

LEHTINEN VARGAS & RIEDI

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 Master
Implementation Sequencing Plan ("MISP") dated November 2004**

Dear Colonel Carpenter:

I. INTRODUCTION

The Miccosukee Tribe of Indians of Florida has conducted a preliminary review of the Draft Master Implementation Sequencing Plan ("Draft MISP") date November 2004. The Army Corps of Engineers ("Corps") has a duty to consult with the Tribe on the MISP. 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 the Chairman Cypress and the Tribe on the Draft MISP.

The initial sequencing of Comprehensive Everglades Restoration Plan ("CERP") Projects is contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" ("PEIS") dated April 1, 1999, which was approved by Congress in the Water Resources Development Act of 2000 ("WRDA 2000") as the framework for the Comprehensive Everglades Restoration Plan ("CERP"). The Miccosukee Tribe of Indians participated in the CERP PEIS process for more almost six years and assumed that it was developing a plan that was properly sequenced to provide the greatest environmental benefits for the Everglades.

The Tribe has reviewed the Draft MISP, which changes the sequencing contained in the PEIS, and finds that it is contrary to the spirit and intent of WRDA 2000, WRDA 1996, the Programmatic Regulations it is supposed to be implementing and federal law. It is the Tribe's position that the federal government's rubber stamping of the State's ACCELER8, the

sequencing of which was devised outside the public process, also violates the National Environmental Policy Act (“NEPA”), the Administrative Procedures Act (APA), and the Corps' Trust responsibility to the Tribe. The Corps' Draft MISP requires a Supplemental Environmental Impact Statement (“SEIS”) to analyze the admitted impacts that ACCELER8 will have on the re-sequencing of important CERP projects that was initiated in the Programmatic EIS in 1999.

The Draft MISP purports that its goal is the “proper grouping and sequencing of the plan components to enable achievement of the goals and objectives of the plan consistent with the intent of the programmatic regulations.” It fails to mention that the ACCELER8 re-sequencing endorsed in the MISP is contrary to this goal and Section 601(h) of the Programmatic Regulations in that it was conducted outside of a public process and without consulting with the Miccosukee Tribe of Indians of Florida. The Corps has not even attempted to feign compliance on the significant changes to CERP caused by ACCELER8 by issuing an Environmental Assessment (“EA”). The Corps' failure to acknowledge the significant changes to CERP sequencing, and responsibility, caused by ACCELER8 is both unlawful and dangerous to Everglades restoration. The Tribe contends that the Corps must issue an SEIS on its current decision to adopt ACCELER8, which deviates from the sequencing and project implementation responsibilities contained in the PEIS approved by Congress.

II. SPECIFIC COMMENTS ON THE DRAFT MISP

A. Draft MISP Process Fails to Comply with the Programmatic Regulations

The Programmatic Regulations define the MISP. It mandates that the projects and goals shall be sequenced and scheduled to maximize the achievement of goals and purposes of the plan. Congress was persuaded to adopt CERP thinking that its goal was to restore the Everglades. The ACCELER8 re-sequencing of projects pushes non-Everglades projects ahead of those vital to its restoration and could actually cause Everglades restoration projects to languish for lack of money and focus. Section 385.1 and 385.30 of the Programmatic Regulations require that changes to the sequencing of CERP projects be conducted in an open public process and in consultation with the Tribe. Contrary to this, the ACCELER8 re-sequencing of the plan was done behind closed doors and without consultation with the Tribe. The federal agencies are now feigning compliance by conducting after the fact public meetings and consultation. Additionally, the use of an MISP “team” to make policy decisions on which projects will move forward appears to violate the Federal Advisory Committee Act (“FACA”).

B. Draft MISP Fails to Comply With WRDA 1996

WRDA 1996 created the South Florida Ecosystem Restoration Task Force (“Task Force”). A vital Congressionally authorized purpose of the Task Force is that it give coordination and advice on restoration activities. Contrary to this mandate, the Corps and SFWMD failed to seek the advice of the Task Force on the closed door re-sequencing of CERP through ACCELER8.

C. Draft MISP Fails to Comply With WRDA 2000

WRDA 2000 contains numerous provisions concerning the working relationship between the Department of the Army and its non-federal partner, the South Florida Water Management District. WRDA 2000 directs the Secretary of the Army to construct CERP. Contrary to WRDA 2000, the SFWMD will now construct certain CERP projects. Contrary to WRDA 2000, ACCELER8 will also push forward projects that are not listed in the initial projects that Congress directed. Additionally, the revelation in the “Draft MISP” that the SFWMD will focus expending its funds on only those projects it selected, and that “it is likely that the USACE will shoulder the majority of the implementation costs of the non-ACCELER8 projects changes the entire arrangement between the federal and non-federal government articulated in WRDA 2000, especially the non-federal responsibilities for CERP articulated therein. This new arrangement could also adversely impact critical restoration projects, such as the Modified Water Deliveries Project, which Congress emphasized must be completed prior to funding vital CERP projects. There has been no analysis of how the new working arrangement under ACCELER8 will be structured. The Tribe is particularly concerned about the statement in the Draft MISP which states, the “SFWMD will continue to work with the USACE to the greatest extent possible” in the implementation of CERP. This is alarming to the Tribe and will likely alarm Congress when they discover the provisions of WRDA 2000 are not being followed.

