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August 18, 2008

U.S. Army Corps of Engineers
Attention: Stu Appelbaum
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By Electronic Mail

**RE: Scoping Comments for the Review and Revision of the Programmatic
Regulations for the Comprehensive Everglades Restoration Plan**

Dear Mr. Appelbaum:

The Programmatic Regulations are at the center of the Water Resources Development Act of 2000 (WRDA 2000)'s system of assurances designed to guarantee that the restoration goals and purposes of the Comprehensive Everglades Restoration Plan (CERP) are realized. The intent of the Programmatic Regulations is threefold: 1) to address the process for developing Project Implementation Reports (PIR), Project Cooperation Agreements (PCA) and Operating Manuals; 2) to ensure that new scientific, technical or otherwise relevant information is integrated into the implementation of the Plan and 3) to ensure protection of the natural system consistent with the goals and purposes of the Plan¹. Essentially, the Programmatic Regulations are the blueprint for carrying out the nuts and bolts of Everglades restoration in order to safeguard the federal interest in restoration².

We recognize the import of the Programmatic Regulations and we would like to take this opportunity to identify the relevant issues that merit attention as the U.S. Army Corps of Engineers (Corps) begins its first five-year review and revision of this critical document. We also ask that during its review of the Programmatic Regulations, the Corps consider the issues raised in the previous comment letters from the environmental community on the development of the initial Programmatic Regulations, the Interim Goals and the Guidance Memoranda.

¹ WRDA 2000 Section 601(h)(3)(C)(i)

² Senate Report 106-363 "Restoring the Everglades, An American Legacy Act; Report of the Committee on Environment and Public Works United States Senate together with Minority Views to accompany S.2797" states: "The predominant federal interest in this bill is the restoration of the South Florida ecosystem."

PROGRAMMATIC REGULATIONS COMMENTS

In general, the challenge in revising the Programmatic Regulations is to provide enough specificity to ensure transparency and accountability, especially on the part of the implementing agencies, but to also provide enough flexibility where needed so as to avoid mirroring CERP implementation in unnecessary process. The following are specific issues that should be considered as the Corps moves forward with its review, many of which are the same or similar to issues and concerns raised by the environmental community in previous comment letters about the Programmatic Regulations:

Issue 1: Weak Restoration Standards for Natural System - Current Interim Goals Do Not Ensure Adequate Benchmarks for Ecosystem Restoration

WRDA 2000 and Congress identified the Interim Goals as a critical evaluation tool for measuring Everglades restoration success and for safeguarding the federal interest (ensuring natural system restoration) in this project³. We recommend that the Programmatic Regulations be revised to include the Interim Goals and to clarify their role: as quantitative desired levels of ecological performance intended to drive the project design and implementation process of CERP and advance total system restoration. Robust Interim Goals will enable CERP implementing agencies to focus more on natural system restoration and less on process.

As a key assurance for the natural system, the Interim Goals have failed to be developed and implemented according to the intent of WRDA 2000 and Congress. In their current form, the Interim Goals fail to guide restoration as directed by WRDA 2000 and disregard the directives set out in the Programmatic Regulations. To date, the Interim Goals remain qualitative and vague measures when, for example, the Programmatic Regulations specifically state that they should be quantitative, science-based restoration benchmarks that will “identify improvements in quantity, quality, timing and distribution of water for the natural system provided by the Plan...” (§385.38 (c)(1)).

Because the Interim Goals remain incomplete there is a resulting void in the overall vision for CERP and a lack of direction for restoration. Because this key evaluation tool to assist Congress, agency managers and the State of Florida is missing⁴, the Programmatic Regulations’ requirements regarding project formulation and adaptive management cannot be adequately complied with. Without a robust, quantitative and complete set of Interim Goals, Project Delivery Teams (PDT) lack guidance on how to evaluate project contributions to total ecosystem restoration in PIRs (and are often required to set project performance goals

³ WRDA 2000 states that the purpose of the interim goals is: “to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process (Section 601(h)(3)(C)(i)(III)).” Further, Senate Report 106-363 “*Restoring the Everglades, An American Legacy Act; Report of the Committee on Environment and Public Works United States Senate together with Minority Views to accompany S.2797*” states: “The predominant federal interest in this bill is the restoration of the South Florida ecosystem.”

