

LEHTINEN, VARGAS & REINERATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION

October 1, 2002

U.S. Army Corps of Engineers
Attn: CESAJ-DR-R
P.O. Box 4970
Jacksonville, Florida 32232-0019Via fax and e-mail: proregs@usace.army.mil

**Re: Miccosukee Tribe of Indians Comments on the proposed
Programmatic Regulations for the Comprehensive Everglades Restoration Plan,
33 CFR Part 385, Federal Register Vol. No. 67, No. 149, dated August 2, 2002.**

The Miccosukee Tribe of Indians of Florida is a federally recognized Indian Tribe, whose members have lived in the Florida Everglades for generations and whose entire culture and way of life depends on a healthy Everglades ecosystem. The Tribe hereby provides its comments on the proposed programmatic regulations for the Comprehensive Everglades Restoration Plan (CERP), that were published in the Federal Register on August 2, 2002 and which are being formulated pursuant to the Water Resources Development Act of 2000 (WRDA 2000). The Tribe also incorporates by reference all comments previously provided to the Army Corps of Engineers (Corps) in meetings and/or in writing concerning the December 2001 and April 17, 2002 drafts of the regulations, including the Tribe's preliminary comments dated February 15, 2002.

I. POSITIVE ELEMENTS OF THE PROPOSED REGULATIONS

A. Clear Procedures: Unlike the usual Corps procedures, which are often difficult for the public to discern or understand, the proposed regulations, for the first time, clearly establish the steps which must be accomplished from the project planning stage to the project operation. These clearly defined procedures should help ensure accountability, both as to the law and Congressional intent, when implementing CERP projects.

B. Integrated Planning, Design, and Operation: The proposed regulations provide for integration of planning, design, and operations, which is a very positive element. Prior Corps Everglades projects consciously and explicitly separated planning and design, which were initiated with an Environmental Impact Statement (EIS), and continued with the development of operations guideline manuals, which involved a separate EIS at a later time. This bifurcated approach made no sense and will be much improved upon by the proposed regulations.

Page -1-

C. Concurrence: The proposed regulations wisely provide that the failure to take any action regarding concurrence or non-concurrence by the Governor or the Secretary of Interior will serve as concurrence, thereby avoiding a "pocket" veto.

II. RECOMMENDED CHANGES

A. Limit Areas of Concurrence: The Tribe believes that the definition of concurrence in the proposed regulations is positive. They are concerned, however, that the regulations include a new Interim Goal agreement amongst the Army, Department of the Interior (DOI) and the State, and a proposal to expand the DOI and State concurrence to cover the Pre-CERP baseline water availability and the six guidance memoranda. The Miccosukee Tribe has experienced first hand the Everglades degradation that results when important restoration projects are held hostage by uncooperative agencies. The Tribe believes that the more agreements and concurrences the regulations contain, the greater the likelihood that stagnation and delay will result on CERP projects. Additionally, the more that the parties outside the "inner-circle" being set up by these concurrence agreements believe that they have been relegated to a secondary status, the less likely they are to support Everglades restoration. Finally, should the Corps persist in listing areas of concurrence and including DOI, they should also list the Tribe as a concurring party, since vast areas of Tribal Everglades are directly impacted by these important CERP decisions.

B. Limit NEPA Exemptions: The National Environmental Policy Act (NEPA) exemptions contained in § 385.14(e) are far too broad and include controversial, and as yet undefined documents and actions that should not be included. Instead of starting with a default position of assuming no significant impact, the Corps should err on the side of caution and examine each action on a case by case basis to properly determine the impact on the human environment. The Tribe is concerned that the proposed regulations contain no mention of NEPA review for interim goals and performance measures. There is no doubt that interim goals have the potential to significantly impact the human environment, and that their impact can only be determined once they are established. Similarly, the addition, deletion, and/or modification of Performance Measures could also have a significant impact on the human environment, which should be analyzed on a case by case basis to determine whether NEPA applies.

