

Summary Programmatic Regulations Environmental Community Workshop
Broward County Water Management Services, Pompano Beach
June 1, 2001 10:00 a.m.-1:00 p.m.

Attendees:

Mellonee Kenneday Meitin, Audubon of Florida
John Brady, USACE, Jacksonville District
Agnes McLean, SFWMD
Abe Cooper, SFWMD
Brenda Mills, SFWMD
Michael Davis, Dept. of the Interior
Elaine Hall, Everglades National Park
Richard Mc Neer, Dept. of the Interior
Brad Sewell, NRDC
Fred Rapach, Palm Beach County Water Utilities
Erin Deady, Audubon of Florida
Kim Lippman, Lewis, Longman & Walker/Seminole Tribe/Lake Worth Drainage
David Lee, Broward County DPEP, Water Resources
Roy Reynolds, Broward County Water Management Division
Brion Blackwelder, Environmental & Land Use Law Center, NSU
Mike Magley, USACE, South Atlantic Division, Atlanta
Betty Grizzle, U.S. Fish and Wildlife Service
Shannon Estenoz, World Wildlife Fund
Mary Munson, National Parks and Conservation Association
David Bogardus, World Wildlife Fund
Sean McMahan, National Audubon Society
April Gromnicki, Audubon of Florida
Stu Appelbaum, USACE
Theresa Woody, USACE

Stu Appelbaum opened the meeting. 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. Shannon Estenoz pointed out an inaccuracy in the first slide; the second "the" is not in the law.

The agreement between the President and the Governor was discussed. Stu explained that there is no time-specific date for the agreement, but no funds can be appropriated for construction until the agreement is signed. The Programmatic Regulations must be promulgated by December 2002—2 years from the enactment of WRDA 2000. The Pro-Regs lay out what is expected in the PIRs, PCAs and the Operational Manuals.

Brad Sewell stated that the agreement between the President and the Governor is to prevent the permitting away of water prior to CERP project construction. With new permits being granted every day, time is of the essence.

Stu responded that no construction funds can be appropriated without the signed agreement. He reviewed the process needed to secure the agreement: the Secretary of the Army is tasked with initiating the process, there is a 180-day review timeline for action by the state and the federal government. If there is no agreement within 180 days, there is deemed to be concurrence. The Secretary of the Army is the Assistant Secretary of Civil Works. DEP and the SFWMD are the Governor's agents in the agreement process. There is a consultative role for federal agencies and the two tribes as well as public involvement. The Pro-Regs must establish a process and new information must be able to be included. The regulations must be reviewed every 5 years, but can be reviewed more often. Federal rulemaking is a long process. We want to achieve consensus among the stakeholders so there are no surprises.

He reviewed the key concerns raised in the previous stakeholder meetings: lots of discussion of interim goals; questions on whether Pro-Regs are meant to be a process or something more detailed; questions on how we deal with PIRs written prior to enactment of Pro-Regs and what happens if those PIRs are not in compliance and do the Pro-Regs trigger a NEPA process.

April Gromnicki pointed out that all PIRs must be consistent with the Pro-Regs. She asked for clarification on the definition of "consistent with the goals and purposes of the Plan.

Stu said the overarching objective is to preserve and protection the natural system. Page 521 in the WRDA guidance and the WRDA summary language is very specific.

Brad Sewell began to review the guiding principles. He said there seems to be some missing language. He suggested adding, "establish a process to ensure protection of the natural system" to make sure protection of the natural system is the guiding principle of CERP. He expressed concern on whether CERP was truly integrated with state processes (bullet 6 on handout). There is a real concern that the state consumptive use renewal-permitting schedule is every 5 years, starting next December. This needs to be coordinated with CERP as the two processes are so intertwined.

Mary Munson asked the SFWMD representatives whether this could be done?

Abe Cooper replied that it will be very difficult. He acknowledged that water assurances and water reservations need to be integrated but the schedule for Pro-Regs is very ambitious with water quantity as the end result.

