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From: Scott, W Ray [mailto:scottra@doacs.state.fl.us]

Sent: Monday, January 10, 2005 1:53 PM

To: Redican, Joseph H SAJ

Subject: Draft CERP Guidance Memoranda

Thank you for the opportunity to comment on the draft CERP Guidance Memoranda. Given their scope and complexity, this preliminary comment opportunity should allow for the resolution of many issues prior to formal publication.

The Florida Department of Agriculture and Consumer Services continues to fully support implementation of CERP consistent with the balanced purposes as stated in WRDA 2000. In addition, we believe it is essential that the respective roles of the Corps and the local sponsor, as defined in law and rule, be strictly maintained. In particular, we have significant concerns regarding any federal administrative action that impinges on the state's sole jurisdiction to reserve or allocate water under state law. The comments that follow are based upon these two general concerns.

In general, the Guidance memoranda appear overly broad in regard to their stated purpose of providing "technical guidance for internal management of Corps of Engineers personnel during Plan implementation," (Section 385.5, Programmatic Regulations). For example, while it would seem necessary to cite existing relevant policies, the creation of new policy would appear to go beyond the stated purpose of providing technical guidance. As discussed below, Guidance Memoranda 3 and 4, in particular, seem to go well beyond this purpose and in some cases may be inconsistent with existing law and regulation.

In regard to the balanced purposes of CERP, the Guidance Memoranda assign priority to natural system benefits while assigning other water-related benefits a secondary or "residual" status. This is most apparent in the definition "beneficial water," which is defined to include only water that contributes to the restoration of natural systems. Further, Attachment 3-C to Guidance Memorandum 3 appears to provide the protection of the Savings Clause to natural system benefits provided by "an intervening non-CERP condition," which is inconsistent with the provisions of WRDA 2000 and provides exclusive protection to natural system benefits over and above that provided to other water-related benefits. Corps staff has explained that this was not intended and would be remedied in the final draft. We recommend that if Attachment 3-C is included in any form, that Guidance Memorandum 3 needs to also address protection of other water-related benefits provided by "an intervening non-CERP condition." Given that the subject of Guidance Memorandum 3 is the Savings Clause from WRDA 2000, removing such provisions that are unrelated to the Savings Clause would make the guidance memorandum more concise and coherent, and avoid the sort of concern and confusion that Attachment 3-C has caused among many stakeholders.

Guidance Memorandum 4 is intended to provide instructions for identifying the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system, but goes well beyond this purpose and directly impinges on state

jurisdiction over water reservations. WRDA 2000 prohibits the Secretary of the Army from executing a project cooperation agreement until the State executes a reservation or allocation of water for the natural system under state law. In other words, it establishes a condition that must be met before execution of the agreement, and whether that condition is met is solely at the discretion of the local sponsor. Attachment 4-D appears to contractually obligate the local sponsor to reserve not only “project water” but also “baseline” water, and is inconsistent with the Programmatic Regulations’ prohibition (Section 385.2(e)) against prescribing any process of Florida law.

Again, thank you for the opportunity to comment on the draft CERP Guidance Memoranda and we look forward to continuing to work with you. Hopefully, many issues identified in the preliminary draft can be resolved prior to the final draft. Once we have the opportunity to review the final draft, we will likely provide more detailed comments based upon that review. If you have any questions regarding these comments please feel free to contact Ray Scott at (850) 410-6714.

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