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ATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION

January 10, 2005

Colonel Robert M. Carpenter
U.S. Army Corps of Engineers
701 San Marco Blvd. Room 372
Jacksonville, District 32207-8175

Via Fax; E-Mail; and Express Mail

**Re: Comments by the Miccosukee Tribe of Indians on the Draft
Six Program-Wide Guidance Memoranda dated November 2004**

Dear Colonel Carpenter:

I. INTRODUCTION

The Miccosukee Tribe of Indians of Florida has conducted a preliminary review of the Six Program-Wide Guidance Memoranda (GM) for the Comprehensive Everglades Restoration Plan ("CERP" or "Plan"), dated November 2004. Under WRDA 2000 and the Programmatic Regulations, the federal government agencies have a duty to consult with the Tribe on the Guidance Memoranda. Since this has not yet happened, the Tribe will provide only preliminary comments at this time. More detailed comments will be provided after the Corps, which has recently requested consultation, formally consults with Chairman Cypress and representatives of the Tribe on this document.

II. SPECIFIC COMMENTS ON THE GUIDANCE MEMORANDA

GM#1 at page 5 states, "Section 385.1 of the programmatic regulations requires the Secretary of the Army to ensure that the public understands the linkage between the processes, tools, and enforcement mechanisms and can monitor the effectiveness of this integrated framework in assuring that the goals and purposes of the Plan are achieved." Contrary to Congressional directive, the Guidance Memoranda are confusing, duplicative and contain unnecessary detail. Additionally, if it was possible to violate the Paperwork Reduction Act, the Corps and South Florida Water Management District ("SFWMD") has certainly done so with these voluminous documents.

GM#1 at Paragraph 1.7.2 (line 33-41) discusses the Corps' guideline for restoration projects which requires that real estate costs should not exceed 25 percent of total project costs on restoration projects. The Tribe questions the accuracy of the figure listed for the real estate percentage of CERP in the document and questions whether CERP will meet this 25% requirement. The Tribe also does not believe that it is proper for individual projects to be lumped together as CERP to judge whether this requirement is met. While the documents says that individual CERP projects are exempt from this individual cost control Corps guideline, it cites no Congressional authority for this alleged exemption. The Tribe is concerned about this section because in the case of the Modified Water Deliveries Project misguided attempts to acquire land unnecessarily have caused land acquisition costs to escalate the cost of the project by at least 50% and stalled restoration.

GM#1 Paragraph 1.7.3 (lines 3-38) discusses land acquisition as fee simple interest. This section needs a much stronger emphasis on "less than fee simple" acquisitions. There should be a heavy emphasis on flowage easements and conservation easements. This section should also include a provision that provides that the Corps and SFWMD must "determine if project will interfere with Tribal rights or sovereignty."

GM#1 Paragraph 1.8 (lines 3-9) correctly states the fact that WRDA 2000 does not provide for reimbursement for work performed by the District in advance of CERP. In apparent violation of the directive of Congress and the National Environmental Policy Act ("NEPA"), the GM states that the Project Implementation Report should recommend that Congress reimburse the SFWMD for work performed in advance of authorized CERP projects. The Tribe strongly opposes this since it will violate federal law. If the Corps refused to provide "after the fact" federal funding perhaps, the State would be less willing to stray from the original CERP plan. Right now, the State is doing whatever they want, including construct before Congress approves the project, assuming that it will later get rubber stamped by the Corps. This is contrary to the entire purpose and intent of WRDA 2000. This section should be rewritten to read that no credit will be recommended by the Secretary of the Army, or approved by Congress, unless it is in compliance with NEPA and other federal law. Constructing first, and rubber stamping later, certainly does not comply with NEPA.

GM#1, Paragraph 4, page 1-20, lines 28-45 discusses federal participation in water quality features for CERP and the 50-50% federal/state cost sharing agreement on improvements. The Tribe is deeply concerned that this section states that a so-called "team" will make the decisions, as to whether federal dollars should apply. The Tribe is concerned that the State will attempt to pass its water quality clean-up responsibilities on to the federal government through CERP. The basis for this concern is the Amended Everglades Forever Act ("EFA") the State adopted in 2003. In the EFA, the State adopted the SFWMD Long Term Plan, which anticipates that many of the States water quality problems will be addressed through implementation of CERP projects. Clearly, the requirement that the State fully meet water quality compliance (and bear 100% financial responsibility) is being ignored by the State's adoption of the Long Term Plan. This has the potential of greatly escalating CERP Costs. The Program Environmental Impact Statement ("PEIS") on CERP that was approved by Congress mandated that it was the State's responsibility

to meet water quality through its Everglades Construction Project by December 31, 2006. Rather than comply, the State passed the Amended EFA which allows them not to meet water quality until 2016 and beyond. In fact, the State has used CERP as a reason to delay water quality compliance in the Everglades. The Tribe contends that it is improper to have a “project team”, which will consist of a plethora of state representatives, make the policy decisions as to whether federal funds should be expended on water quality. It also appears to violate FACA. The GM must contain concrete guidelines and a definitive process, including public comment, to determine whether the water quality responsibility is really part of CERP or should be paid 100% by the state. Federal restoration dollars must not be wasted on the state’s responsibility to clean up the water, because doing so will cause the cost of CERP projects to sky rocket.