⁴ The Programmatic Regulations specify the purpose of the interim goals, stating: “Interim goals are a means by which the Plan may be evaluated at specific points by agency managers, the State and Congress throughout the overall planning and implementation process.” §385.38 (b)(1).

independently without overarching guidance). With incomplete Interim Goals, it also remains unclear to PDTs and other important stakeholders how to best configure projects and take advantage of new opportunities to fulfill the goals and purposes of CERP and maximize natural system benefit.

Meaningful Interim Goals are essential to drive adaptive management, advance restoration progress and ensure that agencies are accountable for realizing the federal interest in this project – ecosystem restoration and its concomitant environmental benefits for public lands. Interim Goals are a cornerstone of both WRDA and the Programmatic Regulations – without this assurance properly in place the Programmatic Regulations cannot be fully executed “to ensure that the goals and purposes of the Plan are achieved (WRDA Section 601(h)(3)(A)).”

The Programmatic Regulations should clarify the purpose and importance of the Interim Goals. The initial Programmatic Regulations were unclear as to whether the Interim Goals should be based on performance predictions for Yellowbook (Scenario D-13R) implementation or whether they should be benchmarks marking the trajectory towards a desired future vision for the ecosystem. The revised Programmatic Regulations should specify that the Interim Goals are meant to represent the desired future vision for the ecosystem and recognize that successful restoration goes beyond the implementation of the Yellowbook.

The specific language in the Programmatic Regulations should be strengthened to position the Interim Goals to drive the project design and implementation process in CERP. In their current form, the Programmatic Regulations diminish the importance of the Interim Goals setting them on equal footing with the Interim Targets, *which were not mandated by WRDA 2000*. Additionally, a stakeholder process should be pursued by the Corps, the South Florida Water Management District (SFWMD) and the Department of the Interior (DOI) to revise the Interim Goals to produce quantitative science-based desired levels of ecological performance to guide and evaluate restoration. Finally, the Interim Goals should be incorporated into the Programmatic Regulations, as required by WRDA 2000, in order to provide the necessary roadmap for restoration.

Issue 2: Important Restoration Guidance Is Deferred to the Guidance Memoranda, Which Are Not the Appropriate Legal or Regulatory Vehicle to Implement Everglades Restoration

The Programmatic Regulations have failed to effectively and efficiently guide Everglades restoration primarily because they are incomplete. The Programmatic Regulations have deferred the majority of the standards and criteria for agency action that Congress intended to be in the regulations (for the purpose of ensuring natural system restoration) to the Guidance Memoranda. These Guidance Memoranda should be finalized and the policies and procedures on CERP implementation in the Guidance Memoranda should be incorporated into the new version of the Programmatic Regulations.

To date, the key Guidance Memoranda remain in draft form. This situation has resulted in eight years without an adequately-defined process for restoration. Because the required process for restoration is not in the Programmatic Regulations, the regulations fail to safeguard the

federal interest (and investment by American taxpayers) in the ecosystem restoration of the federal lands in the South Florida ecosystem. The Programmatic Regulations need to be revised to include specific language to ensure a clearly and legally defined process for restoration to which agencies responsible for carrying out restoration can be held accountable. This revision of the Programmatic Regulations should fold the Guidance Memoranda into the Programmatic Regulations to produce one document that includes all CERP implementation guidance and requirements intended by WRDA 2000⁵.

As it currently stands, locating the majority of the standards for the implementation of CERP in the Guidance Memoranda creates an unnecessary and cumbersome “process within a process.” This structure has resulted in delays in project formulation and implementation due to ambiguous and disjointed guidance. Different draft iterations of the Guidance Memoranda resulted in shifting guidelines for PIR development. Further, the separation of the Guidance Memoranda from the Programmatic Regulations creates a regulatory structure confusing to those implementing CERP and to the public. The lack of final Guidance Memoranda thrusts significant decisions about how to move CERP forward into the hands of the PDTs, decisions that the PDTs were not intended to make⁶. Finally, this approach removes the most important CERP standards, requirements and guidance from the purview of federal regulations and from the concurrency process for the State of Florida and the Department of Interior, as well as from the five-year review and revision cycle required for the Programmatic Regulations⁷.

Issue 3: The Next-Added Increment Analysis is Inappropriately Relied on for Project Analysis Given the Ecosystem Restoration Goals and Objectives of CERP.

