

Summary Programmatic Regulations Agency Workshop
Palm Beach County South County Civic Center, Delray Beach, FL
May 17, 2001 9:00 a.m.-11:30 a.m.

Attendees:

Craig Tepper, Seminole Tribe of Florida
Lorraine Heisler, FWS, Loxahatchee National Wildlife Refuge
Beth Carlson, Seminole Tribe of Florida
Robert T. McMullen, FDOT, Miami (representing Barbara Culhane)
Gary Hardesty, USACE, Headquarters, Washington
Mike Magley, USACE, South Atlantic Division, Atlanta
Robert Pace, U.S. Fish and Wildlife Service
Tom MacVicar, MFL, Inc.
Richard McNeer, Dept. of the Interior
Michael Davis, Dept. of the Interior
Essie Duffie, NOAA Fisheries
Don Jorey, Dept. of the Interior
Danna Ackerman-White, Lake Worth Drainage District
Linda McCarthy, FDACS
Abe Cooper, SFWMD
Dan Hayes, USACE
Mary Ann Poole, Florida Fish and Wildlife Conservation Commission
John Brady, USACE
Frank Metzler, Florida Dept. of Environmental Protection
Brenda Mills, SFWMD
Thomas Van Lent, National Park Service
Robert Johnson, National Park Service
Elaine Hall, National Park Service
Betty Grizzle, U.S. Fish and Wildlife Service
Tom Teets, SFWMD
Terry Breyman, USACE, Headquarters, Washington
Richard Harvey, EPA
Michelle Diffenderfer, Lewis, Longman & Walker
Terry Rice, Miccosukee Tribe (by phone)
Stu Appelbaum, USACE
Nanciann Regalado, USACE
Theresa Woody, USACE

Stu Appelbaum opened the meeting. He explained that this is the first step in developing the Programmatic Regulations for CERP and that there would be two meetings today: one with federal/state/tribal representatives in the morning and one with local governments in the afternoon.

Four handouts were distributed: a copy of Stu's powerpoint presentation on Programmatic Regulations, a 15 May 2001 Draft on Programmatic Regulations

Guiding Principles, the Process for Developing Programmatic Regulations, and WRDA 2000 Sec 601 (h)—Assurances Provisions.

The powerpoint presentation was shown. Section 601 (h) was reviewed. It was emphasized that the Programmatic Regulations are not to be used to establish specific quantities of water for CERP or its features. The regulations are to be designed to ensure that the goals and purposes of the Comprehensive Plan are achieved. The timeline was presented. The regulations must be published by 1 December 02. Public comment and review as well as a required agreement between the President and the Governor with 180 days concurrence period make it necessary to begin the process now in order to meet the deadline prescribed by law.

Stu stated that the goal of the meeting was to have a discussion focused on The Process, Your Role, Context of Regulations and Identify Key Issues.

There was a question raised about work done prior to the enactment of the regulations (01 December 02). Stu responded that those projects would be grandfathered in and the PIRs completed prior to 1 December 02 would need to be consistent with the Plan.

Richard Harvey asked whether these regulations cross-reference ESA/SDW/404/state regulations and other federal regulations. He cited EPA's safe drinking water regulation and the ASR projects as an example.

Stu responded that these regulations must be consistent with other federal regulations. He would take this as a suggestion.

Michael Davis stated that probably a modest number of PIRs would be completed prior the enactment of the regulations so it should not be too hard to reconcile these projects with the regulations. Stu said the Water Preserve Area and the IRL feasibility studies will be done prior to December 02, some OPEs may have their PIR completed before 02 and cited the Golden Gate Estates as an example.

Mary Ann Poole said that she that her reading of the Senate report is that the purpose of the Programmatic Regulations is to ensure that the goals and purposes of the Plan are achieved. She asked what are the goals and purposes of the Plan as stated in the C & SF report? She asked that we define our target at the beginning of the process.

Stu responded that the report to Congress clearly showed ecosystem restoration as the primary purpose and the 1999 language stated other benefits like water supply and flood protection.

Michael Davis stated that if you go back to the beginning of the act, the language is slightly more detailed. He then quoted from the WRDA 2000 "...approved as a framework for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection"

Mary Ann Poole began to discuss the Minimum Flows and Level (MFL) process at the state level and questioned how this effort would be integrated into the Programmatic Regulations

Don Jodrey responded that we must integrate the state and federal processes. He added that MFL and integration of state actions is a full day discussion.

Craig Tepper asked what consultation would be expected of the Seminole Tribe.

Michael Davis stated that no legal document is required; that provision is to make sure we reach out to the tribes.

Michelle Diffendorfer thought that this consultation is probably less of a burden and more of a benefit to the tribe, but they will need to run this through the tribal council as their water rights will be effected and they need to maintain those rights.

Michael Davis stated that the tribes need to issue written comments just like EPA.

Craig Tepper stated that local government will also need clarification on what constitutes official consultation to the Governor.

Richard Harvey said that he suspected that if you take EPA, DOI, local, state and federal concerns into account, you will get "restore, preserve and protect." He asked whether we are reinventing regulations or comply with existing regulation?