GM#2, Paragraph 2.6: This section appears to say that individual project design of a project can move forward based on the Programmatic EIS for CERP dated July 1999. The Tribe was under the impression that the PEIS of the conceptual plan would not suffice for individual projects, which would each have to go through a subsequent EIS, including an analysis of alternatives. Thus, the Tribe does not understand how the design on a project can be based on the PEIS, or how it can move forward until an individual project EIS is completed.

GM#2, Paragraph 2.7.2, page 2-12, line 29-35 discusses the States “Acceler8” plan. As articulated in the Tribe’s comments on the Master Implementation Sequencing Plan (“MISP”), adopted by reference herein, ACCELER8 should be analyzed in an SEIS to determine if it undermines CERP. It is also contrary to WRDA 2000, WRDA 1996, and the Programmatic Regulations. The Tribe is deeply concerned that this ACCELER8 plan, which was developed behind closed doors, does not follow a logical sequence of project construction. For example, the Modified Water Deliveries Projects which is vital to restoration of the Everglades and the future of CERP, is not one of the ACCELER8 projects. Yet, the Biscayne Bay Wetlands, which is being accelerated far ahead of the CERP schedule and has nothing to do with restoring the central Everglades, has been accelerated. The Tribe agrees that some of the projects are needed, for example water storage in the EAA, but contends they will not create benefits to the Everglades unless projects that allow water to flow through the Everglades (such as decompartmentalization) are completed. These issues, and many others, must be analyzed in an SEIS.

GM#2, Paragraph 2.7.1.3 discusses Identification of Selected Alternative Plan. The Tribe is concerned that this section appears to state that the “project team” will select the preferred alternative plan. The Tribe has long expressed its concern that these project teams appear to be making policy decisions, which violates the Federal Advisory Committee Act (“FACA”). The Tribe has the same concern about the entire GM, which appears to circumvent, and neuter, the duties and responsibilities of the Secretary of the Army for CERP under WRDA 2000.

GM#2, Paragraph 2.7.2 discusses the next added incremental analysis. The Tribe is disturbed by the attempt to circumvent this analysis for ACCELER8, and separate it from the rest of CERP, by stating that the entire suite of projects will be considered together as an increment. The Tribe

contends that this is improper, since this analysis is designed to evaluate the effect, or outputs, of the selected alternative plan as the next project to be added to the group of already approved CERP projects.

GM#3, Paragraph 3.7, page 3-4, line 18-27 deals with “intervening non-CERP” conditions. The Saving Clause prevents elimination or transfer of new CERP water until a new source has been identified, but it does not require CERP to make up for water which was poorly managed before CERP projects were implemented. This section needs to better explain the import, and consequences, of lumping the Modified Water Deliveries Project, C-111 into this new category of “intervening non-CERP projects.”

GM#3, Paragraph 3.8.1.2, page 3-5, line 16-24 completely mischaracterizes and misrepresents the Miccosukee Reserved Area Act (“MRA Act”), and also fails to mention the Tribe’s vast land interests in the Everglades. The MRA Act was not, as stated in the document, “a reaction to the major intergovernmental effort to restore the South Florida ecosystem, including the restoration of the environment of ENP.” To the contrary, the MRA Act was sought by the Tribe to clarify its long standing right to live in its traditional homeland in Everglades National Park established under the Park Enabling Act. This Act actually came about because the National Park Service (“NPS”) refused to allow the Tribe to build houses in the area Congress set aside for them to do so, which forced the Tribe to file a lawsuit in federal court and seek help from Congress. Congress was so sympathetic to the Tribe’s plight, and its shoddy treatment by the NPS, that it actually doubled the Tribe’s area along the border of the Park to 666.6 acres, authorized its use of the area in perpetuity, and no longer allowed the NPS any say over the Tribe. It also fails to mention that the MRA Act directed the Tribe to develop water quality standards to protect the headwaters of Everglades National Park.. The Tribe has done so. This Section also fails to mention that the Tribe, which is treated as a state under the Clean Water Act, has set its own EPA approved water quality standards for its 75,000 federal Reservation in the Everglades and also has perpetual use and occupancy rights to 189,000 acres of Everglades in Water Conservation Area 3A. The Tribe requests that this inaccurate and misleading paragraph be corrected. The Tribe offers to assist the Corps in doing so.

GM#3, Paragraph 3.9.2, page 3-7, line 43-44. The Tribe disagrees with the statement that “level of service of flood protection” does not include “design flood targets”. This is the same issue discussed above.

GM#3, Paragraph 3.10.3, page 3-8, line 36-44 discusses “Standard project flood” and “Project design flood”. It appears that the SFWMD and Corps apparently believe that these terms are not the same as the Savings Clause “level of service of flood protection”. It appears that this is pure speculation on their part. The Tribe is concerned that the effect of this interpretation could eliminate flood protection from areas that would otherwise be entitled to it.

