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# Department of Environmental Protection

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David B. Struhs  
Secretary

September 27, 2002

Mr. Stuart Appelbaum  
U.S. Army Corps of Engineers  
P.O. Box 4970, CESAJ-DR-R  
Jacksonville, FL 32232-0019

**SUBJECT: State of Florida Comments on Draft Programmatic Regulations**

Dear Mr. Appelbaum:

On behalf of the State of Florida, I am happy to provide comments on the draft Programmatic Regulations for the Comprehensive Everglades Restoration Plan. These regulations are an important step in the collaborative effort to implement the Restoration Plan in the most timely and cost-effective manner.

As I stated in my testimony to the United States Senate's Environment and Public Works Committee, our goal is to ensure that CERP implementation is a fully collaborative effort. The Water Resources Development Act of 2000 (WRDA 2000) clearly lays out the expectations for this cooperation in decision making. It also wisely vests ultimate responsibility and accountability with a single agent for each of the partners, the United States and the State of Florida.

The procedural regulations developed by the U.S. Army Corps of Engineers create workable rules for how the partnership will make decisions. Some of the additional steps the Corps has included in the rule were not anticipated by WRDA 2000. Examples include requiring the concurrence of two different federal agencies on six different guidance memoranda, and memorializing a predominant role for the federal agencies over other interests in the RECOVER program. Yet I support the rule as proposed.

I do, however, urge that the Corps make no additional changes that would move the procedural regulations further away from the requirements of the carefully balanced and well-considered WRDA 2000 statute.

The comments provided as an attachment to this letter are consistent with the intent of WRDA 2000 and will make for an improved set of regulations to help direct CERP implementation.

*"More Protection, Less Process"*

*Printed on recycled paper.*

Mr. Stuart Appelbaum  
U.S. Army Corps of Engineers  
September 25, 2002  
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I look forward to the opportunity to review the final draft prior to publication, and I am hopeful that the State of Florida will be able to concur on these regulations.

If you have any questions regarding these suggested modifications to the draft regulations, please contact Ernie Barnett at 850/245-2088.

Sincerely,

A handwritten signature in black ink, appearing to read "David B. Struhs". The signature is fluid and cursive, with a large initial "D" and a long horizontal stroke at the end.

David B. Struhs  
Secretary

DBS/jlf

Enclosure

Cc: Henry Dean, SFWMD

## State of Florida Comments on DRAFT Programmatic Regulations

### **Section 385.3 Definitions.**

Reword as follows:

Water made available means water generated pursuant to the implementation of each project in the Plan in accordance with the project implementation report for that project and consistent with the Plan. ~~The components of the Plan and operation of the C&SF Project over and above water that was available on the date of enactment of WRDA 2000.~~

**Justification:** The definition for “water made available” should be amended to make consistent with Section 601(h)(2)(A) of WRDA 2000 regarding the assurances by the State to reserve water made available by each CERP project under the Governor's and President's Agreement. The definition in the draft of the Programmatic Regulations is too broad and would include any change to the C&SF Project which is beyond the scope of WRDA 2000 and these regulations.

### **Section 385.20 Restoration Coordination and Verification (RECOVER).**

Reword as follows:

- (e) RECOVER shall perform assessment, evaluation and planning functions, including, but not limited to:

Assessment Functions: In accordance with 385.31(b)(c), RECOVER shall conduct credible scientific assessments of hydrological, water quality, biological, ecological, and water supply responses to the Plan. The Corps of Engineers and South Florida Water Management District will assure that these assessments are open and independent processes that incorporate the best available science, and that the results are provided for peer review when appropriate and are made fully available for public review and comment.

1. developing assessment performance measures for achieving the system-wide goals and purposes of the Plan;
2. developing and implementing a monitoring plan to support the adaptive management program;
3. conducting assessment activities as part of the adaptive management program to assess the actual performance of the Plan;
4. developing and refining conceptual and predictive models and tools in support of the integration of new science into the adaptive management program;
5. developing recommendations for interim goals pursuant to 385.38;
6. assessing progress towards meeting the interim goals established pursuant to 385.38;
7. developing recommendations for targets for assessing progress in achieving other water-related needs of the region as provided for in the Plan pursuant to 385.39;

8. assessing progress towards achieving other water-related needs of the region as provided for in the Plan pursuant to 385.39;
9. reviewing and synthesizing new information and science that could have an effect on the Plan;
10. cooperating with the independent scientific review panel constituted pursuant to 385.39.

**Evaluation Functions:** In accordance with 385.26(c), RECOVER shall assist Project Delivery Teams in ensuring that project design and performance is fully linked to the system-wide goals and purposes of the Plan and to incorporate, as appropriate, information developed for Project Implementation Reports into the Plan.

11. developing evaluation performance measures for achieving the system-wide goals and purposes of the Plan;
12. conducting evaluations of alternatives developed for the Project Implementation Report in achieving the system-wide goals and purposes of the Plan;
13. conducting analyses associated with the preparation of the Master Implementation Sequencing Plan;
14. developing and refining evaluation predictive models and tools in support of the evaluation of alternate plans developed by the Project Delivery Teams.