Mary Munson asked whether a one-year consumptive use permit moratorium was possible so that the two efforts could be coordinated?

Shannon Estenoz replied that the state permitting process is more mature as it is an extension of the LEC process. As MFLs develop, water reservations will be a difficult issue. The state process must be more consistent with WRDA. She doesn't want to see Pro-Regs be subservient to the state process. The \$4 billion in federal investment gives a tremendous right for federal oversight. The Pro-Regs are the vehicle to ensure that the federal government has meaningful oversight and an opportunity to participate in the process.

Bob Johnson gave an example: what if the state issues a new permit and a year from now, we discover minimum flows and levels are not being met? There is a reservation process for existing water as well as new water. Is there a plan that reservations would be done prior to the issuance on consumptive use permits?

Abe Cooper acknowledged that that was a good question.

Brenda Mills said that LEC did try to address this issue and referred people to a flow chart developed through that effort.

Bob Johnson continued his example. What if consumptive use permits allocate new water and a year from now, MFLs cannot be met. The recovery strategy is CERP. There is a reliance on CERP even before construction has begun.

Michael Davis asked about the timing of consumptive use permits.

Fred Rapach replied some come up in 2004. Shannon Estenoz said that some renewals are as early as December.

Mary Munson stated that even 5-year consumptive use permits can make big differences in terms of water reservations.

Shannon Estenoz said the whole issue is that there is little cross-pollination between the CERP and the consumptive use permit process with little attempt to integrate CERP into the state process. This is unacceptable: CERP must be integrated into the allocation process and the allocation process must integrate into CERP.

Brad Sewell suggested that MFLs could be useful in setting interim goals. We need to establish a process for new information to be integrated fully into CERP. An independent science review panel will be central to this effort. CROGEE was established two years ago. What is the status of CROGEE?

Stu said CROGEE will continue to monitor CERP, but no decision yet on their role in the BI-annual report to Congress.

Michael Davis said when the Task Force is reconvened, the role is CROGEE will be reviewed.

Bob Johnson that CROGEE has been asked to review the ecological performance measure and ASR. It sounds like they should be tasked with reviewing the workplan, but that is not what the Task Force has asked CROGEE to do. Is this the role for CROGEE?

Stu responded that CROGEE is referenced in the legislation.

Michael Davis said that there was discussion that the review body had to be the National Academy of Sciences and he asked for flexibility.

Stu said that CERP may use the SFWMD's process of expert review. The Corps has an Independent Technical Review process for internal review and we must follow that process.

Brad Sewell clarified that independent scientific review does not mean SFWMD and Corps review, it means outside review. He quoted WRDA.

Stu responded that typically, when the Corps produces a report, we need to have it checked, which means we send the preliminary report to South Atlantic Division for review; they review and comment; we incorporate comments and release the report. CERP provides for an Independent Technical Review (ITR) through WRDA 2000.

Shannon Estenoz restated that the definition of independent review is external review.

Stu stated that Corps reports must go through Independent Technical Review (ITR), but he cannot say that every aspect of every report requires independent technical review.

April Gromnicki asked for a discussion of RECOVER's role in the Pro-Regs.

Stu said that a lot of the processes will be a RECOVER activity. The plan is to have RECOVER take a shot at the processes we will use for Pro-Regs as some are procedural, cookbook-type of activities.

Agnes McLean added that the AAT (Adaptive Assessment Team) has been discussing these issues. RECOVER is an interagency team. Susan Gray and Laura Brandt has the lead in drafting an adaptive assessment paper that will be brought to stakeholders for comment. RECOVER has another role: to look at all the different projects and evaluate with a global, system-wide view. The process for still in development.

April Gromnicki said that the big question is we expect CERP to generate lots of water that we'll all share. Who oversees this process?

Stu responded that the RET (Recover Evaluation Team) will be part of this process. RECOVER is tasked with adaptive assessment: to take all this information and all these indicators and deal with this information on a system-wide basis.

