

LEWIS, LONGMAN & WALKER, P.A.  
ATTORNEYS AT LAW

August 22, 2008

U.S. Army Corps of Engineers  
ATTN: Stuart Appelbaum  
P.O. Box 4970  
Jacksonville, FL 32232-0019

**Re: *Rule Review of the Programmatic Regulations for the Comprehensive Everglades Restoration Plan pursuant to Federal Register Notice Volume 73, No. 98, May 20, 2008.***

Dear Mr. Appelbaum:

As you are aware, Lee County (“the County”) has approximately 652,000 acres total land and a population of 497,022 residents. The County also has an extensive network of water resource features and attributes. These include the Caloosahatchee River (C-43 Canal) and Estuary located on the southwest coast. These resources provide drainage from about 1,400 square miles extending from Lake Okeechobee at the northeast extent of the watershed to the Gulf of Mexico on the southwest. The Caloosahatchee River currently extends about 42 miles from Lake Okeechobee to the S-79 spillway with lock. The Caloosahatchee Estuary extends for about 26 miles to Shell Point, adjacent to San Carlos Bay, Pine Island Sound, Charlotte Harbor to the northwest, and Estero Bay to the southeast. Lee County also has 590 miles of shoreline, 50 miles of beaches and 100 plus barrier and coastal islands located in the Gulf of Mexico.

The County has taken a very active role in the implementation of the Comprehensive Everglades Restoration Plan (“CERP”). The County must balance multiple interests, as must the United States Army Corps of Engineers (“Corps”) and the South Florida Water Management District (“SFWMD”), but a primary concern for the County remains the health of the Caloosahatchee River and Estuary and the implementation of CERP projects to restore that system.

The Programmatic Regulations (“PRs”) (33 CFR, Part 385, required pursuant to Section 601(h)(3) of the Water Resources Development Act of 2000, Public Law 106-541 (114 Stat. 2688), were promulgated to ensure that the goals and purposes of the CERP are achieved. Any revisions to the PRs and the CERP Program as a whole are vitally important to the implementation of CERP projects that will restore the Caloosahatchee River and Estuary.

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This correspondence provides a response to the Federal Register Notice, Volume 73, No. 98, May 20, 2008, regarding the initiation of rule review for the PRs (Section 385.6 of the PRs require that review of the PRs occur “whenever necessary”, but at least every five years). The first step in the review process is to collect comments, issues and concerns from the public. To that end, we offer the following general and specific comments.

### **General Comments:**

This five year review of the PRs is timely in order to assimilate the various actions that have occurred since CERP’s implementation. Some actions that the County believes important for consideration are:

- Development of the State of Florida’s initiative to expedite certain CERP projects (Acceler8);
- Development of Guidance Memorandum (although not yet finalized);
- Approval and authorization of some projects and Project Implementation Reports (“PIRs”);
- Development of the Master Implementation Sequencing Plan (“MISP”) and the initiation of the Integrated Delivery Schedule (“IDS”);
- The formulation and continuation of project delivery teams (“PDTs”), Restoration, Coordination and
- Verification (“RECOVER”) activities, and other forums that are responsible for assuring that the goals and the purposes of the Plan are achieved;
- Revisions to the Lake Okeechobee Regulation Schedule;
- Experience gained in the budgeting process; and
- The potential for acquisition of 187,000 acres of land owned by the U.S. Sugar Corporation.

As stakeholders we know that with a long-term program, such as CERP, we would need to adapt to changes based on new circumstances and information. The PRs built a certain level of “adaptability” into the process, known as the adaptive management program. With the lessons learned over the past five years and considering some of the actions listed above, we offer the following general comments and suggestions:

#### **A. Acceler8 and Phasing of Projects**

Now that some CERP projects have moved through the PIR and authorization phases, one lesson learned is that the process is taking a long time to get from the “conceptual framework” outlined in the Yellow Book<sup>1</sup> to authorization, especially for critical or “backbone” projects such as the C-43 Reservoir Project.

