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January 10, 2004

Colonel Robert Carpenter  
District Commander  
Jacksonville District  
U.S. Army Corps of Engineers  
701 San Marco Blvd.  
Jacksonville, Florida 32207

*By Electronic Mail*

RE: Initial Draft Guidance Memoranda for the Comprehensive Everglades Restoration Plan

Dear Colonel Carpenter:

On behalf of the Natural Resources Defense Council ("NRDC"), I write to provide the following comments concerning the initial draft Six Program-Wide Guidance Memoranda ("Draft GMs") for the Comprehensive Everglades Restoration Plan ("CERP"). These comments are submitted based on the Corps' representation that the public will be provided at least one additional opportunity to comment on the guidance memoranda prior to their finalization.

- (1) NRDC supports the development and use of the Pre-CERP Baseline for purposes of determining Savings Clause and Project Benefits Agreement compliance.
- (2) The pre-CERP baseline should not be based on ISOP 2000 water management criteria as these criteria were neither legal nor authorized, as required by the Water Resources Development Act of 2000 ("WRDA 2000").
- (3) The Draft GMs fail to properly incorporate interim restoration goals into PIR development. For example, a project's performances under Next Added Increment and Cost Effectiveness analyses are given far greater importance than its performance under Interim Goals analysis even though Interim Goals analysis is the only specific performance standard required by WRDA 2000.

- (4) The draft GMs will result in “pre-allocation” of water necessary for the restoration of the Everglades in contravention of WRDA 2000. Specifically:
- a. Assuming for the moment that the “amount” of water to be reserved that is necessary to achieve the hydrologic conditions described in WRDA 2000’s Section 601 (4)(A)(iii) (IV) and (VI) cannot be identified until a PIR has been initiated, that leaves the question of how water is adequately protected for such purposes prior to the PIR being initiated. This is a key question because Draft GMs’ concepts of “additional” or “new” water do not appear in the law, and in Section 601 (4)(A)(iii) (V) the Congress identified the amount to be reserved as the amount necessary to achieve the hydrologic parameters described in Section 601 (4)(A)(iii) (IV) and (VI). Obviously this amount will equal the total water that is made available by a PIR when it modifies the C&SF Project. The Draft GMs indicate that the state is planning to establish an initial reservation, but there is no requirement or even expressed expectation that that they do so. Furthermore, we are concerned that the Draft GMs list other processes like CUP permitting and Water Shortage Restrictions as “protective.” There is no basis in the state law, current policy, or in prior practice for such a determination.
  - b. The Draft GMs do not require, as part of the PIR formulation, an analysis to determine and quantify any water that was expected to be available for that project as provided for in WRDA 2000, but at the time the project is initiated, is no longer available. This is a critical step in the process, particularly if the water has been made unavailable in violation of WRDA 2000 or the President/Governor Agreement. The Draft GMs should also include a process for how water that has been made unavailable shall be recovered for purposes of the PIR in question.
  - c. The Draft GMs do not actually appear to require that the amount of water described in Section 601 (4)(A)(iii) (V) which is sufficient for the restoration of the natural system, pursuant to Section 601 (h)(2)(A), actually be “reserved.” Rather, the Draft GMs introduce the concept of “new” or “additional” water, i.e., water to be produced by component that is above and beyond a moving “baseline,” which is incorporating increases in water demands from the built environment over time (i.e., a baseline moving in a direction contrary to the natural system’s interests). The Draft GMs would require only this amount of water to be “reserved.” Such an approach is illegal under WRDA 2000, as well as inconsistent with the federal programmatic regulations for CERP.
  - d. The Draft GMs should be revised to reflect the following type of process: Regardless of the tool chosen by the State of Florida to ensure that water will be available for CERP, the PIR teams should use the stationary *Pre-*

*CERP baseline* to verify that the tool actually worked and that the water is indeed available at the time of the PIR. If it is not available, the water must be restored as part of the PIR process. At the appropriate time, once the PIR identifies the water described in Section 601 (4)(A)(iii) (IV) and (VI), the state should execute the reservation described in Section 601 (4)(A)(iii) (V) pursuant to state law.

- (5) The following analyses are not adequately described in the Draft GMs and/or are not accompanied by adequate guidance for project teams to implement them.

Trade-offs analysis (Page 1-23)  
Risk and Uncertainty analysis (Page 1-23);  
Modified Next Added Increment analysis;  
Next Added Increment analysis;

The description of how the Modified Next Added Increment and Next Added Increment analyses will be used to identify water and reservations is particularly unclear. Specifically, if the Draft GMs intend that these two analyses produce conditions that require some kind of “provisional” reservation that will then be “tweaked” some time in the future based on future CERP or non-CERP implementation, the Draft GMs are silent on how that complicated set of circumstances should play out. Some questions that immediately come to mind are: “What happens if future implementation produces less water than the earlier MNAI/NAI analysis assumed?” and “What is the process and authority for such a “provisional” reservation?”

