

October 1, 2002

# SEMINOLE TRIBE OF FLORIDA

## COMMENTS

### ON DRAFT PROGRAMMATIC REGULATIONS (PR) PUBLISHED IN THE FEDERAL REGISTER ON AUGUST 2, 2002

#### General Comments

The Seminole Tribe of Florida commends the U.S. Army Corps of Engineers on the proposed Programmatic Regulations. These regulations are a substantial improvement over the December 2001 draft that was initially released for public comment. The Tribe appreciates the Corps efforts to incorporate many of its comments into the proposed rule. However, there are some outstanding issues of concern that the Tribe believes should be incorporated into the regulations prior to their being adopted as final. These specific comments are detailed below. New language proposed by the Tribe appears in strikethrough and underline format.

**Issue: The Programmatic Regulations need to set out a process for defining “Existing Legal Source” of water.**

The Tribe continues to believe that it is important for the Programmatic Regulations to address the issue of what is meant by an “existing legal source” of water as of the date of enactment of WRDA 2000. The concept of “existing legal source” is a new concept that is not found in Florida statutes or regulations. The Tribe is aware that there are policy issues that have not been resolved concerning how to define this concept and that these decisions may not be resolved prior to final publication of the Programmatic Regulations. Moreover, the Tribe believes that the State needs to have a key role in developing this definition, as it will be derived from the regulations that have created the state system of water rights. The Tribe therefore suggests that the regulations set forth the process for developing this definition. The Tribe proposes that a new section be added to the Programmatic Regulations under Section 385.36 –Elimination or Transfer of Existing Legal Sources of Water:

**385.36(a)- The Corps of Engineers and the South Florida Water Management District recognize the need to clarify the definition of “Existing Legal Source” as set forth in the Water Resources Development Act of 2000 and that there are policy issues that must resolved prior developing this definition. Therefore, the Corps of Engineers and the South Florida Water Management shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the State of Florida, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and other federal, State and local agencies, develop this definition no**

**later than June 30, 2003, as part of the guidance memorandum described in Section 385.5(a)(2)(vii). The Corps of Engineers and the South Florida Water Management District will provide the public with the opportunity to review and comment on the draft definition of “Existing Legal Source”.**

**Issue: The Programmatic Regulations should consider developing a guidance memorandum on how Existing Legal Sources will be switched under the Savings Clause.**

The Tribe is concerned that the Savings Clause could become a roadblock to CERP implementation without clear guiding principles for developing how and when source switching will take place. The Tribe proposes that the Corps add a seventh guidance memorandum to Section 385.5 of the Programmatic Regulations that addresses source switching. This memorandum should include a definition of Existing Legal Source once that definition has been developed as outlined above. This guidance memorandum should be completed prior to completion of the first Project Implementation Report for a component project of CERP. The Tribe suggests the following language be added to the PR:

**385.5(a)(2)(vii)- process for determining when and how a new source of water supply of comparable quantity and quality as that available on December 11, 2000, is available to replace the water to be lost as a result of implementation of CERP.**

**Issue: The Programmatic Regulations should clarify the process concerning reservations of water for the Natural System.**

The Tribe is very concerned about how to make the project specific Reservation of water contemplated by CERP work correctly to achieve the goals contemplated by CERP versus complete restoration of the South Florida Ecosystem. Specifically, the Tribe believes that there should be a restoration target for each area of the ecosystem (an ecotype), perhaps based on the Natural Systems Model hydrographs. These hydrographs should be evaluated to make sure they represent the scientifically acceptable quantity, timing and distribution of water for the particular ecotype. Once approved, the state should adopt these ultimate end goals as targets for restoration. It is the Tribe's position that these end goal ecotype targets are the reservations contemplated by Chapter 373, Florida Statutes. CERP promised to achieve some of these end goal ecotype targets, but in some cases CERP only promised to improve upon the health of ecotypes without fully restoring them to the levels established by the ultimate end goal targets. The Corps and the SFWMD should establish where these differences occur. Then, as each CERP project comes on line, the water made available from each project should be “reserved” or set aside for the natural system and placed into the regional system. The Corps and the District should then track the incremental improvements towards meeting the objectives promised by CERP, whether the objective is meeting the ultimate end goal ecotype target adopted by the State, or improving upon the ecotype without achieving the full

restoration. Specifically, we believe Sections 385.5(a)(2)(vi), 385.35(b)(2)(i), and 385.3 “reservation of water for the natural system” should be further modified to clarify the distinction between a system wide reservation and a project specific reservation.