With its focus on the need to justify individual restoration projects in isolation, the current form of Next-Added Increment (NAI) analysis runs counter to the ecosystem-wide restoration goals and objectives of CERP and is often a roadblock to important restoration projects. The NAI as currently relied upon should be removed entirely from the Programmatic Regulations and CERP or, if necessary, changed significantly from its current form. Other solutions for ensuring restoration success could be adopted, such as project bundling.

Many of the critical restoration projects that would make needed water available to the natural system do not show benefit on their own when the current NAI analysis is used. Single projects often do not result in ecosystem response because CERP was designed as an integrated ecological restoration program in which projects would work together to yield maximum ecosystem benefit. For example, only together will the Decompartmentalization and the

⁵ Section 601(h)(3)A) of WRDA 2000 requires the Programmatic Regulations themselves “to ensure that the goals and purposes of the Plan are achieved”; it does not provide for the development of Guidance Memoranda, at least as guidance memoranda as they are currently being used. We note that the current Programmatic Regulations, state in §385.5 (b)(6) that “[t]he the Secretary of the Army shall consider incorporating into the regulations of this part the Guidance Memoranda specifically referenced in this section during future reviews and regulations of this part.”

⁶ WRDA 2000 clearly identifies the Programmatic Regulations as the vehicle for outlining the process for the development of project implementation reports, and more generally, CERP implementation (see Section 601(h)(3)(C)(i)).

⁷ The Guidance Memoranda only have to be revised “whenever the Secretary of the Army believes it is necessary” §385.5 (c)

Everglades National Park Seepage Management projects result in an adequate ecosystem response.

Therefore, the NAI analysis in its current form should be eliminated, and, if necessary, replaced with a methodology more sensitive to the particularities of Everglades restoration project design and implementation. One potential replacement methodology apparently under discussion is project bundling. Project bundling entails combining individual projects into project packages essential for the restoration of a certain part of the Everglades ecosystem; each such package would be implemented in phases. We do not support the proposed alternative to the current NAI that suggests that CERP projects be justified using a form of NAI analysis that solely examines a project's ability to efficiently generate the water storage envisioned in the Yellowbook. We are troubled by the narrow focus of such an approach. Any approach to project justification must go beyond Yellowbook project configurations and water storage volumes as well as address how water storage will be allocated. In short, whatever form NAI analysis takes, it should focus on ensuring that individual projects are being best designed (and implemented) to provide progress toward restoration goals.⁸

Issue 4: The Programmatic Regulations Need to Provide Stronger Assurances for the Protection of the Natural System

The language, standards, and requirements of the current Programmatic Regulations do not provide specific and adequate guidance with regard to water reservations for the natural system or implementing the Savings Clause. Additional explicatory language should be incorporated.

The Programmatic Regulations need to meaningfully address the effects of non-CERP intervening events on water available for the natural system since the passage of WRDA 2000. To this end, the pre-CERP baseline should be used to verify that water will indeed be available at the time a PIR is completed. If water will not be available, the Programmatic Regulations should provide a process for how water that has been made unavailable will be recovered for the purposes of the PIR in question.

Further, the Regulations should clarify what is needed to identify and protect the water that a CERP project will make available to the natural system over its lifetime. This should include an identification of project water made available for the natural system that looks not just at general volume and probability curves but also at the water the project would make available in wet and dry seasons and wet and dry years. If a project is planned to have a phased implementation, with its ability to provide significant environmental benefits depending in part on the later implementation of other projects, the regulations must provide a process to assure that the water that is anticipated eventually to be made available by the project can in fact be made available to the Everglades once the other projects are online. To that end, the Programmatic Regulations should clarify the process and timeline for any revisions to adopted water reservations for the natural system.

⁸ See Section 601(f)(2) that specifies that "activities" carried out pursuant to Section 601 can move ahead if they "are justified by the environmental benefits derived by the South Florida ecosystem" and are "cost effective."

In relation to the Savings Clause, an unambiguous set of standards, requirements and guidance needs to be provided in the Programmatic Regulations as to how to determine Savings Clause violations and how to resolve such violations. In addition, the intent of the Savings Clause to prevent adverse effects to the natural system should be plainly recognized in the Programmatic Regulations.

