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ATTORNEYS AT LAW

August 20, 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, the Seminole Tribe of Florida is a federally-recognized sovereign Indian Nation with reservations and other lands within the south Florida ecosystem including the Brighton, Big Cypress, Immokalee, Hollywood and Ft. Pierce Reservations. The Seminole Tribe of Florida lives in the Florida Everglades and its traditional cultural, religious, and recreational activities, as well as commercial endeavors, are dependent on a healthy Everglades ecosystem. Because of this distinction, the interests of the Seminole Tribe of Florida in relation to the implementation of the Comprehensive Everglades Restoration Plan are unique. Federal law recognizes these unique characteristics by requiring government-to-government consultation by the U.S. Army Corps of Engineers and the Department of the Interior with the Seminole Tribe of Florida on various aspects of Comprehensive Everglades Restoration Plan implementation.

The Programmatic Regulations (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 Comprehensive Everglades Restoration Plan are achieved. Any revisions to the Programmatic Regulations and the Comprehensive Everglades Restoration Plan Program as a whole, are vitally important to the Seminole Tribe of Florida reservations and lands.

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 Programmatic Regulations. Section 385.6 of the Programmatic Regulations require that review of the Programmatic Regulations 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.

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**General Comments:**

This five year review of the Programmatic Regulations is timely in order to assimilate these various actions that have occurred since the Comprehensive Everglades Restoration Plan's implementation. Some actions that the Seminole Tribe of Florida believes important for consideration are:

- Development of the State of Florida's initiative to expedite certain Comprehensive Everglades Restoration Plan projects (Acceler8);
- Development of Guidance Memorandum (although not yet finalized);
- Approval and authorization of some projects and Project Implementation Reports;
- Development of the Master Implementation Sequencing Plan and the initiation of the Integrated Delivery Schedule;
- The formulation, and continuation, of project delivery teams, 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 a stakeholder the Seminole Tribe of Florida knew that with a long-term program, such as the Comprehensive Everglades Restoration Plan, we would need to adapt to changes based on new circumstances and information. The Programmatic Regulations 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. Create an initial outline of the fundamental requirements in the Programmatic Regulations to determine if all timelines have been met.**

To complete this initial assessment, a list should be developed with the following information:

1. All the document and process requirements from the current Programmatic Regulations. Examples of these include periodic Comprehensive Everglades Restoration Plan Updates, the Master Implementation Sequencing Plan, the System Operating Manual and Program Management Plans.
2. The timelines within which those were to be met.

3. A determination of whether or not those requirements have been met, or will be, in the near future. An example of this type of requirement is finalizing the Guidance Memoranda.
4. A determination of what requirements are still outstanding.
5. A determination of whether or not those requirements are still relevant and if they should continue to be included in the Programmatic Regulations. An example of this might be the Master Implementation Sequencing Plan in light of the new Integrated Delivery Schedule.

This type of analysis can show some specific revisions or deletions that may need to be made.

#### B. Streamline the Programmatic Regulations and avoid duplicity with the Guidance Memoranda

The Programmatic Regulations 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 Memoranda on the achievement of benefits of the Plan. Some of this language could be eliminated because presumably all of the Guidance Memoranda will soon be completed.

Another key issue is, can the Programmatic Regulations 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 Programmatic Regulations can occur. For instance, several of the fundamental principles in the Programmatic Regulations have been, or will be, explained in greater detail in the Guidance Memoranda, upon their adoption. Therefore, some of the more descriptive language in the Programmatic Regulations 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 (as opposed to policy directives) in the Programmatic Regulations or can we delete some of that language? In the alternative, can the Programmatic Regulations include a shorter statement explaining any specific requirements and that they have been met?

#### C. Acceler8 and Phasing of Projects

Now that some Comprehensive Everglades Restoration Plan projects have moved through the Project Implementation Reports 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.

With the creation of the State’s expedited Acceler8 initiative, and the advance acquisition of many project lands, the Programmatic Regulations should include a new process to develop Project Implementation Reports more quickly by concentrating on the pieces that are required pursuant to the Programmatic Regulations as opposed to those already completed in the Basis of Design Report (the State’s companion decision document). (An example of this includes certain features of the Water Preserve Areas and Everglades Agricultural Area projects). This new process should incorporate principles of project phasing and any other relative revisions to get to a final PIR and authorization more quickly. A benefit of this will be overall cost savings because less funds will have to be spent on development of the Project Implementation Report.