Section V of the preamble, 67 FR 50549 (NEPA Compliance), states *[a]s required by regulations of the Council on Environmental Quality (40 CFR 1505.1 and 1507.3) agencies must issue regulations identifying classes of actions generally requiring an Environmental Impact Statement (EIS), generally not subject to the National Environmental Policy Act (NEPA) and actions requiring an Environmental Assessment (EA) of whether a full NEPA EIS is required or not.* As stated in the same section, the Corps has already adopted such procedures implementing NEPA in § 230 of this chapter. Thus, the Tribe sees no need for the Corps to further elaborate and extrapolate from these procedures in the proposed programmatic regulations, or to go beyond specific categorical exclusions already identified in § 230. The Tribe believes that it is unwise and premature for the Corps to predetermine which specific CERP actions will, or will not, require an EA or EIS in the programmatic regulations. The Corps should merely refer to its preexisting regulations and the

relevant law, NEPA, and provide that they will analyze CERP actions on a case by case basis to determine whether a specific action has a significant impact on the human environment.

It is clear that even the Corps so-called *categorical exclusions* may be subject to NEPA in the realm of the Everglades and should not be given a blanket exclusion in the programmatic regulations. For instance, § 385.14(e)(9) contains a categorical exclusion for *Deviations from Operating Manuals for emergencies and unplanned minor deviations, as described in applicable Corps of Engineers Regulations, including §§ 222.5(f)(4) and (1) (5) of this Chapter, and Engineer Regulation ER 1110-2-8156 Preparation of Water Control Manuals*. In the context of the Everglades, such a deviation could be subject to NEPA review. For instance, a federal Judge in Miccosukee v. Army Corps of Engineers, Case no. 00-33-CIV-Moore, found the Corps acted in an arbitrary and capricious manner by not completing an EIS on a so-called emergency deviation from their Water Control Plan, which was a major federal action that had significant adverse impacts on Tribal Everglades. Thus, the Tribe believes that this provision should be removed from the programmatic regulations, as it could contribute to future NEPA violations.

B. Establish a Strong Role for the Task Force: While the Corps recognizes a valuable role for the Task Force, its working group, and other advisory bodies to provide advice on Everglades restoration issues in § 385.10(e), it does not mention that Congress prescribed this role in WRDA 1996. The Tribe is concerned that the role of the Task Force has been purposely limited and usurped in the proposed regulations. For instance, this section contains language that providing information to, or consulting with the Task Force will usually occur on a "case-by-case basis." The programmatic regulations should explicitly recognize a strong coordination and consultation role for the Task Force, and state that this was the role envisioned for them by Congress in WRDA 1996. The programmatic regulations should contain language from §528(f)(2)(b) of WRDA 96 that states that the Task Force *shall coordinate the development of consistent policies, strategies, plans, programs, projects, activities, and priorities for addressing the restoration, preservation and protection of the South Florida ecosystem*. Thus, the proposed regulations should explicitly state that the Task Force will be provided the opportunity to receive and review all recommendations on all aspects of Everglades restoration. This would include the recommendations of RECOVER, which the Tribe contends should become an advisory committee to the Task Force to avoid violating the Federal Advisory Committee Act (FACA). The Task Force could review the advice and recommendations of RECOVER and make recommendations to the Secretary of the Army, as envisioned in WRDA 1996. The Task Force should also be given the opportunity to review and make recommendations on any proposed CERP updates and revisions. Finally, the regulations should emphasize that the Task Force will play an important coordinating role in selecting and coordinating any independent scientific review, since § 528(f)(2)(G) of WRDA 96 states that the Task Force *shall coordinate scientific and other research associated with the restoration of the South Florida ecosystem*.