April Gromnicki asked when are the protocols to "fix" CERP revisited? How does the RET interact with RECOVER?

Michael Davis responded that he felt that Pro-Regs would create a forum for the public to interact with RECOVER.

STU said he is the Program Manager for RECOVER so there is a definite linkage. Issues at RECOVER need to be completed by December with the goal of avoiding disagreements and clarifying the rules of engagement. The federal CERP process is tied into the state water reservation process, there are legal entry points. The LEC includes a 5-year requirement to update water supply plans.

April Gromnicki reiterated that all the 5-year processes need to come into alignment ASAP.

Agnes McLean stated that the CERP team is aware of all these processes and acknowledges that at present, the timeline is staggered, but ultimately all the timelines must align.

Shannon Estenoz said that April asked who is responsible, but ultimately, it is the law that must be followed.

Brad Sewell understood that Pro-Regs was intended by Congress as a vehicle for everyone to be involved in these decisions. The regulations need more input beyond RECOVER.

Stu responded that RECOVER's role is to comment on the strawman at a technical level. RECOVER needs to be as broad-based as possible and needs to involve all the agencies with stakeholder input. In the next six months, there are some key issues RECOVER must address.

Shannon Estenoz stated that the actual dividing of the water will be done under state law; there will be no federal water reservation. When will the 80/20 split in the report be addressed?

Stu responded we expect the Pro-Regs to provide guidance to help meet the goals of the CERP and to guide the state water reservation process.

Brad Sewell said that it is very necessary for the Pro-Regs to include language on the volume of water needed up front in order to avoid conflicts. We need to establish the primacy of the natural system and avoid 60 fights (each project). This was contemplated by Congress.

April Gromnicki suggested that the 80/20 split, while a rough number, is a number. The Pro-Regs should establish a process to determine if there is a need to change that number and have a process on how to change the allocation.

Stu said asked April how could we do that?

April Gromnicki responded that we use 80/20 as a starting point. There is a process through adaptive assessment to determine what the right numbers are but Pro-Regs should establish a process to change the number.

Mary Munson said that the environmentalists understand that every project cannot meet the goal of 80/20, but a process is needed to allow us to step back and assess how much we have achieved.

April Gromnicki responded that maybe 80/20 isn't the right number. We need to have a process to change it.

Shannon Estenoz asked the meaning of the guiding principle "not establish specific quantities of water to be achieved by the CERP or its features.

Michael Davis responded that we cannot quantify water in the Pro-Regs as we don't know the amount of water needed. The PIR process identifies quantity and reserves it for the natural system. The law does not preclude establishing quantity, but that is not the agreement between the federal government and the state.

April Gromnicki restated that there is a number: 80/20.

Michael Davis said that the law requires us to capture 1.2 billion-acre feet of water and we cannot stray from that goal.

Brad Sewell stated that the Pro-Regs should guide the PIRs. Goals and Principles on allocations should be in these regulations; the legal ramifications of setting these are different than a federal water reservation. If we don't capture 245,000 acres feet, we cannot come close to 80/20.

Stu said that the number may be closer to 75/20.

Shannon Estenoz asked about the agreement between the President and the Governor. The law requires that the agreement be signed. That agreement should include the 245, 000 acre feet. The state must commit not to permit this water away from CERP. There is a lot of concern about this number and a need to make sure that this is the right number. To be true to the Restudy, the water needs to be protected.

Shannon wanted to know the status of modeling of the 245,000 acres?

Bob Johnson asked what if the analysis yields more new water, will we adhere to the same percentage split?

Shannon said that we need to be driven by the restoration targets and get away from how much water we can produce. Congress expects Everglades restoration. Let's get away from the 80/20 split and focus on restoration targets—CERP should be performance driven.

Brad Sewell maintained that you need both to guide the PIRs.