- (6) It appears that the MNAI/NAI analysis is intended, among other things, to distribute “risk” among the various beneficiaries of CERP. Absent additional analysis and discussion, the basis and consequences of this “risk” distribution are not clear. We do note that, given that CERP’s priority purpose is restoration of the natural system, it would be improper to simply distribute risk evenly between the system that is to be restored and competing uses.
- (7) The PIR development process described in the Draft GMs is not consistent with NEPA. The Draft GMS are, at best, unclear on whether key initial decisions concerning alternatives, particularly on “cost-effectiveness” issues, will be fully incorporated into the PIR NEPA process. It is critical that alternatives that could, for example, better achieve interim restoration goals not be eliminated from full NEPA analysis and public comment as a result of “black box” decisions concerning purported cost-effectiveness earlier in the process. Moreover, and as noted earlier, the role of interim restoration goals needs to be significantly increased in the PIR development process generally, including but not limited to its earliest stages.

We have appended a copy of our comments to the Corps on the draft CERP programmatic regulations, dated September 30, 2002, in further support of these comments.

Please contact me at (212) 727-4507 if you have any questions or concerns regarding these comments.

Sincerely yours,

Bradford H. Sewell  
Senior Attorney

**ENVIRONMENTAL AND LAND USE LAW CENTER \* ENVIRONMENTAL  
DEFENSE \* NATIONAL PARKS CONSERVATION ASSOCIATION \*  
NATIONAL WILDLIFE FEDERATION \* NATURAL RESOURCES DEFENSE  
COUNCIL \* SIERRA CLUB \* WORLD WILDLIFE FUND**

September 30, 2002

Via First Class Mail and Electronic Mail

U.S. Army Corps of Engineers  
Attn: CESAJ-DR-R  
P.O. Box 4970  
Jacksonville, FL 32232-0019

Re: Proposed Programmatic Regulations for the Comprehensive Everglades  
Restoration Plan

Dear U.S. Army Corps of Engineers:

On behalf of the National Parks Conservation Association, World Wildlife Fund, Natural Resources Defense Council, Environmental and Land Use Law Center, Sierra Club - Florida Chapter, National Wildlife Federation and Environmental Defense, we are pleased to submit the following comments on the "*Programmatic Regulations for the Comprehensive Everglades Restoration Plan ("CERP"); Proposed Rule.*" The comments included in this document overlap with and add to the comments of the Everglades Coalition that are being submitted to your agency as part of this rule making process.<sup>1</sup>

Our organizations have identified a number of significant deficiencies in the proposed rule, including (1) the failure to ensure a priority for restoration in the event of conflict with ancillary CERP goals such as water supply, (2) the failure to incorporate interim restoration goals in the proposed rule or to require subsequent incorporation by reference, (3) an improperly diminished role for the Department of Interior and an inappropriately and improperly inflated role for the South Florida Water Management District, and (4) the formal codification of the level of performance described in the April 1999 CERP, which is commonly (and legally) recognized to be inadequate. If such deficiencies are not remedied, we will consider the programmatic regulations to be inadequate and not in compliance with the governing statute, the Water Resources Development Act of 2000 ("WRDA 2000"). In addition, we also comment on the ongoing failure of the CERP agencies to implement required independent science review,

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<sup>1</sup> In the event of any inconsistencies between these comments and the comments of the Everglades Coalition, these comments should be considered to supersede for the purposes of the undersigned organizations.

a failure that has also emerged as a critical shortcoming of the CERP implementation process to date.

In our view, the consequences of inadequate programmatic regulations strike at the heart of Everglades restoration. Fundamentally, these regulations are to establish assurances for Everglades restoration so that we do not discover, billions of dollars and twenty years into the implementation process, that we have failed to restore the Everglades. As we discuss below, tremendous forces will try and pull CERP in other directions, such as prioritizing water supply benefits, or will stymie and delay progress. Thus, these regulations are the most significant component of protecting the federal interest in CERP implementation, restoration of America's Everglades.

In addition to the comments included in this comment letter, we incorporate by reference all prior comments submitted by our organizations on the draft regulations, the initial draft regulations, and specifically the detailed "redlined" version of the draft regulations dated February 14, 2001 and submitted to the Army Corps of Engineers. Most of the February 14<sup>th</sup> comments were not incorporated into the current draft and remain applicable and relevant. We ask that the Corps consider them again prior to promulgation of the final regulations. We draw the Corps' particular attention to our previous suggestions concerning Sections 385.4 (now 385.1), 385.8 (d)-(3) (now 385.5), 385.9 (now 385.6), 385.18 (now 385.20), 385.23 (now 385.26), 385.24 (now 385.26), 385.25 (now 385.28), 385.26 (now 385.30), 385.27 (now 385.31), 385.28 (now 385.32), 385.30 (b), (c)(iv), (d) (now in 385.35), 385.31 (now in 385.36-37), and 385.32 (now 385.38).

### Background

In its deliberations in 2000, Congress recognized quite well that the politics and legal realities of water, development, agriculture and growth in Florida could easily sidetrack CERP. The concern was that, as had occurred in the past, the water supply and flood protection benefits woven into the project might be maximized at the cost of restoration benefits, thereby jeopardizing the federal investment in Everglades restoration. Although the CERP was designed to meet all predicted needs, ecosystem and built system alike, conflicts are certain, given the realities of funding, engineering and scientific uncertainties, and political expediencies.

Moreover, Congress recognized that CERP as presented to it in 1999 was a conceptual "framework" with many uncertainties and opportunities for improvement. Indeed, Congress emphasized the need for "adaptive management" partly in response to significant questions raised about aspects of the original plan by the Department of Interior, independent scientists, and the environmental community.