#### D. Timing of Programmatic Regulations review and U.S. Sugar Acquisition

In this review of the Programmatic Regulations there are many opportunities to address some of the deficiencies in the overall Comprehensive Everglades Restoration Plan implementation process, but there remain certain unknowns, such as the impact of the U.S. Sugar land buyout on the Comprehensive Everglades Restoration Plan. Since the closing on these properties is scheduled for later this year, it may be prudent to take a step back with this Programmatic Regulations review and determine the impact of this acquisition on the Comprehensive Everglades Restoration Plan as a whole. The public is concerned over what this acquisition will mean to the Comprehensive Everglades Restoration Plan process.<sup>3</sup> There are

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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”).

<sup>3</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 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.

<sup>5</sup> This should be discussed at the Task Force meeting September 17th and 18th.

fiscal implications for the Comprehensive Everglades Restoration Plan and local governments which will be impacted by a decrease in tax revenue when the lands come out of agricultural production. Several questions in the context of this acquisition and the Programmatic Regulations come to mind such as:

1. Fundamentally, how will the lands be used? This will have significant water resource implications and impacts for surrounding, and adjacent, lands upstream and downstream.
2. How will the adaptive management program (and “Management actions”) be used to plan for these lands?
3. Will a Comprehensive Plan Modification Report be completed? When?
4. How much of the Comprehensive Everglades Restoration Plan will need to be revised?
5. Will there be a change to the System Operating Manual, and if so when?
6. How will this affect the Master Implementation Sequencing Plan and Integrated Delivery System (already under development)?
7. Will Congress need to act? If so, what action must they take?
8. What will happen to other ongoing the Comprehensive Everglades Restoration Plan projects as these issues are determined? What will happen to other ongoing Comprehensive Everglades Restoration Plan projects, or during a pending Comprehensive Plan Modification Report if one is completed?
9. How will this acquisition be incorporated into the Interim Goals and Targets?

**Specific Comments:**

Section 385.3 Definitions. The Integrated Delivery System should be described and defined in the Programmatic Regulations. This should be distinguished from the Master Implementation Sequencing Plan.

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 Programmatic Regulations.

Section 385.10 Implementation responsibilities, consultation, and coordination. At the end of this section, the Programmatic Regulations list certain milestones that the Task Force will make recommendations upon. Some of these items include the questions listed in D. 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

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Comprehensive Everglades Restoration Plan 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 project delivery teams, 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. Part of this is due to the problems associated with consistency in the membership of the project delivery teams. Changing project managers and the fact that experience is lost when staff members transition are part of this “consistency” issue.

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 project delivery teams meeting is attended. While we are aware that there are regular status reports from the project delivery teams 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 project delivery teams meetings, but attending every project delivery teams meeting, especially if your interests are affected by multiple projects, is difficult. This is also relevant to the number of meetings and committees involved with RECOVER. Many times the “Project Status” sheets available on [www.evergladesplan.org](http://www.evergladesplan.org) are outdated. Posting of project delivery teams 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.

The Corps should help the public understand all of the Corps’ project management and design process requirements. Various business, construction and design reviews take place and changes can be made based on these reviews. This can occur after the alternative for the project is selected and then the PDT does not get to have input into those changes. Congressional, State, Corps, water management district and local sponsor budgets also have influence on the project schedule, funding and authorization process. Greater coordination and explanation of these various budgeting processes and constraints is needed.

Finally, we are concerned that some of the projects, in the name of “optimization” may include additional features that increase costs. While we understand the need to arrive at the best project alternative possible, the goals and purposes of the individual projects as articulated in the Yellow Book must be the starting point (and ending point) for project development considering the downturn in the economy and the impacts on local tax revenue. It is critical that project costs are contained to the maximum extent practicable.

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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 Master Implementation Sequencing Plan. It is our understanding that the Master Implementation Sequencing Plan is a subset of the Integrated Delivery System. It has also been conveyed at public meetings (such as the Task Force) that the Corps is required to still do an Master Implementation Sequencing Plan because of the requirement in the Programmatic Regulations. If there is a way, one single schedule for the Comprehensive Everglades Restoration Plan should 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 Master Implementation Sequencing Plan.

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>5</sup> This section should be carefully reviewed for any revisions that may be necessary in light of the acquisition. 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. This section should be condensed, if possible, 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 and 385.39.

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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 Seminole Tribe of Florida appreciates the opportunity to provide this preliminary feedback on the Rule Review of the Programmatic Regulations. We look forward to working with you through this process and the Seminole Tribe of Florida would appreciate a consultation meeting once an initial draft of the revised Programmatic Regulations has been developed. For further information on these comments, please do not hesitate to contact one of us directly.

Yours sincerely,



Michelle Diffenderfer  
Erin L. Deady

c: Jim Shore, Esquire, General Counsel - Seminole Tribe of Florida  
Craig Tepper, Director - Seminole Tribe of Florida, Environmental Resource  
Management Department