The programmatic regulations should remove the statement, "*Providing information to, or consulting with, the Task Force usually will occur on a case by case basis.*" § 385.10(e). These words should be replaced by the language that was drafted by the Working Group and adopted by

the Task Force at its May 2002 meeting:

Under the provisions of WRDA 1996, the Task Force will provide general input into the implementation of CERP and continue its duties as specified. The Task Force will provide recommendations to the Secretary of the Army regarding the implementation of CERP. The Secretary of the Army will notify the Task Force to ensure it is afforded an opportunity to review and provide recommendations on CERP products, to include but not limited to: Project Performance Measures; Interim Goals; Project Implementation Reports; Comprehensive Plan Modification Reports; RECOVER Reports and Products; Pilot Project Reports; Reports to Congress; Post Authorization Change Requests; CERP Implementation Management Plans.

Although the Preamble at 67 FR 50549 states that at recent meetings the Task Force expressed an interest in consultation on several subjects and states that the proposed regulation incorporates consultation on those subjects, it appears that there was a failure to include all of the items contained in the above resolution. The programmatic regulations should contain the resolution in its entirety and include all items on which the Task Force has asked to be consulted.

C. Limit and Clearly Define the Role of RECOVER: RECOVER was given no Congressional authority in either WRDA 96 or WRDA 2000 to act as an advisory body on the restoration of the South Florida Ecosystem and/or CERP. Thus, RECOVER's role in § 385.20 is overly broad and often contradictory. If RECOVER will merely be an *interdisciplinary, interagency scientific and technical team*, as stated on 67 FR 50543 at (G), the regulations must clearly limit its role. While the proposed regulations contend that *RECOVER is not a policy making body*, it is clear that RECOVER will provide advice and recommendations to the federal government on important CERP policy issues. If so, RECOVER must either be constituted as an advisory body under the Federal Advisory Committee Act (FACA) or become an advisory body to the Task Force. RECOVER is far too prominent in the proposed regulations and takes on the aura of a quasi-public agency. For instance, RECOVER will screen and conduct performance evaluations of alternatives for Project Implementation reports. Thus, it appears that they will select and recommend which alternatives will be placed in NEPA documents. It also appears that RECOVER will screen, select and recommend the proposed interim goals that will be ultimately placed in the Federal Register.

The Tribe recommends that RECOVER's role be limited and precisely defined in the programmatic regulations, and that they become an advisory body to the Task Force if they are going to be used to provide advice and recommendations to the federal government on the CERP. RECOVER could then provide CERP advice and recommendations to the Task Force for review. The Task Force could then provide advice and recommendations to the Secretary of the Army, as Congress authorized them to do in WRDA 1996. It is important to note that a recent 11th Circuit Court of Appeals decision in Miccosukee Tribe v. Army Corps of Engineers et al, 2002 U.S. App. LEXIS 18486 (11th Cir. 2002), rejected the theory that a seemingly benign purpose, such as Everglades restoration, does not subject an advisory group to FACA. The Corps must be careful not

to set up an illegal advisory group in the programmatic regulations for CERP, because they could later be prevented from relying on its work products should a federal court later find that they did not comply with FACA.

The Tribe recommends that RECOVER become an advisory body to the Task Force, and make recommendations to that body. This would eliminate the FACA issue, and alleviate the Tribe's concern that this committee of federal and non-federal entities will become another Southern Everglades Restoration Alliance (SERA) that will delay important restoration projects and cause further damage to Tribal Everglades.

D. Interim Goals and Performance Measures Should be Subject to Task Force Review:

Interim goals carry significant policy implications and require extensive review. Interim goals and performance measures should receive a thorough public review by the Task Force, as a balanced federal, state, local and Tribal coordinating group. The Task Force must be consulted before decisions are made and placed in the Federal Register, not after as suggested in § 385.38. The danger that subordinate goals will cause deviations from the CERP purpose is great. The Task Force should receive advice and recommendations on interim goals and performance measures for review and adopt and recommend them to the Secretary of the Army. RECOVER, as an advisory body to the Task Force, or other agencies or interested parties as appropriate, may also recommend goals or measures to the Task Force. The Tribe supports the inclusion of general hydrologic goals that have been subject to NEPA review in the programmatic regulations, but believes that the development of most interim goals and performance measures should await review by the Task Force and the public. The programmatic regulations should specify the above role for the Task Force in § 385.38.