Stu said that in the 70's, everyone thought minimum deliveries was brilliant, but we discovered that just guaranteed quantities of water wasn't enough.

Stu moved the discussion to Interim Goals.

Brad Sewell stated that 50% restoration by 2010 is the environmental community's goal. What does 50% restoration mean in ecological, hydrological and water quality goals? We need a good definition of what we mean and some way to quantify this. Interim Goals must be included in Pro-Regs.

Richard McNeer asked if the interim goals will be only for the natural system? This is not a requirement of WRDA; interim goals could also apply to urban and agricultural water needs. We need balance.

Stu said that no group has a problem with interim goals, as the law requires these in the Pro-Regs. The question is should Pro-Regs spell out the interim goals or lay out a process to identify the interim goals.

April Gromnicki responded that her sense is that if Congress intended the Pro-Regs to be a process, the law would have clearly said that.

Brad Sewell said that the goals need to be relatively stated in the Pro-Regs, but should also be quantifiable and measurable. He suggested a tiered system as something workable and expected by Congress. The quantitative and measurable measures need to be real world measure—beyond modeling and be able to be measured by the 5-year mark. This is where the MFL process could

help as this measures volume and depth rather than hydroperiod like a model. Integrating a team into RECOVER for performance measures could be inform that group by adding input from water supply and MFL people. The real world water and depth measures can assist in dealing with the allocations process.

Shannon Estenoz asked what are the MFLs as defined in a restored system?

Brad Sewell continued that CERP should not be the recovery system for MFLs. If we don't hit the performance standard by 2010, we need a process to revisit use, forecasting and modeling and do this periodically. We need formalized and measurable goals to provide the CERP blueprint. Performance measures of a generalized nature that would be implemented in a formalized process with a better integration of LEC and CERP—integration and synchronization.

Shannon Estenoz asked how specific will the Pro-Regs be? For example, the MFL rule is very detailed and dictates specific depths and duration. Will Pro-Regs be that detailed?

Agnes McLean responded that we have begun integrating the efforts. There will be a 5-year look at the projects with real world monitoring—sometimes daily monitoring. RECOVER has been working with water supply folks i.e. Brenda Mills, Fred Rapach, DACS but she can see a good reason to broaden that group to include representatives of other stakeholder groups.

Stu said the real question is evaluation vs. assessment. Evaluation equals predictions using models and assessment is on ground measurements. Evaluation is planning and assessment is figuring out if the system is responding the way we said it would and why.

Brad Sewell suggested that Pro-Regs could take this a step further; from adaptive assessment to adaptive management.

Mary Munson said that the assessment must have performance standards to measure against. These need to be specifically stated in Pro-Regs.

Agnes McLean said that the adaptive assessment plan was adapted with 150 performance measures. All those measure have targets. The performance measures are really geared to the end state.

Betty Grizzle said that ground zero is the PIR. How do Project Managers view adaptive assessment; do they see it as RECOVER's job?

Brenda Mills replied that we just continue to teach them that it is a two-way process.

Bob Johnson talked about the problem with performance measures. He cited urban water storage as an example. You can figure out why you don't meet your target, since there is strong link to demand. But when the natural system does not meet its targets, you don't know why.

Bob wanted to know how much environmental benefits will be realized early. He discussed the relationship between LEC water supply expectations, MFLs and CERP. There is a disconnect between federal expectations and the state's water allocation process—both have different sets of goals.

Shannon Estenoz said that the MFL rule contemplates new allocations of water; we are not meeting MFLs today. There is a definite disconnect. She resists the process vs. substance argument as a response to the state's bias. Congressman Smith's office said that Pro-Regs have 3 functions they must meet and while process is great, you can't meet the 3 functions with process. The Pro-Regs need to include some measurable, quantifiable goals and targets. We will not meet the expectations of the federal appropriators with pure process. She suggests we combine measurable (even general) targets and that can be integrated into the MFL effort. The federal government cannot just acquiesce to the state's process.