Accordingly, WRDA 2000 enacted a system of "assurances" to ensure that the goals and purposes of the Plan, in particular those related to restoration, are achieved. The programmatic regulations are at the center of this system of assurances. WRDA 2000 requires that

*“the Secretary shall, after notice and opportunity for public comment, with the concurrence of the Governor and the Secretary of the Interior, and in consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and other Federal, State, and local agencies, promulgate programmatic regulations to ensure that the goals and purposes of the Plan are achieved” 601(h)(3)(A)*

Like most regulations, the programmatic regulations are to bridge the gap between the generalities of statutory direction and the specificity of agency action, ensuring that Congressional intent is reflected in the details of CERP implementation. But these regulations are more than simply implementing regulations – they have a singular role to assure the federal interest in this project is satisfied, in the face of inherent conflicting priorities, engineering and scientific uncertainties, and the need for restoration performance improvement. In short, the letter and spirit of the assurances required by WRDA 2000 must be reflected in the programmatic regulations. See 601(h)(3)(C)(i) (The programmatic regulations are to “establish a process to ... (III) ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals ...) We also note that the development of the programmatic regulations has been a subject of significant public scrutiny since the passage of WRDA 2000, as demonstrated by the attached news articles.

Unfortunately, as we discuss below, the current draft programmatic regulations, published in the Federal Register on August 2, 2002, fail to satisfy the requirements of WRDA 2000.

## Discussion

### **(1) The draft programmatic regulations fail to ensure the protection of the natural system.**

Congress chose the verbal command “ensure” in section 601(h)(3)(C) carefully. To “ensure” means to make certain or to guarantee. Thus, Congress expected the Corps to put in place a set of mechanisms in the programmatic regulations that would *make sure* that Everglades restoration would become a reality.

The draft regulations fail to accomplish their stated legal purpose of ensuring protection of the natural system. The draft is all procedure and no substance. Nowhere in the draft regulations does the Corps set forth standards or criteria for agency action that will ensure natural system restoration. As we will discuss further below, significant portions of the process that Congress intended to be encompassed within the programmatic regulations are sidetracked to “guidance memoranda.” The process that is included in the draft regulations could as easily result in further degradation of the Everglades as result in their restoration – in other words, the draft fails to ensure anything.

- (2) The draft programmatic regulations fail to establish ecosystem restoration as the primary and overarching purpose of the CERP, including by failing to preclude the achievement of water supply and flood protection goals at the expense of restoration goals.

WRDA 2000 states “[t]he overarching objective of the Plan is the restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection. The Plan shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, the improvement of the environment of the South Florida Ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to this section, for as long as the project is authorized.” Section 601(h)(1). Congressional debate on the Everglades provisions of WRDA 2000 – and the resulting headlines -- focused *without any notable exception* on the restoration purpose of CERP. Indeed, the acronym CERP could not make it clearer: it is a plan to comprehensively restore the Everglades first and foremost.

Thus, the CERP was intended to accomplish three broad goals. First, it must alter the hydrology in the remaining Everglades so that the system can recover from the damage it has sustained over the past five decades. In doing so it must establish the physical, regulatory and operational conditions necessary to protect a restored Everglades from future degradation. Second, it must continue to serve its originally authorized purposes for the population that existed in the region on December 11, 2000 (a population more than triple that for which the project was originally designed). Third, it must provide certain water supply and flood control benefits without compromising the achievement of interim and final restoration goals.

If the Plan is reasonably successful, its components will capture and store enough water to restore the Everglades and provide for some portion (perhaps most or all) of the projected population growth of the next 50 years. We support this win-win scenario. The assurances provisions of WRDA 2000, however, were not created to address such a “best case scenario.” They were prudently crafted to cope with “worse and worst case scenarios.” In the event that CERP components do not perform as well as expected, we strongly *object* to a corresponding lose-lose approach to parceling out benefits. In other words, the argument that under such scenarios there should be a “balancing” of available benefits between the Everglades and water for growth is completely unacceptable. We cannot support a CERP implementation process that employs such an approach. While there are numerous opportunities for addressing the needs of south Florida’s growing population, including the CERP projects, the CERP is the Everglades’ last hope.

Moreover, even if conflicts between *expected* benefits were never to appear, the political pressure to satisfy *additional* water supply and flood protection needs over the natural system will be applied continuously. Such pressures will be present in a myriad of agency decisions, down to some of the smallest design decisions. It is accordingly critical that a priority for ecosystem restoration be embedded in the programmatic

regulations to help withstand such pressures and serve as protection – the only protection – for the federal interest in Everglades restoration.

In sum, CERP is fundamentally a remedial program that makes no demand on existing human users to cease and desist the activities that have harmed and continue to harm the Everglades. The Plan in fact very specifically sets out to rescue the Everglades while accommodating those activities, and WRDA 2000 actually holds those activities harmless from CERP implementation. But water supply and flood protection benefits for *additional* growth must not be achieved at the expense of achieving interim and final remedial goals in the Everglades.

The draft regulations, however, do not establish – in any matter of form or substance – restoration of the Everglades as the primary and overarching objective of the Plan. On the contrary, throughout the draft regulations equal priority is consistently placed on restoration, water supply and flood protection goals.