Mary Ann Poole stated that we need more than existing regulations—we need existing regulation to prevent further degradation. This is a higher purpose: restoration. Programmatic Regulations need to ensure the goals and objectives of the Plan are achieved.

Stu stated that to the Corps, regulations means the procedures we must follow. He sees the Programmatic Regulations as how we are going to analyze things, procedural framework and analytical procedures.

Michelle Diffendorfer said that we need to get all the agency procedures on the table to understand.

Richard McNeer referred to the schedule for developing the Programmatic Regulations. Step #6 is Develop Draft Outline of Programmatic Regulations by July 2001. If we develop a concern after July 01, are we out of luck?

Stu responded that before we develop regulations, we need to take a step back and develop an outline. An outline inevitably will raise some more questions/comments.

Michael Davis asked what are these regulations? When he wrote the legislation, he didn't want it to be so prescriptive that it compromised flexibility. It was written as it is to have flexibility. CERP is a different project. We need to bridge from legislation (not overly prescriptive) to lay out the processes and procedures we will use to assess what we're doing. We will want to codify what's been done in the past. We need to keep an open, inclusive process and we need to bridge from the December legislation to the PIRs.

Tom Teets stated that the Water Resources Advisory Commission at the SFWMD will want to engage on this early.

Stu responded that they have already asked for a briefing.

Craig Tepper asked whether we will review the Programmatic Regulations whenever necessary to attain to Plan's goals? What is the relationship to RECOVER?

Stu responded that we need to define this.

Michelle Diffendorfer asked for a discussion of the President/Governor concurrence requirement.

John Brady responded that the Corps has no update on this.

Don Jodrey said that this Administration is in transition and this matter has not been addressed due to this.

Stu said that the state is taking first cut and drafting a strawman. We don't know the process for getting from the Governor to the White House.

Don Jodrey said that Interior thought there was a need to put this into place ASAP to make sure water gets to the natural system. These regulations represent the best effort not to federalize Florida water law and still meet the goals of the plan. Since this is a new process, it only makes sense that there is some uncertainty.

Michael Davis stated that the Congress has high expectations that this project will restore the environment.

Elaine Hall stated that the schedule has months indicated; she asked when we will see specific dates. Elaine said that her boss wants specific dates so ENP staff can participate. It is difficult to decide which meetings to attend without this information and they don't want to miss important meetings and then have objections at the end.

Stu said that meeting dates will be posted on the calendar on the web.

Tom Van Lent asked about the meeting dates for stakeholder meetings.

Nanciann Regalado responded that these are scheduled for June 1, June 11 and June 12 with public meeting scheduled for June 26, 27 and 28.

Don Jodrey asked who the stakeholders are.

Nanciann Regalado responded that they are the environmentalists, agriculture-north and south, and we will see how this meeting and the afternoon meeting goes as to whether the utilities will be included in that group.

Beth Carlisle asked why are we meeting with everyone separately? The state engages in an informal consensus process before the official public workshop to try to resolve issues.

Nanciann Regalado responded that our experience reveals that we get a better initial read on the concerns of the groups this way.

Beth Carlisle talked about water supply plan development in South Florida. She said that we might spend three or more meetings with everyone together so everyone has the same definition of what is meant. It's a huge educational process.

Nanciann Regalado said that we'll continue to talk about this and if the stakeholders feel the same way, we're open to combined meetings.

Tom Teets asked how does the Corps envision participation of all the different agencies in these meetings? The agencies will want to hear what the stakeholders think. You'll want to participate at least if it is just to sit and observe. He also asked about the notification process for these meetings—posted on Evergladesplan.org, e-mail, how?

Nanciann Regalado said yes to e-mail.

Stu said that these June meeting are more targeted to stakeholders. The public meetings will be noticed on Evergladesplan.org.

Mary Ann Poole said that as an agency representative, she would like to hear what other stakeholders say. She would like to get noticed.

Mary Ann Poole said she understands the requirement to coordinate with DEP, SFWMD and DOI, but also understands that the Corps has an obligation to coordinate with other agencies. She anticipates that we want written response. Stu responded that the process requires us to provide public notice in the Federal Register then accept and analyze comments for 60 days. The goal is publish the draft regulations and to have the issues worked out ahead of time. That's the reason for this intensive process.

Richard McNeer asked whether the first draft will be published on December 01 or 15 March 02?

Stu responded that 15 March 02 is when we publish the draft in the Federal Register. The December 01 draft is internal and for input from those following the issues.

Michelle Diffendorfer explained the process used to develop Minimum Flows and Levels used a flow chart and it was very helpful. She suggested that model.

Stu asked for any comments on Roles.

Richard Harvey stated that there are specific procedures under NEPA and the Clean Water Act that must be followed. Why do we need these process regulations

Don Jodrey responded there is a statutory requirement for Programmatic Regulations to make sure that at the end of the day, we have an overarching framework that makes sure the puzzle is put together as we want it to be. We want to ensure that the individual part work together. This is a 30+ year plan.

Michael Davis stated that we can't diminish any other federal requirements. We don't want to be inconsistent. The regulations are designed to tie the projects together and to make CERP stronger.