**Planning Functions:** In accordance with 385.31(c) (Adaptive Management Program) and 385.32 (Comprehensive Plan Modification Report), RECOVER shall develop and implement an overall Adaptive Management Program as a basis for identifying opportunities for improving the performance of the Plan. Information on opportunities for improving the performance of the Plan shall be transmitted to the Corps of Engineers and South Florida Water Management District, which shall ensure that these activities comply with the requirements of NEPA.

15. developing refinements and improvements in the design or operation of the Plan during all phases of implementation;
16. conducting activities associated with preparation of Comprehensive Plan Modification Reports;
17. conducting activities associated with the preparation of Operating Manuals;
18. preparing technical information to be used in the development of the periodic reports to Congress prepared in accordance with 385.40.

- (f) RECOVER shall provide technical support to the Corps of Engineers and South Florida Water Management District as needed.
- (g) In carrying out its responsibilities, RECOVER shall consider projects that are not part of the Plan, but could affect the ability of the Plan to achieve its goals and purposes.
- (h) As appropriate, the Corps of Engineers and the South Florida Water Management District shall consider seeking independent scientific review or other similar assistance to RECOVER in carrying out its responsibilities, including review of documents developed by RECOVER.

**Justification:** Proposed reorganization of the text to arrange the tasks according to the three missions of RECOVER (assessment, evaluation & planning), showing that there are different protocols to be followed by RECOVER in implementing the three missions.

## **Section 385.26 Project Implementation Reports**

Reword (b)(1)(iii)Interim Project Assessment as follows:

“The guidance memorandum shall include a process for evaluation of the selected alternative as the next added increment of the Plan for the purposes of impact assessment, identifying the water to be reserved for the natural system, determining if the alternative developed for the Project Implementation Report will function without regard to projects not yet approved, and in assisting in the development of interim operational strategies.”

**Justification:** This modification is needed for a number of reasons. First, the Comprehensive Everglades Restoration Plan was formulated and justified on a system-wide basis. The plan was approved as the framework for restoration, therefore, future formulation in support of implementing the plan should be consistent with the approval provided by Congress. Justifying projects on both the system-wide basis and on the next added incremental basis will require a significant amount of additional work for each project implementation report with little to no additional benefit derived from the process. Second, evaluation of project performance should be based on system-wide performance measures instead of interim goals and targets. Interim goals and targets are intended to be assessment tools to measure the actual on the ground affects stemming from the implementation of CERP projects. In addition, interim goals are expected to include biological and ecological indicators that cannot be evaluated using models that currently exist.

Reword (b)(iv)Identification of the Selected Alternative as follows:

“The guidance memorandum shall also include a process for identification of the selected alternative, based on the analyses conducted in paragraph (b)(1)(ii) of this section. This alternative should be justified based on the project’s contributions to the system-wide goals and purposes of the Plan. The Guidance Memorandum shall also include an evaluation of the selected alternative as the last added increment of the Plan to determine the incremental benefits and costs of the project in terms of how it contributes to achievement of the system-wide goals and purposes of the Plan. This analysis should also identify the extent to which benefits are dependent on other components of the Plan, and note any benefits that will also be included in the last added increment analysis for other projects. The PROJECT IMPLEMENTATION REPORT should also include an identification of the water to be reserved for the natural system, based on the next added increment analysis.”

**Justification:** This change is needed to make the identification of the selected alternative consistent with the formulation process used to develop the C&SF Project Comprehensive Review Study submitted to Congress in July 1999 and subsequently approved by Congress as the framework for modifications and operational changes to C&SF Project 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. This methodology is also consistent with that used for the development of the South Florida Water Management District’s Lower East Coast Regional Water Supply.

Modify (c) RECOVER Performance Evaluation of Alternatives for a Project Implementation Report as follows:

(1) delete

(2) & (3) move to (b) (above) as (v) and (vi) and modify as follows:

(b)(v) RECOVER shall evaluate the system-wide performance of alternatives developed for the Project Implementation Report towards achieving the goals and purposes of the Plan as required in (ii) above and to assess system-wide interim impacts of the alternatives as the next-added increment as required in (iii).

(b)(vi) RECOVER shall prepare information for the Project Delivery Team describing the results of the evaluations of alternatives developed for the Project Implementation Reports towards achieving the goals and purposes of the Plan and assessment of system-wide interim impacts, including as appropriate, recommendations and suggestions for improving the performance of the alternatives.

**Justification:** The guidance memorandum required in 385.26 (b)(i) of this section will contain the requirements for the performance evaluation of alternative for a Project Implementation Report by RECOVER making this guidance memorandum redundant. The requirements for the RECOVER evaluations will be integrated into the guidance memorandum described in 385.26 (b)(i).