GM#3, Paragraph 3.10.8, page 3-11, line 10-11. This section should include a statement that the most cost effective way to deal with a reduced level of service for flood protection may be to simply purchase a flowage easement or a conservation easement. The Tribe is concerned that the Corps and SFWMD have a single-minded drive to acquire land through fee simple acquisition.

GM#3, Attachment 3-D, page 3-23, line 40-45. states that there are no federal or state levels of service for groundwater. This is incomprehensible to the Tribe and potentially a huge problem. Flood protection in South Florida is entirely driven by groundwater levels. If there is no guarantee of a level of service for groundwater protection then certain agricultural operations may be adversely impacted. Agriculture depends on a certain depth to the “root zone”. By raising groundwater levels (or not guaranteeing a certain level of service), entire crops may fail. The Tribe is concerned that this section could be interpreted to constitute a “taking” of groundwater flood protections and result in litigation.

GM#3, Table 3-G-1, page 3-29. The 75,000 acre Miccosukee Tribal Federal Reservation, which is jurisdictionally distinct from WCA 3, but contains thousands of acres of Everglades, should have “X” in each of the four columns for “source dependence,” similar to WCA 3 which has an “X” in each of the four columns.

GM#4, Paragraph 4.7, page 4-11, line 38-40. The Tribe is concerned about language in the section on “beneficial water” that authorizes the storage of excess water in natural areas if it is beneficial to the downstream user. The Tribe’s lands in WCA 3A have been a victim of the stacking of water for many years to benefit downstream Everglades National Park. This has resulted in the loss of tree islands, harm to the critical habitat of the snail kite, and has caused irreversible impacts to the Tribe’s culture and way of life. This last sentence, must be modified to prevent the WCAs from becoming water supply reservoirs for downstream users or ENP.

GM#4, Step 6, page 4-26, lines 39-43. This section is a perfect example of the failure to follow the mandate that these documents be comprehensible by the public. There is far too much detail in this document for anyone to comprehend. As Albert Einstein once said, even the most complex subject can be made simple and the Corps should strive to do so.

GM#4, pages 4-28 thru 4-39 contains equations in calculus. The Tribe does not understand why the GM has to contain this level of detail, which is incomprehensible to most. The old saying “the devil is in the details” could be reinterpreted by this document to mean the “detail is the devil”.

GM#4, page 4-50, lines 3-46 discusses reservations of water for the natural system. The “Initial Reservation of Water” is above and beyond the Minimum Flows and Levels (MFLs) and should be done on a system wide basis, since WRDA 2000 only requires that specific projects have reservations prior to entering into Project Cooperation Agreements (“PCAs”). It appears that this “Initial Reservation” is discretionary, because state law says that they “may” reserve water and they “shall” protect existing legal users. The SFWMD Governing Board has decided to perform a system wide “reservation of water” to protect fish and wildlife. One flaw in the SFWMD approach is that it has not yet decided to reserve water for “the protection of public health and safety” - which is also authorized (not required) under the same statute. Unless a system wide analysis is performed, a reservation for one project may adversely impact an area outside the project boundary. The Tribe, not unlike the federal government, would like some assurance that the CERP projects will provide benefits to its Everglades homeland, but also understands that all interests must also be assured that their interests will be protected.

GM #5 discusses the Project Operating Manual (“POM”). The Tribe believes that the POM may be the most critical document to ensuring that restoration benefits are achieved. The POM is the document which should ensure that individual CERP projects will actually benefit the environment. To this end, the Tribe is extremely concerned by section 5 - 4.3, which describes the relationship between operational flexibility and adaptive management. The Tribe is concerned that the so-called “operational flexibility” will be used to operate the project on a “whim” basis depending on the political interests in play. The Tribe has submitted extensive comments to the Corps about so-called “temporary deviations” in ISOP and WSE. The Tribe would remind the Corps that the ISOP “temporary deviation” lasted for many years and caused a great deal of harm to the Everglades. This document appears to say that such deviations will continue to be made, and that they will be done without complying with NEPA. Under NEPA, and Corps policy, any change to the Water Control Plan for the project must have an accompanying Environmental Impact Statement. This section ignores that requirement. The POM should provide assurances that the project will be operated in the manner set out in the PIR/EIS. The so-called “operational flexibility” and “temporary deviations” identified in this section could undermine the POM and SOM. Adaptive management, and operational flexibility, must not be used to circumvent NEPA and other federal law.

III. CONCLUSION

The Tribe believes that the Corps should have conducted ongoing consultation with the Tribe during the drafting of the Guidance memoranda, as it did on the Programmatic Regulations. Such consultation would have prevented the totally inaccurate description of the Miccosukee Reserved Area Act. The Tribe is concerned that the Corps has decided to wait until the draft was completed to consult with the Tribe, whose members’ entire culture and way of life is dependent on restoring its Everglades homeland. The Tribe will submit additional comments after the Corps conducts formal consultation with Chairman Cypress and Tribal representatives about the Guidance Memoranda.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dexter Lehtinen".

Dexter W. Lehtinen