Particularly significant is how the draft regulations treat interim restoration goals. Even though WRDA 2000 only mentions such goals for restoration performance, the draft regulations improperly contain a new set of goals, called water supply “targets.” Most alarmingly, the draft regulations do not prioritize achievement of interim restoration goals over interim water supply “targets” in the event that these two come into conflict with each other.

In the draft regulations, language providing for a priority for restoration, including achievement of interim restoration goals, should be inserted in sections 385.8, 385.9, 385.26(b), 385.26(c), 385.28, 385.30(a)(1), 385.30(b)(1), 385.31(a), (c)(1), (c)(2), (c)(3), (c)(4), 385.38, and 385.39. We also refer you to our comments on the initial regulations for specific language suggestions on how to ensure suitable priority is placed on restoration.

### **(3) The draft programmatic regulations fail to incorporate interim restoration goals.**

Congress recognized the importance of interim restoration goals and recognized that the programmatic regulations were the appropriate vehicle for “establishing” those goals.<sup>2</sup> We believe the Congressional intent is clear on these points and for good reason. Absent interim goals and a close nexus between them and the planning and implementation of individual projects, CERP is far more subject to localized political and bureaucratic pressures to serve water supply and flood protection goals rather than

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<sup>2</sup> *Senate Report 106-363*: “In developing the programmatic regulations, the Federal and State partners should establish interim goals – expressed in terms of restorations standards – to provide a means by which the restoration success of the plan may be evaluated through the implementation process. The restoration standards should be quantitative and measurable at specific points in the Plan implementation.”(emphasis added) This statement was repeated during debate on the Senate floor on September 21, 2000, and brought to the attention of the implementing agencies *again* in a letter from the four Senators most instrumental in passage of the Everglades legislation (attached).

restoration goals. It is unacceptable to not know what the public is getting, at least in broad strokes. The stakes are too high, and the conflicts too compelling.

It is also critical that the interim goals be the cornerstone of the planning and implementation process. Each separate project must show it makes the necessary contribution to achievement of relevant interim goals.

The draft regulations fail to incorporate interim restoration goals, and to adequately tie them back to the component design and implementation process. Instead, the draft only calls for a future process to develop interim restoration goals that will then be incorporated into memoranda of agreement, which have far less legal significance than regulations. Indeed, the draft regulations allow the interim goals to be changed *whenever* the agencies decide to do so. No limits, standards or criteria are imposed on such changes, such as even the most general of limiting changes to those based upon new scientific or technical information indicating a revision will better enable restoration success to be evaluated.

We believe the legislation is clear that interim goals are to be included in the programmatic regulations themselves. They are a part of the process for ensuring restoration benefits are met. Federal regulations are a well-tested vehicle for regulatory tools of the import of interim goals, and their flexible use in this case per the principles of adaptive management is enhanced by the WRDA 2000 requirement that the programmatic regulations be reviewed and revised every five years or more frequently if necessary.

The draft regulations also omit from the list of PIR requirements that the PIR should “identify how the component will contribute to achievement of interim restoration goals.” We strongly recommend that this be added to the Section 385.26(a)(2) in the final regulations. Additional references to this need to be consistent with accomplishment of interim goals should also be added to 385.26(b) as well. Finally, section 385.26(c)(2) should include a RECOVER evaluation of the performance of alternatives specifically in terms of accomplishing interim restoration goals.

The preamble of the draft rule asserts that the agencies require more time to develop the interim goals. We find this discussion specious and misleading. There was certainly more than adequate time to develop interim goals, if work for that purpose had been started before now. Indeed, work on performance measures and interim performance milestones has been ongoing for years, including by the Restudy team and now by RECOVER. Rather than attaching the ample work product of the various inter-agency teams that have developed comprehensive measures of the Plan’s anticipated performance at various windows of implementation, we reference for incorporation into the record the work of the RECOVER group, including specifically the RET, and the Restudy team, including that work accessible via the Internet.

**(4) The draft programmatic regulations improperly “lock in” CERP to the April 1999 plan and modeling.**

We view the April 1999 plan as a conceptual document with recognized uncertainties and opportunities for improvement. For example, the modeling provided in the April 1999 plan documents showed strong and early performance on the water supply front, but delayed restoration benefits, particularly to the southern Everglades. Moreover, it did not adequately restore connectivity and flow through the system, as was characteristic of the natural Everglades. There was also significant reliance upon uncertain and even destructive engineering solutions. The components that comprise the “Lakebelt” are prime examples – the Corps recently permitted an initial phase of rockmining activities in over 20,000 acres of critical Everglades wetlands, a project that has been partially rationalized on the grounds that some of the mining pits might be used several decades down the line, *if* they could be made to store water, to provide water flows to Everglades National Park.

The Corps demonstrated significant ability to improve the performance of the Plan even before the original plan was delivered to Congress in July of 1999. The Corps conducted additional modeling in May and June of 1999 that demonstrated that the performance of CERP could be improved quite readily. In 2001, the Corps developed a much-improved plan for restoring the Indian River Lagoon, thus proving again that adaptive management can work.