### **Section 385.30 Master Implementation Sequencing Plan:**

Modify (a)(1) as follows:

“Projects shall be sequenced and scheduled to maximize the achievement of the goals and purposes of the Plan at the earliest possible time and in the most cost-effective way, including the achievement of the interim goals established pursuant to §385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant §385.39, consistent with §385.36 and §385.37 and to the extent practical given funding, engineering, and other constraints.”

Modify (b) as follows:

Insert- (5) Consistent with 385.36 and 385.37.

**Justification:** The Master Implementation Sequencing Plan must take into consideration the WRDA 2000 Savings Clause as described in the draft Programmatic Regulations.

### **Section 385.35 Achievement of Benefits of the Plan**

Modify (a)(1) as follows:

Not later than June 30, 2003, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop the pre-CERP baseline ~~to determine the quantity, quality, timing, and distribution of water delivered by the existing Central and Southern Florida Project prior to the date of enactment of section 601 of WRDA 2000.~~ In developing the pre-CERP baseline, the Corps of Engineers and the South Florida Water Management District shall use a method that is consistent with the guidance memorandum approved in accordance with paragraph (b)(2) of this section.

Modify (a)(2) as follows:

~~Within 180 days from the development of the pre-CERP baseline, or December 31, 2003.~~ Within 60 days from the development of the pre-CERP baseline, or August 29, 2003

**Justification:** The information from the pre-CERP baseline is critical information needed by project delivery teams for developing project implementation reports. It is important to have the pre-CERP baseline established as soon as possible to avoid delaying the development and implementation of projects. A narrow list of issues has been identified with regard to the pre-CERP baseline and the issues are now being actively vetted through the SFWMD's Water Resources Advisory Commission. The Corps of Engineers, SFWMD, and Department of Interior are all actively engaged in this process, therefore, rapid concurrence should be attainable. The definition following pre-CERP baseline should be deleted because pre-CERP baseline has been previously defined in 385.3.

Replace (a)(3) as follows:

In preparing a Project Implementation Report, the Corps of Engineers and the South Florida Water Management District shall determine and consider any change in availability of pre-CERP baseline water and previously reserved water in identifying whether additional quantity, timing, and distribution of water should be made available in the Project Implementation Report, by subsequent projects or recommending preparation of a Comprehensive Plan Modification Report as described in 385.32. The Project Implementation Report will also determine whether improvements in water quality are needed in order to ensure that water delivered to the natural system meets applicable water quality standards. Additionally, the Project Implementation Report will consider whether to recommend that the State of Florida and its agencies re-examine the reservation or allocation of water made pursuant to State law in order to provide for restoration of the natural system consistent with the Plan. In preparing a Project Implementation Report, the concurrence provisions of paragraph (a)(2) of this section shall not apply to a determination of whether the pre-CERP baseline is still available.

**Justification:** This section needs to clearly identify the options available to the Corps of Engineers and South Florida Water Management District if there is a change in availability of pre-CERP baseline water. In addition, necessary water quality improvements cannot be deferred to another project or a Comprehensive Plan Modification Report as proposed in the draft regulations.

### **Section 385.38 Interim Goals**

Modify (c) as follows:

(c) Process for Establishing Interim Goals.

(1) In developing proposed goals for inclusion in the Interim Goals Agreement, the Secretary, the Secretary of the Interior, and the Governor, shall be provided with, and consider, the technical recommendations of RECOVER and any modifications to those recommendations by the Corps of Engineers or the South Florida Water Management District. These recommendations shall be provided no later than ~~June~~ October 31, 2003. Thereafter, the Secretary, the Secretary of the Interior, and the Governor shall provide a notice of availability of the proposed agreement to the public in the Federal Register, seek public comments, and consult with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. After considering comments of the public and consulted agencies on the proposed agreement, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary, the Secretary of the Interior, and the Governor, shall execute the final agreement, and provide a notice of availability to the public in the Federal Register by no later than December 31, 2003.

**Justification:** The development of Interim Goals is dependent upon the establishment of the pre-CERP baseline as well as the updated Master Implementation Sequencing Plan that must take into consideration the Saving Clause as required by WRDA 2000 and these draft Programmatic Regulations. Due to these complex inter-relationships, it is more practical for the draft Interim Goals to be identified by October 2003, however, the Interim Goals will be jointly developed through the RECOVER process that actively involves the Corps of Engineers, SFWMD, and the Department of Interior. Therefore, the time required to reach agreement on the Interim Goals Agreement can be expedited.

## **Section 385.39 Evaluating Progress on Achieving Other Water Related Needs of the Region**

Modify (b) Process for Establishing Targets, as follows:

(1) Not later than ~~June 30~~ October 31, 2003 RECOVER shall develop recommendations on targets to evaluate progress on achieving the other water-related needs of the region, for consideration by the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in establishing targets for evaluating progress towards achieving other water-related needs of the region provided for in the Plan. These targets shall be established by the Corps of Engineers and the South Florida Water Management District by December 30, 2003. Targets for evaluating progress towards achieving other water-related needs of the region provided for in the Plan are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not intended to be standards or schedules enforceable in court.

**Justification:** Same as for interim goals agreement