The Tribe believes that § 385.38(d)(2) (iii) should not contain *ecological responses* in addition to the water quantity and quality goals. Explicitly establishing these ecological goals, which are hydrologically dependent, will undermine the primary CERP ecosystem approach of *getting the water right*. Additionally, the language which provides that the Secretary of the Army and Secretary of DOI will consider the technical recommendations of RECOVER and then provide the proposed agreement to the public in the Federal Register is another example of the federal government's establishment and use of an advisory team, without complying with the requirements of FACA, and inviting the public in after-the-fact. The Miccosukee Tribe, and the public, should have input to these important Everglades restoration policy decisions while they are being developed and selected, not after the already selected interim goals are placed in the Federal Register.

E. Interim Goals Should Focus Only on Process and Avoid Things that Will Stop

Progress: The Tribe has repeatedly contended that programmatic regulations should establish a process for adopting interim goals and performance measures, but the goals and measures themselves should not be in the regulations. Poorly chosen interim goals and performance measures can have a severe negative impact and divert the effort away from overall restoration toward subordinate, sub-optimal goals promoted by narrow agency or special interest agendas.

The Tribe is pleased to see that the proposed regulations do not contain specific interim goals, but merely define the process for their establishment. The concern remains, however, that the process does include some requirements that have the potential to delay, and even prevent, restoration. Section 385.38, discussed at 67 FR 50547, requires interim goals to be memorialized in an agreement to be signed by the Department of the Army, Department of the Interior, and the State no later than December 31, 2003. Historically, the need for DOI's explicit agreement has proven to be a recipe for stagnation. Similarly, the Tribe believes that § 385.39 should not ignore other water related needs of the region and relegate them to "targets." Relegation of other water related needs to a secondary status will undermine the broad support for CERP, which is essential to its success. Finally, as previously mentioned, the inclusion of ecological responses that are hydrologically dependent in § 385.38 is premature and will undermine the CERP goal of "getting the water right."

F. Define Task Force Role in Scientific Review: Section 385.22 states that the Task Force will have a consultation role in establishing the panel, but that only the Army, DOI, and the State will prepare *agreements, procedures, and guidance*. The programmatic regulations should provide the Task Force the opportunity to assist in preparing *agreements, procedures, and guidance*, since § 528(f)(2)(G) of WRDA 96 provides that the Task Force *shall coordinate scientific and other research associated with the restoration of the South Florida ecosystem*.

G. Limit the Restoration Definition to Hydroperiod and Water Quality: CERP aims to re-establish natural hydroperiod (quantity, location, timing) and water quality. Reestablishment of natural Everglades conditions will follow from hydroperiod and water quality restoration. Interim goals which focus prematurely on assumed biological or ecological characteristics too quickly, threaten to divert and even block hydroperiod and water quality restoration. The track record of Everglades restoration to date contains numerous examples of subordinate, sub-system short-term goals and/or measures overriding the real long-term overall goal of ecosystem-wide restoration.

The language contained in § 385.38, which lists ecological goals that are hydrologically driven as interim goals, should be removed from the programmatic regulations or it will be a major setback for ecosystem restoration. Explicitly establishing ecological goals that are hydrologically dependent responses as interim goals will only serve to undermine the CERP system approach to "getting the water right."

H. Disregard Senate Report Discussion: Courts recognize that legislative *intent* is relevant only if statutory provisions are vague or unclear, and even then such *intent* is looked upon with great reluctance and disfavor. Senate Report 106-362 is an outstanding example of the wisdom of that policy. The Report's recitation of the WRDA provisions relating to the programmatic regulations (WRDA Section 601(h)(3)) properly makes no reference to interim goals and performance measures, as there is no such reference in the bill. However, the Report's *discussion* section says the Corps *should* (adopt such goals) even though there is no mandate or suggestion to do so in the bill. In fact, the negotiated terms of the consensus agreement on the bill by a broad array of parties specifically included the specific exclusion of interim goals in the programmatic regulations. The bill limits the

regulations to process and procedures only. Accordingly, courts and even members of Congress pay little attention to such reports, which contain language that its proponents could not get into the bill. The Corps, should likewise remove all references to Senate Report No. 106-362 in its programmatic regulations that are contained in the Preamble at 67 FR 50544 relating to Project Implementation Reports, 67 FR 50545 relating to adaptive management; 67 FR 50546 relating to new water allocation; and 67 FR 50546 relating to the intent of the Savings clause.