Tom MacVicar stated that Programmatic Regulations will not make features work, that's the PIR. He agrees with Richard Harvey; he can't find the value-added. He thinks it creates more potential for public intervention, legal challenges and eroding public support.

Don Jodrey said that the goal was to make sure that the water was not permitted away. The plan does reflect a compromise. The federal government is paying half and felt it was necessary to have a guarantee. We need to work together to achieve the benefits of the plan. It's a jointly managed project. The purpose of the Programmatic Regulations is to make sure we achieve the goals.

Michelle Diffenderfer responded that if the Programmatic Regulations are one-sided, we need to tell the state. The LEC relies on CERP. We know you're not building a water supply project, but you are switching us from our water supply now. For example, ASR is not funded. Maybe we need to, from a taxpayers view, may want to fund de-sal and not CERP.

Stu suggested that everyone review S.R. 106-360, dated July 27, 2000. This is the report from Congress from the Environment and Public Works Committee to accompany S.B. 2796. He then quoted the Programmatic Regulation section on Savings.

Beth Carlisle suggested that people might want to supplement the report with the House/Senate conference language.

Stu responded that the House and Senate bills are different; the House addressed the role of DOI. The report is #106-1020, the conference report for WRDA 2000 dated October 21, 2000.

Brenda Mills said it might be useful to describe the practical view of what will be in the Programmatic Regulations. She sees a straight-forward document that lays out the process of how the state and the feds will proceed. We just need to lay out milestones, mechanisms, entry points and when approvals will be sought/granted.

Abe Cooper said we need a generic process to describe how the Programmatic Regulations will mesh with the PIRs and how to deal with water allocations/reservations assurances for all stakeholders. It is important that they understand the process by which decisions are made.

Michael Davis responded by saying that DOI believes these are more that process rules. There needs to be debate and resolution. The Army believes these are more than process rules. There should be substantive goals. We need a dialogue on how we go about meeting those goals—how do we get from legislation to the PIRs.

Brenda Mills said we have to make it clear how we will interact and how the pieces fit together.

Michael Davis said how we will measure interim goals and the process to get there equals Programmatic Regulations. They shouldn't be 100 pages; should be very brief and efficient. There is no legal mechanism that would codify this process. Programmatic Regulations can lay out the rules so that the people who follow us can continue on the same path.

Mary Ann Poole said we need to take into account MFL and other SFWMD efforts.

Elaine Hall questioned how should the agencies staff this effort? With limited staff, how do we know that we are at the right meeting? Her agency needs more information in order to decide.

Bob Johnson said we need to work independent scientific review into the process.

Bob Johnson said that it all goes back to assurances. It's all tied back to availability of water and allocations of water. The PIRs will need to be tied to consumptive permits.

Tom McVicar asked how can we do this by March? He expressed his doubt that we could accomplish this by March.

Bob Johnson asked that we be specific; how will we assure meeting a goal?

Michael Davis responded by saying there is no other good guidance except the Senate Report. The goal is expressed in restoration standards and it need to be quantified.

Abe Cooper responded by saying that the legislation is very clear and any secondary documents don't carry the weight of law. The legislation doesn't say standards; it says a process to develop a process. There is a big difference between developing a process and developing standards. It will be hard to develop a process that gets you standards by 2002.

Tom McVicar said that the first chapter of the PIR should address the allocation of water goals.

Michael Davis stated that DOI is not far apart from others and doesn't have huge differences of opinion.

Terry Rice (by phone) asked if an EIS is associated with promulgating the Programmatic Regulations.

John Brady responded that it depends on how specific the regulations are: if it is pure process, then no EIS is required, but if the regulations are more detailed and determine allocations of water at various states, then perhaps yes. An EIS is required for actions that affect the quality of the human environment. The question is open at this time.

Michael Davis responded that DOI doesn't anticipate allocating water in the Programmatic Regulations.

Elaine Hall asked Mary Ann Poole what her agency's role would be in the process? How does the Commission fit in because they are constitutionally created. Who comments for the Governor?

Stu responded that DEP and the SFWMD will act for the Governor but there will be coordination with the Commission.

Mary Ann Poole said she expects some requirements for coordination as required under the Fish and Wildlife Act.

Stu responded that concurrence is defined specifically in the act and we will coordinate with the rest.

Mary Ann Poole stated that the Governor controls the budget for her agency but not policy, as they are constitutionally created.

Elaine Hall asked that if FWC not in concurrence with DEP, then what?

Stu responded that the Governor ultimately is responsible. DEP has a lead role in advising the Governor.

John Brady asked about the state consumptive use permit process. Does the process take into account leaving a quantity of water necessary for natural system restoration under CERP?

Tom McVicar responded that there are several mechanisms: 1) not allowed through consumptive use to harm wetlands and 2) Minimum Flows and Levels.

Mary Ann Poole said that Programmatic Regulations must be integrally intertwined with state rules.

Michelle Diffendorfer said that in the Minimum Flows and Levels rule, utilities are only promised a renewal of existing permits under MFL; no new water and doesn't ever commit new CERP water.

Stu ended the meeting by saying that this will continue to be an interactive process.