We believe that improving the model runs and the implementation schedule of individual projects will achieve the goals and purposes of the CERP more quickly and with better ecological results. Congress also believed this – the Senate Committee report specifically stated (at 8) that:

“[e]ndorsement of the Plan as a restoration framework is not intended as an artificial constraint on innovation in its implementation. The committee does not expect rigid adherence to the Plan as it was submitted to Congress. This result would be inconsistent with the adaptive assessment principles in the Plan. *restoration of the Everglades is the goal, not adherence to the modeling on which the April, 1999 Plan was based.... Further, the committee expects that the implementing agencies will make every effort to accelerate the delivery of Plan benefits to the natural system to the extent practicable.*

Adaptive management is the process by which these changes are mandated, and the changes should be incorporated into the regulations as the Corps approves them, with concurrence from the Department of Interior and the State.

Despite the history discussed above, and all the progress that has been made over the last several years, the draft regulations generally tie long-term performance of CERP to the April 1999 “yellow book” performance. The draft regulations do set forth processes for improved performance. But not only are there no mandates or timelines to

make such improvements, but the regulations prioritize changes based upon monitoring results – which will not emerge for years.

Perhaps the most immediate and significant specific problem is that the initial set of interim goals (and targets for water supply) are explicitly tied to the April 1999 “modeling output” -- the modeling to which Congress instructed the Corps *not* to restrict itself. This provision in the draft specifically commits the Corps (unless it changes the programmatic regulations in the future) to develop interim goals considering a plan that provides inadequate benefits to the central and southern Everglades -- even \$4 billion into the project. We are very concerned that the regulations ignore the improvements that the Corps itself demonstrated were feasible in May and June of 1999, and believe that it is critical that at least this level of improvement be incorporated into the interim and final restoration goals.

We provide the following additional specific comments:

- The draft regulations should be revised to delete the reference to the April 1999 modeling output.
- The definition of adaptive management in the draft regulations should be revised to incorporate (i) use of new modeling (see Senate Report at 8), not simply “new or updated models,” and (ii) operational changes
- The adaptive management provisions in the draft regulations should be similarly revised to allow for changes based upon new modeling.
- The adaptive management provisions should also allow for changes based upon improved restoration performance.
- Sections 385.8(b), 385.8(c), and 385.9(a) should all be revised to focus on *restoration* as the goal of Plan implementation, not simply achieving the benefits set out in the April 1999 Plan.

Finally, we note that Acting Assistant Secretary of the Army for Civil Works Les Brownlee testified before the Senate Committee on Environment and Public Works on September 13, 2002 and reiterated that the April plan was authorized solely as a “conceptual framework.” The final regulations need to incorporate this recognition that the initial authorization was contingent and Plan improvements are necessary.

**(5) The draft regulations arbitrarily retract the commitment to provide eighty percent of the CERP’s water supply to the environment.**

In 2000, the Corps made one significant promise about the performance of CERP that was accepted enthusiastically by all. As the Senate Committee discussed in its report (at 8): “According to the Army Corps, 80 percent of the water generated by the Plan is needed for the natural system in order to attain restoration goals, and 20 percent of the water generated for use in the human environment.... Subject to future authorizations by Congress, the committee fully expects that the water necessary for restoration, currently estimated at 80 percent of the water generated by the Plan, will be reserved or allocated for the benefit of the natural system.”

The Corps retracts this commitment in the draft programmatic regulations. It explains simply that these estimates were “initial” and somehow no longer applicable, and that water will be allocated on a project-specific basis in greater or lesser amounts than the 80/20 ratio. In light of the public reliance upon this figure in 2000, neither explanation is sufficient to support rejection of the 80/20 ratio as a *generalized* planning goal. The Corps has not provided any technical explanation to support any change in the promised performance of CERP. Moreover, while of course individual projects may not provide water supply in exactly such proportions (indeed, some projects are not intended to produce any water storage), there is no reason to reject the 80/20 ratio as a planning guide for aggregates of projects, working in conjunction with operations of the entire C&SF project.

We believe that the regulations should ensure, as one interim goal for CERP implementation, adherence to the 80/20 performance goal. It is obviously critical that the 80/20 ratio be roughly achieved in steady increments over the lifetime of the project, not simply by the project’s end. At the recent hearing held by the Senate Environment and Public Works Committee, we were pleased to hear Assistant Secretary Brownlee commit to such a planning goal, and accordingly would expect this goal to be incorporated in the final programmatic regulations.

**(6) The draft programmatic regulations improperly diminish the role of Department of Interior.**

Congress recognized that the overarching goal of the CERP, namely Everglades restoration, is unlike that of traditional Corps projects. Even as its mission is reshaped and experience grows, the Corps is not a recognized expert in the ecological, biological, and scientific underpinnings of this historic enterprise. Moreover, the historic relationships between the Corps and client entities for the secondary purposes of CERP, namely flood protection and water supply, remain strong, and an institutional interest in providing such deliverables frequently predominates.

Accordingly, in WRDA 2000, Congress established a unique relationship between the implementing federal agency, the Corps, and the federal steward of and scientific expert in the lands intended to receive the benefits of CERP implementation, the Department of Interior. While the Corps is clearly the lead implementing agency, maintaining sole federal jurisdiction over the implementation of individual projects, Congress established a special leadership and accountability role for the Department of Interior. It specifically gave the Department of Interior concurring authority over the programmatic regulations, in order to provide Interior with a leadership role in programmatic decision-making. In other words, where the traditional relationship between these two agencies regarding water resource projects typically relegates Interior to a “participating” or “commenting” role, WRDA 2000 establishes a new and important leadership role for Interior, equal to that of the Corps (and the State) on key programmatic implementation issues. (For its part, the South Florida Water Management District (SFWMD) is to partner with the Corps in the development of project-specific

documents and is provided a consultation role in several other places, such as the reports to Congress on the progress of CERP.)