April Gromnicki expressed concerns about a MFL process that might not meet MFLs by 2015 and if CERP is counting on meeting restoration goals and might not meet the targets by 2010, the MFL process is seriously flawed. We need assurances that we are going to restore the Everglades and set some measurable goals that can be understood.

Bob Johnson said that the environment is not starting at the same point as other water users. The standard is not to cause significant harm to the natural system, More development in South Florida is realistic. We may not meet restoration targets, but with more development, we may be past the point of causing significant harm.

April Gromnicki said we need to level the playing field. She believes in balance, but we need to get the natural system beyond all the adversity before we apply that principle to its needs.

Richard Mc Neer asked if the interim goals aren't substantive in the statute, where are they substantive? If this was Congress' intent, why was it not addressed this way in the legislation?

Elaine Hall responded that we might need more legislation to address this.

Richard Mc Neer said that MFLs are the sort of environmental interim goals that Pro-Regs should think about using; you can measure depth and duration through the MFL process and measure this against the model to determine improvement.

Then figure out which CERP projects are on-line and you can determine if you have met your timelines. You could compare the state standards with a rainfall driven ecological model as a place to start.

Michael Davis said he believes that the goals are substantive as opposed to process goals. The intent was to have some meat and focus almost exclusively on the natural system. The law may focus on goals for the natural system, but how does the environmental community feel about interim goals for urban water supply?

Richard McNeer said that when MFLs are not exceeded or violated, there will be fewer water shortages. This is a shared benefit to both the natural and the built system.

Shannon Estenoz responded that the message is that you cannot meet the provisions of the law with 100% process. The law does not preclude or demand the concept of setting interim goals for utilities, but it is going to be so difficult to develop these goals for the natural system, the energy should be spent on meeting this provision of the law.

Brad Sewell said that if the law requires one thing, and not the other thing, you have to address what the law requires. He advised being careful not to set up conflicts.

Shannon Estenoz said that in the LEC process, there was a small sub-group, an informal working group that formed after the LEC disbanded. The LEC flow chart came out of that effort. The group tried to resolve points of conflict based on the concept of parity.

Brad Sewell said that if the interim goals have no degree of certainty, we are doomed to a system of conflict and guerilla warfare where the environmentalists go to Congress to de-authorize various projects. We need to hammer this out and the Pro-Regs is the vehicle.

Shannon had a general comment: during writing the legislation, the only assurances good enough for the national environmental community was a federal water reservation. The negotiated package delivered the agreement between the President and the Governor, the Purposes of the Project, Pro-Regs and the Savings Clause. These concepts are central and important to WRDA. The environmental community is looking for these elements of WRDA to be implemented correctly.

Michael Davis pointed out that it is a very powerful statement that the Secretary of the Army cannot sign a PCA until water reservations are made.

Shannon Estenoz responded that the state should not enter into any processes that reserve water in the absence of the agreement between the President and the Governor. We need to integrate the Savings Clause into the whole water allocation process, not just into Pro-Regs. We need a plan to analyze how we're distributing water to the natural system and how we are violating the Savings Clause. This should be part of the Programmatic Regulations.

Shannon asked for a discussion on the severity of the drought.

Bob Johnson said that depends on where you are in the system. The proposed MFL rule states interim measures towards meeting the MFL targets and are tied directly to shortage restrictions. The state process dictates that water shortages be a facet of the MFL process.

April Gromnicki asked when the Guiding Principles will be amended to include the main principle: Establish a process to ensure the protection of the natural system?

Brenda Mills asked for the group to review the process for developing Pro-Regs and asked for comments.

Stu said that there would be two more meetings with stakeholders working toward the goal of no surprises when we publish the draft regulations in 2002. He thanked everyone for attending the meeting and thought it was useful to meet with individual stakeholder groups, but he is open to other models. He suggested that the SFWMD WRAC (Water Resources Advisory Committee) should be used as a forum for a broader discussion with all stakeholder groups.