Issue 5: RECOVER's Role

Successful Everglades restoration is predicated upon an effective science synthesis body that can organize, communicate and apply the best collective science in support of restoration planning, implementation and assessment. As originally envisioned, the multi-agency and tribal government RECOVER science team was specifically created to serve this role. However, in recent years RECOVER has been underfunded, under-attended and often lacked the appropriate avenues to effectively convey important science messages to senior managers in CERP. RECOVER should be given the resources and support it needs to be an effective, well-equipped and well-led team that can highlight significant science questions and clarify scientific uncertainty for restoration policymakers/managers/planners. Its leadership and structure should also replicate the tripartite nature of the Programmatic regulations, incorporating equal roles for the Corps, the State of Florida, and the Department of Interior. To this effect, the Programmatic Regulations should be revised to strengthen and clarify the role of RECOVER as it relates to the planning, implementation and assessment of CERP. How RECOVER interfaces with key policy coordination and stakeholder groups should be reconsidered as part of the Programmatic Regulations revision to ensure that RECOVER (and science) can successfully inform and shape restoration planning and policy.

To manage scientific uncertainty, there is a clear need for RECOVER to produce a series of consensus statements on important science issues (to function similar to Intergovernmental Panel on Climate Change but for Everglades Restoration) at specific time intervals throughout Restoration. This function for RECOVER should also be built into the Programmatic Regulations language.

Issue 6: Project Evaluation Methodology of Alternatives

There is a need to rethink the project evaluation methodology for CERP and set out this new process in the Programmatic Regulations. An overly narrow definition of cost effectiveness is built into the current project evaluation process. Instead, environmental valuation should be factored into project cost/benefit analysis as the value of many ecosystem services and benefits falls outside the realm of traditional economic analyses.

We also supports the findings of the 2006 National Academy of Sciences Committee on Independent Scientific Review of Everglades Restoration Progress Report, which points to ambiguities in the current project evaluation process that need to be remedied:

“Ambiguities in the rules governing the current planning process may be a barrier to timely completion of the PIRs and to the execution of an effective adaptive management program. For example, each PIR project team

must justify any investment using monetary and nonmonetary benefits, but it is not clear what these benefits may include. The regulations offer no specific instruction on how to measure such benefits, except to say that benefit measures should be able to be assessed and predicted and should be consistent with performance measures used to develop CERP interim goals and interim targets. A systematic approach to analyze the costs and benefits across multiple projects in support of plan formulation is notably lacking in the project planning process...”⁹

The Programmatic Regulations should be modified to include language that would clarify how to measure and assess project benefits.

Finally, as discussed above regarding the NAI analysis, the use of habitat units in the evaluation of project alternatives may not be an accurate measure of how much ecosystem restoration will be achieved. This procedure is built from only a minimal amount of information about the ecosystem and often does not yield reliable results. It has also been a roadblock to projects important for making water available to the natural system (“getting the water right.”) because hydrologic benefits do not necessarily translate into habitat units. We feel the Corps should reconsider the use of habitat units as the principal evaluation tool for measuring the ecological benefit of project alternatives and explore a new methodology that can more precisely account for ecosystem response.

Issue 7: Stronger Role for the DOI in CERP Implementation Needed

In WRDA 2000, Congress conveyed its intent that DOI be on equal footing with the State of Florida and the Corps in CERP implementation; for example, WRDA 2000 gave the DOI, as well as the State of Florida, a *concurrency role* in development of the Programmatic Regulations.

Because DOI is the federal steward of and the scientific expert on the management of the federal lands in the South Florida ecosystem, DOI is best positioned to represent the federal interest – the restoration of the federal lands in the South Florida ecosystem – in Everglades restoration. The Programmatic Regulations should recognize the tripartite nature of CERP implementation between the State, the Corps and the DOI in all its major components. Specifically, the Regulations should identify the DOI as a co-chair of RECOVER and establish DOI’s leadership role on the Quality Review Board.

Summary: Revisions to the Programmatic Regulations Need to Bring the Regulations Back into Accordance with the Intent and Purpose Specified by Congress in WRDA 2000.

⁹ Committee on Independent Scientific Review of Everglades Restoration Progress, National Research Council, National Academy of Sciences. 2006. *Progress Toward Restoring the Everglades: The First Biennial Review*. Washington, D.C.: p. 75

GENERAL COMMENTS

This first five-year review and revision of the Programmatic Regulations provides the opportunity to analyze and rethink the larger-scale policies, intents and processes that define Everglades restoration.

When reconsidering how to carry out effective Everglades restoration, it is fundamental to recognize that environmental restoration programs are unique and that each restoration project is unique to its ecosystem. The Corps should consider grounding all relevant federal rulemaking and processes for executing environmental restoration in this premise. Successful restoration projects require a new governance paradigm.