We strongly believe that the Department of Interior must be granted this concurring authority over all aspects of CERP implementation described in Section 601 (h)(3). To the extent that new instruments such as guidance memoranda and pre-CERP baselines are created, introduced or referenced by the regulations as a means of meeting the requirements of 601 (h)(3), these must be subject to the concurrence structure created by WRDA 2000.

In addition, the draft regulations do not implement the concurrence role created for the Department of Interior by WRDA 2000. Rather, for a handful of specific programmatic actions and processes, such as guidance memoranda, Interior is given a role that is referred to as “concurrency.” But the draft regulations state that the Corps (*and the SFWMD*) need only give “good faith” consideration to Interior’s statement of “concurrency” or “non-concurrency.” This amounts to simply consultation by a different name, which the agency already has pursuant to the Endangered Species Act, Fish and Wildlife Coordination Act and other laws. There is absolutely nothing in the legislative history to indicate that concurrence means anything other than a requirement for agreement from Interior and the State of Florida prior to implementation of the programmatic regulations.

For a number of critical programmatic decisions, Interior is not even provided the afore-mentioned “good faith consideration” authority. These decisions include the adaptive management program (including approvals of comprehensive plan modification reports), the master implementation schedule, and the system operational manual, any one of which will be instrumental in determining whether the Everglades is restored. *Interior must be provided concurrence authority on such decisions.* In addition, as we will discuss further below, a large number of science-based programmatic decisions are handed off to the Restoration Coordination and Verification Team (RECOVER), rather than being included in the programmatic regulations. RECOVER, however, is controlled by the Corps and the SFWMD, not by the tri-partite arrangement (i.e., Corps, Interior, and the State) Congress required for programmatic decision-making. (Section 601 (h)(3)(A))

**(7) The draft regulations set forth an improper role for the SFWMD.**

While diminishing the authority of the Department of Interior, the draft improperly elevate the role of the SFWMD over and above what was provided for in WRDA 2000 and is permitted by the U.S. Constitution. For example, the SFWMD is given an equal role with the Corps in the development of guidance memoranda, even as the Corps proposes to defer to these documents much of what Congress intended to be contained in the programmatic regulations. In addition, the SFWMD is given authority, with the Corps, to weigh statements of concurrence or non-concurrence by Interior on programmatic matters referenced in 601(h)(3). This is not consistent with the

requirements of WRDA 2000, which clearly sets the state of Florida and the Department of Interior on equal footing on such matters.

Generally, the draft federal regulations provide that the Corps and SFWMD carry out all the mandated responsibilities and tasks under the regulations together, with each having an apparent veto over the other. When considered together with the SFWMD's sole authority over water allocation and land use, the draft regulations position the SFWMD as the most powerful agency in implementation of CERP. If the draft regulations become final, the SFWMD will essentially be developing and implementing *federal* rules intended to protect the sole federal interest in this project – Everglades restoration.

**(8) The draft regulations fail to comply with NEPA.**

The National Environmental Policy Act (NEPA) requires the Corps to develop an Environmental Impact Statement (EIS) for the CERP programmatic regulations. There can be no doubt that regulations with the purpose of “ensuring the protection” of the Everglades and implementing a \$8 billion dollar, multi-decade long public works project constitute a “major Federal action significantly affecting the quality of the human environment.”

**(9) The draft regulations create an improper role for RECOVER.**

WRDA 2000 requires the programmatic regulations to include provisions concerning adaptive assessment, including monitoring, and adaptive management. Indeed, Congress made it clear that this was one of the central functions of the programmatic regulations, and a centerpiece of the CERP effort. The draft regulations, however, improperly defer many of these tasks and responsibilities to the inter-agency RECOVER group. As already noted, RECOVER is not subject to the tripartite inter-agency arrangement of the programmatic regulations, but is instead controlled by the Corps and SFWMD. Indeed, the draft regulations provisions concerning RECOVER even extend so far as to interfere in the responsibilities of separate agencies to *independently* report to Congress; according to the draft regulations, RECOVER is charged with preparing the “technical information” to be used in such reports. Similarly, the draft regulations require RECOVER to provide the technical basis for the interim goals (*after*, in what seems a redundant step, modifications by the Corps and SFWMD), rather than allowing the agencies to develop the goals themselves per the intended tripartite arrangement.

Finally, we note that the Federal Advisory Committee Act (FACA) applies to the inter-agency RECOVER. As currently constituted and intended to operate pursuant to the draft regulations, RECOVER does not comply with FACA.

**(10) The draft regulations fail to institute the required independent scientific review process.**

Independent scientific review is critical to ensuring an open, science driven decision-making process that separates the "auditors" from the "managers" of Everglades restoration. Congress recognized this and accordingly in WRDA 2000 required that

*“The Secretary, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, shall establish an independent scientific review panel convened by a body, such as the National Academy of Sciences, to review the Plan’s progress toward achieving the natural system restoration goals of the Plan. 601(j)(1)*

To make this independent science review process effective and to sustain its integrity, it is critical that it (a) operate independently of the U.S. Army Corps of Engineers, the State, and the Department of the Interior, (b) have access to all pertinent information generated by the implementation of CERP, and (c) be adequately funded.