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<sup>1</sup> Central and Southern Florida Project Comprehensive Review Study, *Final Integrated Feasibility Report and Programmatic Environmental Impact Statement*, April 1999 (commonly referred to as the “Yellow Book”).

With the creation of the State's expedited Acceler8 initiative, and the advance acquisition of many project lands, the PRs should include a new process to develop PIRs more expeditiously. This new process should incorporate principles of project phasing and any other relative revisions to get to a final PIR and authorization more quickly.

#### B. Timing of PR review and U.S. Sugar Acquisition

In this review of the PRs there are many opportunities to address some of the deficiencies in the overall CERP implementation process, but there remain certain unknowns, such as the impact of the U.S. Sugar land buyout on CERP. Since the closing on these properties is scheduled for later this year, it may be prudent to take a step back with this PR review and determine the impact of this acquisition on CERP as a whole. The public is concerned over what this acquisition will mean to the CERP process.<sup>2</sup> Several questions in the context of this acquisition and the PRs come to mind such as:

1. How will the adaptive management program (and "Management actions") be used to plan for these lands?
2. Will a Comprehensive Plan Modification Report be completed? When?
3. How much of CERP will need to be revised?
4. Will there be a change to the System Operating Manual, and if so when?
5. How will this affect the MISIP and IDS (already under development)?
6. Will Congress need to act? If so, what action must they take?
7. What will happen to other ongoing CERP projects as these issues are determined? What will happen to other ongoing CERP projects, or during a pending Comprehensive Plan Modification Report if one is completed?
8. How will this acquisition be incorporated into the Interim Goals and Targets?

#### C. Streamline the PRs and avoid duplicity with the Guidance Memoranda

The PRs should be reviewed to incorporate any "lessons learned" during the development of the Guidance Memoranda to assure consistency between the two. Section 385.35(3) outlines all the requirements for inclusion into the Guidance Memorandum on achievement of benefits of the Plan. Some of this language could be eliminated because presumably the Guidance Memoranda will soon be completed.

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<sup>2</sup> While we understand that the Corps does not have concrete answers to these questions yet, it would be prudent to start discussing this strategy with the South Florida Ecosystem Restoration Task Force at the September 17 and 18 meeting. There is great concern that this acquisition, the planning for those lands, and general CERP process, will come to a screeching halt and other projects will be placed in jeopardy of delay while these questions are being answered. Given that this is the first time the Task Force will meet after the announcement of the acquisition, we are sure the agenda will be quite full of items regarding the acquisition, but starting the discussion on some of these issues is critical to keeping broad-based support for CERP.

Another key issue is, can the PRs be “streamlined”? We recognize that many policy decisions were resolved in the Programmatic Regulations, or deferred to the Guidance Memoranda, but we feel that further streamlining of the PRs can occur. For instance, several of the fundamental principles in the PRs have been, or will be, explained in great detail in the Guidance Memoranda, upon their adoption. Some of the more descriptive language (as opposed to policy directives) in the PRs can be eliminated if it is covered in the Guidance Memoranda.

Finally, several requirements in the original regulations have already been met. Therefore, a threshold question is, do we still need all of the descriptive language in the PRs or can we delete some of that language?

**Specific Comments:**

Section 385.3 Definitions. The IDS should be described and defined in the Programmatic Regulations. This should be distinguished from the MISIP.

Section 385.5 Guidance Memoranda. The date should be revised since not all of the Guidance Memoranda are finalized. Paragraph (6) of this section states that the Secretary of the Army shall consider incorporating the guidance memoranda into the PRs during future reviews and revisions. Therefore, the Guidance Memoranda need to be finalized as soon as possible and then referenced, as contemplated, in the PRs.