D. Draft MISP Fails To Comply with the Indian Trust Doctrine

The Corps owes the Miccosukee Tribe of Indians a sacred trust obligation and fiduciary duty to protect Tribal lands, resources, and assets pursuant to the federal Indian Trust Doctrine. The Corps’ adoption of the ACCELER8, which is being rubber stamped through the MISP process, will allow projects outside of the historic Everglades to advance, while causing those that will benefit the Tribe’s traditional Everglades homeland to languish. The Corps has not consulted with the Tribe before agreeing to the ACCELER8 re-sequencing and shift of responsibility. Nor, has the Corps analyzed the impact that the state’s taking over of the construction of these Everglades restoration projects from the Secretary of the Army will have on the trust responsibility that the Corps has to the Tribe. The Corps has a duty to analyze the impact that the MISP, which rubber stamps the re-sequencing done in ACCELER8, will have on the Tribe, its lands, and the general Trust Responsibility.

E. Draft MISP, which includes ACCELER8, Must Be Analyzed in an SEIS

The Corps must take the objective hard look of the MISP required by NEPA. The Corps’ proposed MISP, especially the preordained ACCELER8 re-sequencing and its change in responsibility, is a major federal action that significantly impacts the human environment. The Corps will violate NEPA if it fails to analyze the MISP in an SEIS. The Corps is legally required to analyze the impacts its re-sequencing will have on the Everglades and the CERP project, as a whole. Such an analysis should include the impact ACCELER8 will have on the already delayed Modified Water Deliveries Project, which could be further delayed due to the shift in resources and priorities. WRDA 2000 requires the Modified Water Deliveries Project to be completed prior

to the funding of important CERP components, such as decompartmentalization. The statement in the MISP that Project Implementation Reports, and project design, will be conducted at the same time will allow rubber stamping of projects and is contrary to the National Environmental Policy Act and the Corps' Regulations.

F. Draft MISP Fails to Comply with the APA

Changes to the Corps MISP requires the Corps to follow its own rules and regulations and proper rulemaking procedures, including notice and the opportunity to be heard, pursuant to APA prior to the decision being made. In this case, the decision was made first and the public invited in afterward, which is contrary to the APA and the corps' Regulations.

G. Draft MISP Must Comply with the ESA

The Draft MISP must comply with the Endangered Species Act (ESA). There is no mention in the Draft MISP that the Corps has followed the consultation and coordination required by Section 7 of the ESA. The Corps knows that there are endangered species that could be affected by the ACCELER8 re-sequencing of these projects, but the document does not say that it has formally consulted with the Fish and Wildlife Service as to the impact that the MISP, which includes ACCELER8, will have on endangered species in the project areas. For instance the endangered sparrow and snail kite could be adversely impacted by a delay of the Modified Water Deliveries Project that could be caused by the re-sequencing. The ESA requires that a Biological Assessment be prepared as part of the interagency consultation process to analyze whether proposed actions, such as the MISP, are likely to jeopardize the continued existence of endangered species.

III. CONCLUSION

A plethora of laws and regulations mandate that changes to the sequencing plan for CERP in the form of the MISP be conducted in an open public process prior to the changes being made. In the instant case, all the decisions were made behind closed doors and the public was invited in after to rubber stamp the plan that had already been devised. Neither the Tribe nor the Task Force were consulted prior to the decision on the MISP being made. It is clear from the language in the Programmatic Regulations, WRDA 1996, and WRDA 2000 that this backdoor public process is not what Congress intended. It is also clear from the Draft MISP that ACCELER8 has caused a significant change in the MISP sequencing and responsibilities identified in the PEIS ("yellow book") that was adopted by Congress in WRDA 2000. It is the Tribe's position that the Draft MISP, which rubber stamps the ACCELER8 re-sequencing and change in responsibilities for CERP, is a significant change that must be analyzed in an SEIS. The Corps Draft MISP is a legally insufficient and inadequate attempt to fool Congress and the general public that will not succeed. The Corps unsupported statement that the re-sequencing conducted behind closed doors (ACCELER8) could expedite CERP is unsupported by any analysis and can not be ascertained without conducting the required SEIS and ESA analyses.

The Tribe would have preferred if the Corps had consulted with the Tribe during the drafting of the MISP, as it did on the Programmatic Regulations. The Tribe is concerned that the Corps has chosen to wait until the document was completely drafted before seeking consultation with the Tribe, whose members culture and way of life depends on the restoration of its Everglades homeland. The Tribe will submit additional comments after the Corps has formally consulted with Chairman Cypress and Tribal representatives about the MISP.

Sincerely,

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

Dexter W. Lehtinen