Although the programmatic regulations do not necessarily need to be the vehicle that institutes the requirement for independent science review, we are very troubled that two years after the enactment of WRDA 2000 and with a report due to Congress this December, the panel still does not exist. The draft regulations do little more than reference the statute on the question of independent scientific review, and we have seen no significant independent effort to implement the statutory provisions. The draft regulations certainly do not implement the independent science body, or even set a date by which it will be implemented.

Indeed, the implementing agencies have seemed more concerned about the extent to which independent scientific review can or should be circumscribed than with establishing it. In this regard, the definition of “independent scientific review” in the draft regulations needs to be expanded to incorporate the responsibilities of evaluating and offering comments, not simply to “to review and validate.” Additionally, in 385.31(b)(4)(ii), the independent panel must be provided an opportunity to review *and* comment on, not simply review, the RECOVER report.

Finally, it is important that the programmatic regulations themselves specifically discuss how separate agencies and the inter-agency RECOVER team shall work with the independent science panel, including providing the panel a role in dispute resolution on scientific matters and within the process for adaptive management and assessment.

**(11) The draft regulations define “restoration” as simply the result of the outdated and inadequate April 1999 plan, rather than in the necessary hydrologic and ecologic terms.**

CERP was created as a response to the degraded and unsustainable condition of the greater Everglades ecosystem caused by human alteration of the environment.

Restoration, therefore, must always be defined as achieving sustainable natural areas that possess the essential ecological characteristics of the pre-drainage Everglades over the maximum spatial extent possible.

The underlying principle within the CERP is that hydrological restoration of natural areas will foster biological restoration in those areas. Therefore, the first requirement for restoration is to return proper water quality, quantity, timing, and distribution throughout the system. To the degree hydrological restoration is successful, biological restoration should follow -- with various communities responding at different points in time.

The draft regulations inappropriately define restoration as the level of recovery and protection to the South Florida ecosystem as described in the April 1999 plan, with such modifications as Congress may provide for in the future. However, the “yellow book” provides only a framework for achieving restoration and does not clearly describe the essential ecological characteristics of a sustainable, restored Everglades. Instead, the Plan consists of a series of projects whose resulting hydrological improvements are anticipated to achieve the desired biological benefits. It is important to keep the definition of restoration, the main goal of the CERP, based on ecological necessity and not anticipated performance. This structure is necessary for the adaptive management process to be successful in making meaningful improvements to the plan.

Specifically, reference to the Plan should *not* be included in the restoration definition; rather, the definition should incorporate solely those criteria that demonstrate ecological restoration as applied to the remaining Everglades. For example, the definition of restoration could be revised as follows: “Restoration for purposes of this part means to bring about the recovery and protection of the South Florida ecosystem by increasing water storage and water supply, ...[rest of current definition].”

**(12) The draft regulations fail to make clear that the natural system must be protected from increased flooding.**

The legislative history for WRDA 2000 shows that Congress intended that the legal protection from increased flooding provided by the Savings Clause applies to the natural system as well as the built environment.<sup>3</sup> The draft regulations, however, imply that Savings Clause protections apply only to the built environment. At the very least, the draft is unclear on this point, and the final regulations need to clarify that the natural system is equally protected by the Savings Clause, as well as *prioritized* over the built system in terms of providing new levels of service for flood protection resulting from CERP implementation.

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<sup>3</sup> For example, Senator Baucus and Senator Smith agreed during debate that the natural system had an “existing, legally recognized right to a level of protection against flooding” and that “the Savings Clause provision was not intended to allow the U.S. Army Corps of Engineers to redirect to the natural system water from the human environment of unsuitable quality or quantity in an effort to provide the flood protection guaranteed in the section.”

**(13) The draft regulations contain an overly-narrow definition of “cost effectiveness.”**

State law requires that only the “most cost-effective” CERP projects move forward. We are concerned that the sugar industry may attempt to take advantage of this requirement to delay the reservoirs in current sugar-growing areas. Cost-effectiveness may be evaluated in a number of ways, including both “next-added increment” (considering only components implemented to date) and “last added increment” (considering components to be implemented in the future as well). The cost justifications included in the draft regulations focus on the “next added increment” test. This makes components early in the implementation schedule like the reservoirs in the sugar lands look much less attractive. Considering the extreme importance of these reservoirs, it is critical that “last added increment” analysis be used in cost justifications on an equivalent basis with “next added increment” analysis. (The preamble (on p. 12-13) must also be revised to reflect the use of the more appropriate, broader cost-effectiveness language.)

**(14) The draft regulations improperly defer even much of the CERP implementation procedure to guidance memoranda.**

The draft regulations defer much of the procedure that Congress intended to be in the regulations to so-called guidance memoranda (called “protocols” in the initial draft regulations). The memoranda are not even required to be incorporated upon their completion into the programmatic regulations. This use of guidance memoranda makes the regulations a hollow shell on key points and undermines the safeguards intended by Congress, including the five-year review and revision cycle for the regulations. For example, by deferring how operating manuals will be developed to a guidance memorandum, the Corps improperly fails to include the detailed criteria for this process in the programmatic regulations themselves. We refer the Corps to our comments on the initial draft regulations (Section 385.25) for specific language suggestions concerning the content of Operating Manuals.