**Issue: The amount of time for consultation should be proportionate to the complexity of the task under review.**

The Tribe appreciates the changes that the Corps has made to the consultation section. The Tribe has one additional concern about the amount of time allowed for timely consultation. The amount of time allowed should be related to the complexity of the task. The Tribe has limited resources to devote to tracking CERP, and wants to make sure that it has the ability to give timely input. The Tribe suggests that the following changes be made to the Programmatic Regulations:

**Section 385.10(d) ... It is expected that the Corps of Engineers and the Non-Federal Sponsor will set reasonable time limits for consultation on a specific decision consistent with the purposes of this part and that the parties consulted will consult in a timely and meaningful way. The Corps of Engineers and the Non-Federal Sponsor recognize that the time limits established for each specific decision will be proportionate to the complexity of the decision and will take into account the resources of the entity with whom the consultation is occurring in order to allow consultation to occur in a meaningful way. ...**

**Issue: The Programmatic Regulations need to assign the Task Force the role of oversight body to ensure that the alternative selected for each project meets the design goals envisioned in the Comprehensive Everglades Restoration Plan.**

The current draft of the Programmatic Regulations provides for a more defined role for the Task Force. The Tribe believes that the Task Force should be given the role of evaluating the proposed alternatives for each project to review whether the design goals envisioned in the Restudy (now CERP) are being met. If the goals are not met, any changes must be justified through the PIR and Adaptive Management process. It is the Tribe’s opinion that it is important that high-level review by policymakers be performed on each project so that the Corps and the South Florida Water Management District make any trade offs in the alternatives public and debated prior to final selection. This process should help reduce the potential for litigation over the selected alternative. Bringing in the Task Force can help avoid potential misspending of limited funds. The Tribe is bringing this issue to the Task Force for discussion at the next Task Force meeting. The Tribe recommends that the Programmatic Regulations be amended as follows to add a new section preceding Section 385.21 stating the following:

### **385.21- Review of Project Alternatives**

**The Corps of Engineers and the Non-Federal Sponsor shall provide the Task Force with the opportunity to review the proposed alternative or alternatives for each Project after the alternatives have been prepared by the Project Delivery Team and evaluated by RECOVER in accordance with Section 385.20(f) and in accordance with the language developed in the guidance memo on alternative selection under Section 385.26(b)(iv) and (c). The purpose of this review is for the Task Force to evaluate whether the design goals for each Project set forth in the Comprehensive Everglades Restoration Plan are being met in the proposed alternative or alternatives. This review will be conducted prior to final selection by the Corps and the Non Federal sponsor of the alternative for the Project that will be the subject of a Project Implementation Report.**

**Issue:** The Requirement that operating manuals include a Drought Contingency Plan should have language added stating that the Drought Contingency Plan must be consistent with the Seminole Water Rights Compact and State rules and regulations.

The Tribe wants to ensure that the Programmatic Regulations do not inadvertently impose restrictions on operation of the state system during the dry season that are inconsistent with existing rules and regulations. This is particularly important to the Tribe because the Tribe has agreed in the Water Rights Compact to mirror state rules concerning water shortage events for operations on its Reservations. The Tribe suggests that the following changes be made to the Programmatic Regulations:

**Section 385.28(a)(6)(vi) and (viii) should be amended to read:**

**(vi) Include a drought contingency plan as required by 222.5(i)(5) of this Chapter and Engineer Regulation ER 1110-2-1941 that is consistent with the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District and Florida Administrative Code Section 40E-21 (Water Shortage Plan) and Florida Administrative Code Section 40E-22 (Regional Water Shortage Plan);**

**(viii) Allow for adjustments during the year when substantial departures from expected rainfall and runoff occur, or are necessary based on adaptive management so long as these adjustments are consistent with the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District and Florida Administrative Code Section 40E-21 (Water Shortage Plan) and Florida Administrative Code Section 40E-22 (Regional Water Shortage Plan);**

**Issue: The Programmatic Regulations needs to add a section addressing maintaining the original purpose of each component of the Plan over time.**

The Tribe continues to believe that it is critical to include a provision in the regulations specifying the long-term use of CERP project components so that the components will continue to be operated for their intended purposes. The Programmatic Regulations need to ensure that the projects being constructed as alternate storage continue to be operated as such in perpetuity. These areas are being created in order to reduce the impacts on environmental areas currently being used as storage. The concern is that these new storage areas may over time become habitat themselves and then be in jeopardy of no longer being operated for storage purposes. The Tribe proposes that the following language be added to the Programmatic Regulations to cover both projects for which PIRs are completed (and are therefore subject to the NEPA process) and projects where PIRs are not completed:

**Section 385.28(c)(3) – Each Project Implementation Report shall include a Project Operating Manual, unless it is determined by the Corps and the Non –Federal Sponsor that an operating manual is not necessary for the Project, as an appendix to the Project Implementation Report.**

**Section 385.28(c)(4)- The Project Operating Manual shall contain language identifying the specific purposes of the Project. It shall also include language stating that the Project will be operated to ensure that the goals and purposes of the Plan are achieved and maintained for the life of the Plan.**

**Section 385.28(a)(x)- include a statement (1) that the operations set forth in the manual are consistent with ensuring that the goals and purposes of the Plan are met and maintained for the life of the Plan and (2) that changes to the operating manual may not be made for purposes other than ensuring that the goals and purposes of the Plan are met and maintained for the life of the Plan.**

**Issue: The Programmatic Regulations should specifically state that if a component Project does not produce the amount of water predicted in the PIR, the resulting shortfall will be shared equitably amongst the natural system, replacement sources, and other water related needs of the region.**

The Tribe continues to believe that the success of CERP will depend on balancing all the water related interests of the South Florida ecosystem throughout the implementation process fairly and equitably. If actual operation of a Project produces a shortfall of water, the purposes and goals of CERP require this shortfall be apportioned evenly between the natural system, the replacement source, and other water related needs of the region. This should be done until the water shortfall is addressed, either through modification to the current Project or through changes to future projects to address the

shortfall. The Tribe proposes that the following language be added to the Programmatic Regulations:

**385.26(a)(2)(xiii)- Include language stating that if the amount of water identified for the natural system and for the other water related needs of the region, under sections (vii) and (viii), is not produced by the Project once fully operational, the shortfall will be shared between all the anticipated uses on a pro rata basis of what the project was expected to produce for each use.**

**Issue: The Processes for Developing the Interim Goals and the Section on Developing the Other Water Related Needs of the Region should be made as parallel as possible.**

One overarching theme to the Tribe's comments is that it is critical to the long-term success of CERP implementation that the concerns of all stakeholders be addressed on an incremental basis to keep all parties at the table. One of the major ways of measuring incremental success is through interim goals. The Tribe is concerned about the creation of a separate process as set forth in Section 385.39 for evaluating progress on other water related needs of the system for the following reasons. It is important that the separate processes do not devalue the importance of the other water related needs of the regions as an objective of CERP. Second, restoration of the natural system and meeting the other water related needs of the region are inextricably linked throughout the CERP process. It is important that both these processes be treated equally so that the coalition of interests necessary to keep CERP implementation moving forward stays together for the long term. Should the Corps determine to keep the processes separate, the Tribe believes that the processes should be kept as close to parallel as possible. Therefore, the Tribe recommends the following changes to the Programmatic Regulations to make these processes parallel:

**Section 385.39(b)(3)- The Corps of Engineers and the South Florida Water Management District shall review the targets for evaluating the progress towards achieving the other water related needs of the region under the Plan at a minimum of every five years beginning in 2005 in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the State of Florida, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and other federal, State and local agencies to determine if they should be revised and determine what those revisions should be. The public will also be given the opportunity to comment on the proposed revisions. The Corps of Engineers and the South Florida Water Management District may also revise the targets for achieving the other water-related needs of the region whenever appropriate as new information becomes available. These revisions shall also be made in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the State of Florida, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and**

**other federal, State and local agencies. The public will be given the opportunity to comment on these proposed revisions.**

**Issue: The Programmatic Regulations should include a specific indicator for the Tribe in the section on developing targets for the other water related needs of the region.**

The Tribe requests the following indicator be added to the Programmatic Regulations:

**385.39(c)(2)(iv)- the frequency of water shortage restrictions on lands covered under the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District.**

**Issue: RECOVER should not have the authority to contract for scientific research.**

RECOVER has numerous missions outlined in the Programmatic Regulations. One mission that RECOVER should not have is contracting directly for scientific research in support of CERP. RECOVER can prioritize the scientific tasks needed for restoration but should not expend its funds directly on scientific tasks. The Tribe proposes that the following subsection be added to Part 385:

**Section 385.20 (h) RECOVER shall not directly contract for, nor financially support, scientific research needed to support CERP implementation. RECOVER technical teams may recommend to Federal, State, and/or local agencies, and/or to the Miccosukee Tribe of Indians, and/or to the Seminole Tribe of Florida to undertake certain research.**