Section 385.10 Implementation responsibilities, consultation, and coordination. At the end of this section, the PRs list certain milestones that the Task Force will make recommendations upon. Some of these items include the questions listed in B. above. The Task Force has been briefed at each of its meetings about some of these milestones and this process has become integral to disseminate information to the public about the status of various CERP activities. We support the continuation and enhancement of this process.

Section 385.17 Project Delivery Team. We concur with the need for a multi-disciplinary approach to project development through the PDTs, but as mentioned earlier in these comments, we are concerned with the length of time it is taking to get to a preferred project alternative. One such project is the Southwest Florida Feasibility Study.

Additionally, some of the information available to the public is dated or is not readily available unless the project manager is contacted specifically or a PDT meeting is attended. While we are aware that there are regular status reports from the PDTs to the Corps and South Florida Water Management District (“SFWMD”) leadership, the public is not privy to those briefings and any potential obstacles to project implementation. Not every project is reported at the Task Force meetings. We do realize the public is free to attend the PDT meetings, but attending every PDT meeting, especially if your interests are affected by multiple projects, is difficult. Many times the “Project Status” sheets available on [www.evergladesplan.org](http://www.evergladesplan.org) are outdated. Posting of PDT documents online is the best way to keep the public apprised of a project’s status, therefore keeping this information up to date is important for public outreach.

Section 385.25 Program Management Plans. In light of the U.S. Sugar acquisition, will a Program Management Plan be initiated to address an approach to incorporate these lands into the Plan? If so, when will this Program Management Plan be initiated?

Section 385.28 Operating Manuals. This section should be reviewed to determine if any of the language can be removed because it is likely very duplicative of the Guidance Memoranda (as contemplated in Section 385.28(5) of the PRs).

Pursuant to paragraph (7)(b), there was a requirement that the System Operating Manual be completed. Has that been revised and/or updated based on the new Lake Okeechobee Regulation Schedule?

Section 385.30 Master Implementation Sequencing Plan. This section should be expanded to include a description of the Integrated Delivery Schedule and its relationship to the MISP. It is our understanding that the MISP is a subset of the IDS. It has also been conveyed at public meetings (such as the Task Force) that the Corps is required to still do an MISP because of the requirement in the Programmatic Regulations. If there is a way that one single schedule for CERP shall be developed to guide the process in order to avoid confusion.

Additionally, because of U.S. Sugar acquisition, it is unclear from a planning and funding perspective what the impact will be on the MISP.

Section 385.31 Adaptive management program. It is unclear how this provision will be utilized to address issues related to the U.S. Sugar acquisition.<sup>3</sup> This section should be carefully reviewed for any needed revisions that may be necessary in light of the acquisition as well. The same holds true for (4)(d) of this section regarding Management actions.

Section 385.32 Comprehensive Plan Modification Report. The comments from the previous section are also relevant to the Comprehensive Plan Modification Report. If a Comprehensive Plan Modification Report will be pursued, when will this effort be undertaken?

Section 385.35 Achievement of the benefits of the Plan. If possible, this section should be condensed without removing substantive policy directives to address anything that is covered in the relevant Guidance Memoranda. This same comment is relevant to Sections 385.36, 385.37, 385.38 & 385.39.

Section 385.40 Reports to Congress. As soon as practicable, an updated report on the implementation of the Plan should be submitted to Congress in light of the U.S. Sugar acquisition. The report should address many of the questions in Section D. of these comments.

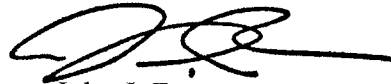
The County appreciates the opportunity to provide this preliminary feedback on the revision of the PRs. We look forward to working with you through this process and reviewing an initial draft of the revised PRs once it has been developed.

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<sup>3</sup> This should be discussed at the Task Force meeting September 17th and 18th.

For further information on these comments, please do not hesitate to call John Fumero or Erin Deady at 561.640.0820.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Fumero', with a long horizontal stroke extending to the right.

John J. Fumero