**(15) The draft regulations contain inadequate safeguards concerning changes to water reservations.**

WRDA 2000 requires the PIRS to set forth, among other things, initial reservations of water for protection and restoration of the natural system. Accordingly, these important planning documents are the product of extensive consultation between agencies. Public review and compliance with NEPA are required. PIRS must ultimately also be approved by both the Corps and Congress before implementation.

The draft regulations improperly short-circuit these critical safeguards by allowing “changes” to reservations to occur with only “verification” by the Corps. The final regulations should set forth the same federal process/controls, including public and Congressional review, for changes to reservations as required for their initial setting.

**(16) The draft regulations fail to assure that the “pre-CERP baseline” is appropriately utilized.**

One positive aspect of the draft regulations is the required development of a pre-CERP “baseline.” The draft regulations, however, are unclear as to how the baseline will be used, and thus the significance of its development is uncertain. Indeed, subsection 385.35(3) is confusing in that it asserts the possibility that pre-CERP baseline water may not be available at the time a PIR is prepared. This should not be possible as such would be a violation of the Savings Clause; this should be revised in the final regulations.

Our specific suggestions are the following:

- The final regulations should clarify that the pre-CERP baseline will be used in determinations involving both the water availability and flood protection provisions of the Savings Clause, such as pursuant to subsection 385.36. The pre-CERP baseline is critical in ensuring that the natural system is protected under the Savings Clause from further degradation.
- Relatedly, in the Definitions section, the definition of “water made available” should be modified to specifically reference the pre-CERP baseline, in order to ensure that the pre-CERP baseline is the measuring device used to assess whether water is no longer being made “available.”
- The initial System Operating Manual should also be based upon the operational criteria utilized to develop the pre-CERP baseline.
- The final regulations need to assure that the operational criteria utilized to develop the baseline are legal and authorized. Specifically, we recommend that the following phrase be added concerning operations: “operations that are in accordance with all authorizations of the Central and Southern Florida Project and all other applicable laws, including federal and state environmental laws.”
- Similarly, the provisions concerning the initial System Operating Manual should also ensure that only operational criteria consistent with applicable laws be utilized in this initial manual.

**(17) The draft regulations allow virtually unconstrained deviations from operating manuals.**

Congress set forth only two specific requirements for operating manuals: that they be consistent with – in other words, protect, -- the reservation of water made in the PIR, and, second, that the manuals be changed only with public notice and comment. The draft regulations violate both requirements.

First, the requirements for operating manuals contained in draft regulations contain exceptions that contravene the legislative directive to protect the water reservation. Specifically, the draft regulations allow for operating manuals to be “adjusted” when there are “substantial departures from expected rainfall and runoff,” “temporary deviations for ... emergencies and unplanned minor deviations,” or, most

cryptically, when “necessary based on adaptive management.” Such language is not “consistent with” reservations intended to protect and restore the Everglades. Second, the draft regulations do not call for public notice and comment in instances when such “exceptions” are triggered, even though the use of such exceptions amounts to a de facto change to the operating manual.

**(18) The draft regulations lack a definition for “existing legal source.”**

“Existing legal source” is a key concept in the WRDA 2000 savings clause and is a legal phrase unique to WRDA 2000. It is important that the final regulations contain a definition of this concept, as possible interpretation under state law could result in conflict with the federal interest in this project. We refer the agency to the attached comments on the SFWMD’s “white paper” on this topic and incorporate these comments by reference herein.

We also note that the concept of water “available on the date of enactment of the Act” is at least equally important. The definition that is included in the draft regulations should be revised to incorporate the temporal aspect of water availability. Specifically, simply because water is “available” in the wet season does not mean it is “available” in the dry season; accordingly, “availability” must be defined with reference to demand.

**(19) The draft regulations fail to define the flood protection “in accordance with applicable law.”**

WRDA 2000 intended that the flood protection encompassed under the Savings Clause should be narrowly defined. Specifically, the Senate Report stated that Congress intended that only “authorized” and “legally recognized” rights to flood protection be protected under the savings clause. The final regulations should contain a definition of “in accordance with applicable law” that ensures that the savings clause applies to only those levels of flood protection that are contained in Congressionally-authorized documents and are consistent with all federal laws, including the Endangered Species Act and the President and Governor agreement.

**(20) The draft regulations improperly exclude guidance memoranda from NEPA compliance.**

The draft regulations contain a “categorical exclusion” for all guidance memoranda. In light of the important procedures that have been deferred from the regulations to the guidance memoranda, it is improper to exclude – categorically and prior to their development – such actions from compliance with NEPA.

**(21) The draft regulations improperly leave CERP operational components out of the definition of “component.”**

A number of CERP components consist wholly of operational changes. But the definition of “component” in the draft regulations does not specifically include

operational changes. The final regulations should reflect that CERP “components” include the operational components described in the April 1999 document.

\* \* \* \*

Our organizations hope that we will have the opportunity to review a significantly-revised final regulation in December. We thank you in advance for consideration of our comments on the draft regulation.

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(Signatures not included to expedite delivery)

cc(w/o enclosures):

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