

# 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 of Florida  
On the Draft Pre-CERP Baseline Dated November 2004**

Dear Colonel Carpenter:

## **I. INTRODUCTION**

The Miccosukee Tribe of Indians of Florida has conducted a preliminary review of the Pre-CERP baseline document. Under WRDA 2000 and the Programmatic Regulations, the federal government agencies have a duty to consult with the Tribe on the Pre-CERP baseline. Since this has not yet happened, the Tribe will provide only preliminary comments at this time on the Pre-CERP baseline document. 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 DRAFT PRE-CERP BASELINE**

Since this document is the is the basis for determining whether or not an “existing legal source” of water will be eliminated or transferred, it is important to the Tribe. It is critical to the Everglades that the baseline be properly defined to measure any new water which might become available in the future.

Paragraph 7.1 (line 12-21) acknowledges that the legal sources of water to the Miccosukee Tribe are protected through state and federal law. The Tribe has adopted the philosophy that it’s water rights are best defined by a fully restored Everglades.

Paragraph 7.2 (line 33-36) states that the Interim Structural and Operational Plan (ISOP) will be used as one of the assumptions in the pre-CERP baseline analysis. It is the Tribe's position that the use of ISOP, which was a deviation from the approved Test 7 Water Control Plan, was never analyzed in an Environmental Impact Statement ("EIS") under the National Environmental Policy Act ("NEPA") and is improper. ISOP, which was based on singles species management and caused flooding of the WCAs and reduced flood protection, is not the proper way to manage an ecosystem. Therefore, it follows that the poor management choices should not be the basis from which everything is measured. A more proper "baseline" would be the Test 7 Regulation Schedule, which was subject to NEPA.

Paragraph 7.2 (line 38-41) states that operational changes or structures that were authorized but not fully operational were not included. The Tribe is concerned that this may mean that if the C&SF project was supposed to deliver a certain level of flood protection, but those flood protection benefits were not actually obtained, they will not be considered in the Pre-CERP baseline analysis. The Tribe is concerned that certain lands will have less protection because they have not yet been developed. By not including the authorized level of flood protection in the Pre-CERP baseline, are the Corps, and the SFWMD taking an authorized level of flood protection away?

Paragraph 7.4.1 (line 24-39) seems to indicate that the model which is used to define the pre-CERP baseline will be updated on a continual basis. As the history of CERP shows, if the model is updated, the results will constantly be changing. The Tribe is concerned that even if the basic assumptions never change, the actual baseline will always be changing. Adaptive management used in this fashion assures that a constantly moving target can never be hit.

Paragraph 8.2 (Table 1 - Lake Okeechobee) assumes Lake Okeechobee backpumping for emergency flood control of the Everglades Agricultural Area ("EAA") in the Pre-CERP baseline. This is improper. In 2001, the SFWMD found itself in a self-induced crisis because of poor management of Lake Okeechobee, which resulted in the backpumping of dirty water for water supply. The Pre-CERP baseline should not be based on poor Lake Okeechobee water management and a backpumping policy which is a violation of state water quality standards and the federal Clean Water Act.

Paragraph 8.2 (Table 1 - Big Cypress) states that "the northern end of Big Cypress receives flows from the S-190." This statement is factually incorrect. The S-190 discharges down the I-28 Interceptor canal (L-28I), which has levees on both sides along its entire length. Water cannot possibly enter the Big Cypress, as described. The L-28 Interceptor canal moves water away from the Big Cypress and discharges into WCA-3A.

### **III. CONCLUSION**

The Tribe would have preferred if the Corps had conducted consultation with the Tribe during the drafting of the Pre-CERP baseline document, as it did on the Programmatic Regulations. The Tribe is concerned that the Corps waited until the draft document was

completed before seeking consultation with the Tribe. The Tribe will submit additional comments after the Corps has formally consulted with Chairman Cypress and Tribal representatives about the Pre-CERP baseline document.

Sincerely,

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

Dexter W. Lehtinen