I. Clarify Flood Protection: The language in the programmatic regulations in § 385.37 should ensure that the flood protection provision does not deviate from WRDA 2000 (601)(h)(5)(B), by either expanding or contracting the requirement for flood protection by clarifying that improved flood protection would be permitted when it is not inconsistent with restoration. Language should be added that in preparing the Project Implementation Reports, the Corps and the non-federal sponsor *will consider opportunities to provide flood protection consistent with restoration*. Additionally, the Tribe finds the flood protection language throughout the proposed regulations is very unclear. The Tribe is uncertain what the *level of service* constitutes. This uncertainty will be unsettling to urban and agricultural interests who will want assurances that the authorized level of service at the time of enactment of WRDA 2000 is that either actually being provided by a project, or that authorized to be provided by a project but not yet provided. The language in the proposed regulations appears to be purposely designed to obfuscate this issue.

J. Clarify Procedures for CERP Revisions: The methodology for CERP *updates and revisions* should be clarified in the programmatic regulations in § 385.32 concerning the Comprehensive Plan Modification Report. RECOVER has no authority to implement updates and revisions. RECOVER recommendations on such updates and revisions should be made to the Task Force, as its advisory body. The programmatic regulations should clarify that CERP updates and changes must follow normal procedures, including public comment and NEPA review, and that changes to CERP may only be adopted by Congress. The Tribe is concerned that the *minor change* language will be used as a loophole to avoid NEPA. The Tribe suggests that the *minor change* language be deleted and replaced with language that each modification will be analyzed on a case by case basis. The modification process should also include consultation with the Miccosukee Tribe of Indians, who live in the Florida Everglades and are directly impacted by such changes.

K. The Pre-CERP Baseline and Adaptive Management: The Tribe is concerned that the language in § 385.35 on establishing a pre-CERP baseline could be based on an unlawful deviation from the water control plan, such as the Interim Structural and Operational Plan (ISOP 2000), which actually reduced flood protection for certain areas of Miami-Dade County. Similarly, the definition of adaptive management set forth in § 385.31 should be clearly limited to the uncertainties of ecological responses in the natural system and should not be used for flood control, as is currently being done in the Interim Operations Plan (IOP). The public health and safety, including the health and safety of the Tribe, must not be compromised by using adaptive management in the day to day operations of the Central & South Florida project. Support for Everglades restoration will evaporate if the public perceives that their flood protection could be negatively and adversely impacted by adaptive management. The programmatic regulations must clearly state that adaptive management

applies to the restoration of the natural system.

L. Further Clarify and Strengthen Tribal Consultation: The Tribe is pleased that the consultation requirements in the proposed regulations have been strengthened since the initial draft, but believe that the language needs to be further strengthened. The Tribal consultation provisions should recognize that Tribal consultation should be conducted on a *government-to-government basis*. The regulations should also recognize the Tribe's role as promulgator and enforcer of its own water quality standards for its federal reservation lands in the Everglades Protection Area and the need to consult on CERP actions that could impact those water quality standards. The language contained in § 385.6 should also contain language which defines timely and meaningful consultation as having input on decisions before they are made. The programmatic regulations should also contain language on the general trust responsibility of the federal agencies and should not be limited to one Executive Order. Finally, a definition of *trust responsibility* and *government to government relationship* should be added to the definitions in § 385.3.

Sincerely,



Dexter W. Lehtinen
Special Assistant for the Everglades to the
Miccosukee Tribe of Indians of Florida