Process Concerns

The Corps remains an infrastructure-construction agency and retains policies and procedures linked to this mission, even for ecosystem restoration projects. This role poses difficulties to ecosystem-specific restoration. The Corps policies and procedures related to infrastructure implementation are not always relevant to Everglades restoration and often slow it down. Additionally, if the federal government is going to utilize Everglades restoration as a role model for other restoration activities, then the Corps' activities here will be repeated and scrutinized, as is already happening.

Layering the Programmatic Regulations on existing Corps requirements, *i.e.* appending a restoration process to a fundamentally infrastructure-focused process, has not worked and is inefficient for ecological restoration. For example, the current policies and procedures for Corps project development required the Corps to spend approximately six months preparing for a briefing to agency headquarters in Atlanta and Washington D.C. to present project alternatives for the C-111 Spreader Canal CERP project (C-111). Initially, the Corps and the State of Florida (through the SFWMD) both were considering a set of alternatives. The SFWMD was able to receive stakeholder input and reformulate the project alternatives to create a workable Tentatively Selected Plan while the Corps was unable to integrate this new information until after the aforementioned briefing. Such an example is illustrative of how the Corps often cannot be responsive to changing project circumstances because of cumbersome and often irrelevant policies and procedures.

Instead, it is necessary to consider rewriting and/or reformatting the policies and procedures for the Corps to follow when conducting environmental restoration projects. Due to numerous Corps process difficulties, WRDA 2007 specifically directed the Corps to review its Principles and Guidelines. We support revising the federal Principles and Guidelines and advocate that this revision adjust Corps policies and procedures to recognize the unique nature of ecosystem restoration projects and the partnerships being used to implement such projects. In addition, federal legislation and agency regulations/guidance focused on creating project formulation and design policies and procedures specific to restoration projects, such as the passage of a Water Resources Restoration Act, legislation proposed by former Senator Bob Graham, would further facilitate this effort. Finally, in reference to CERP, another possible solution could be to tailor a specific single set of regulations/guidance, such as the Programmatic Regulations, to

thoroughly address how to conduct Everglades restoration and have this serve as the sole implementation manual for the Corps and other executing agencies.

Stakeholder Input

There are concerns that the current channels for stakeholder input in Everglades restoration decision-making are ineffective. It is critical to create a process that enables more meaningful and collaborative stakeholder involvement in restoration activities. As a key facet of restoration implementation, this topic should be reconsidered and measures taken by the Corps, the State of Florida and the DOI to enhance lucid communication between planning, policy, science and stakeholders.

This topic is particularly relevant and important given that it was addressed in both the National Academy of Sciences' first Biennial Review of Everglades Restoration and as a Programmatic Topic under the area of Restoration Policy and Planning at this year's Greater Everglades Ecosystem Restoration (GEER) Conference.

Rethinking Agency Roles

Given experience to date and the long-term and comprehensive nature of CERP, it is important to recognize that a 50/50 division of responsibility on the development of specific projects between the Corps and the SFWMD is not always appropriate. The Corps and the SFWMD do not always share the same agency objectives and policies or skills and abilities. Instead, a division of responsibility that recognizes the attributes of each agency, the nature of specific projects, and allows different agencies to take the lead on specific CERP projects, depending on the technical and logistical dynamics, could be considered. In addition, the DOI and other agencies, when appropriate, should be given the opportunity to lead or act as the co-lead on Everglades restoration projects. What is important is that the project design and implementation process allow flexible ways for federal, state and local parties to work together to move projects forward in a manner that does not result in repeated delays in project implementation but which provides – not short-circuits -- the assurances required by Congress in WRDA 2000 to ensure that CERP projects will affect a significant degree of Everglades restoration.

Successful Restoration Hinges on More than the Programmatic Regulations

Other critical components to successful restoration include strong, effective and dedicated leadership and a commitment to natural system restoration by policymakers and by key CERP implementation and advisory bodies; a strong commitment to funding Everglades restoration; ensuring that CERP's restoration benefits are not undermined by new water supply or flood protection benefits; an effective and expedient means of dispute resolution; opportunities for effective stakeholder input; and a desire on the part of stakeholders to come together to work towards a consensus-based restoration endgame.

We appreciate the opportunity to provide these scoping comments and look forward to engaging in further dialogue with the U.S. Army Corps of Engineers as the review and revision of the CERP Programmatic Regulations progresses.

Sincerely,

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