortage Band”.

# Lake Okeechobee

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- High Lake Management
- Okeechobee Avg Elev
- Average Elev [1965-2007]
- Water Shortage Management

# U.S. Sugar Relief Requested

**Does not** ask that the 2007 EIS be updated under NEPA, or that a new NEPA analysis be completed for what they consider a new operational regime

Does ask the Court to:

- Declare that Corps has violated NEPA.
- Declare that Corps action was arbitrary, capricious, in violation of the APA.
- Invalidate the Corps' justification documents - the October and February MFR's.
- Enjoin the Corps from implementing operational flexibility to lower Lake Okeechobee below the water levels established in the 2008 Regulation Schedule.

# What if U.S. Sugar Prevails?

Corps would be precluded from using “Operational Flexibility” of LORS 2008 to lower the Lake until they had completed the necessary NEPA analysis.

Corps could do additional analysis under NEPA to justify future actions to release water to lower the Lake.

# **Another Lake O Case: Center for Biological Diversity, Calusa Waterkeeper, and Waterkeeper Alliance v. Corps, NMFS, DOI, and FWS**

**Southern District of Florida (Ft. Pierce Division)  
Filed in June 2019, before Judge Don Middlebrooks  
Currently set for jury trial in February 2020.**

- Challenges the Corps' failure to update the 2007 EIS to address newly discovered information about how discharges from Lake Okeechobee can exacerbate harmful algal blooms.
- Also raises Endangered Species Act claims against the Corps, FWS and NMFS.

## **Relief requested:**

- Order the Corps to reinitiate NEPA analyses
- Order the Corps, FWS and NMFS to reinitiate consultation under the ESA
- Order FWS to withdraw its 2018 Biological Opinion
- Order NMFS to withdraw its 2015 Concurrence Letter
- Enjoin Lake Okeechobee releases until Corps, NMFS and FWS comply with NEPA and the ESA.

# Additional ongoing Corps Actions - Harmful Algae Bloom Protocols

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**DRAFT ENVIRONMENTAL ASSESSMENT AND  
PROPOSED FINDING OF NO SIGNIFICANT  
IMPACT**

**2019 PLANNED DEVIATION TO  
THE WATER CONTROL PLAN FOR LAKE OKEECHOBEE  
AND EVERGLADES AGRICULTURAL AREA (LORS 2008)**

**GLADES, HENDRY, MARTIN, OKEECHOBEE AND PALM  
BEACH COUNTIES**



**US Army Corps  
of Engineers** ®  
Jacksonville District

# **Additional ongoing Corps Actions - Harmful Algae Bloom Protocols**

The planned deviation will allow the Corps to alter the timing and volume of Lake Okeechobee releases to the WCAs, east, and/or west to allow for greater flexibility with water management decisions when HABs are present or forecasted in Lake Okeechobee, the St. Lucie or Caloosahatchee estuaries or the system of canals that connect them.

Planned for a minimum duration of 1 year.

# Additional ongoing Corps Actions - Lake Okeechobee Systems Operations Manual “LOSOM”

- Will better incorporate CERP and other projects that are coming online into the Lake’s operations - Herbert Hoover Dike Rehab, Kissimmee River Restoration, C-43 and C-44 Reservoirs.
- Planning ongoing now, goal for completion in 2022.
- Additional planning proposed as new projects come online.

# Questions / Comments?



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Photo by Carlton Ward