

**Seminole Tribe of Florida (“STOF”) Comments on Guidance Memorandum #2:
Instructions for Formulation and Evaluation of Alternatives Developed for Project
Implementation Reports, Their Cost Effectiveness and Impacts**

2.5.1: This section discusses the development of performance measures and the use of a sub-set of interim goals and targets to evaluate and formulate alternative plans. The document should clarify what entity makes the determination on which interim goals and targets to use and whether they are appropriate to use. The document should also clarify how project teams can develop project-specific performance measures, if necessary to capture localized alternative effects.

2.5.2: Project teams should justify the use of additional project-specific performance measures and there should be some type of check and balance in place to ensure consistency between new project-specific performance measures, system level performance measures and the use of interim goals and targets. The document merely states that RECOVER will conduct this consistency review, but there is no discussion of how the review will take place.

2.5.5: The first paragraph in this section refers to a period of analysis used in a Project Implementation Report (“PIR”) as consistent with the period of analysis used in the most current version of the Plan. The document should clarify if the most current version of the Plan is based on a change that occurred in the Initial CERP Update, a Comprehensive Plan Modification Report or simply define what the most current version of the Plan means and how it can be changed over time. The paragraph also describes the period of analysis end-point for a PIR and that it will be consistent with the most current Plan. The concept of the period of analysis end-point should be further defined.

2.5.7: The document states that trade-off analysis is the procedure to identify the potential gains and losses associated with producing a larger or lesser amount of a given output or outputs. When creating or utilizing a trade-off analysis the rationale for such decisions should be clear to the reader of the PIR and the decisions based on this analysis should be transparent to the public.

2.6: In the third paragraph in the section, the document states that project teams should continue detailed design of the selected plan previously formulated if it continues to meet the purposes described in the Plan and provides the benefits expected in the Plan. The process or some criteria should be incorporated into this section that describes what is considered when that decision is made. There should be some level of oversight from a higher level such as RECOVER in making that determination.

2.6.1: The last paragraph in the section states that evaluation criteria and performance measures that are used in the PIR process should be consistent with the goals and objectives of the projects. In the process of developing projects, evaluation criteria and performance measures must be consistent with the goals and objectives of the projects. Again, RECOVER should be the responsible entity to make sure this occurs.

2.6.3: This section describes the process for determining if there have been any changes to Pre-CERP baseline water. The section states that the results of this comparison will be factored into

project formulation and evaluation. Will the fact that there has been a change in Pre-CERP baseline water be a driving influence on project development and evaluation? How is this change weighted in the evaluation process for a particular project alternative? The linkage between this comparison and how it will be factored into project formulation and evaluation needs to be clarified. This section should also clarify when this determination is made because of the time involved in developing a PIR. This time lag could lead to changes between when the comparison is made for evaluation purposes and when the project comes on line. This comparison should be made at multiple intervals over the project formulation process.

2.7.1: In this section, the following statement needs to be clarified: “The projects will be formulated to optimize system-wide benefits and costs while ensuring beneficial, although not necessarily optimal, local and interim impacts.” This statement seems to indicate that local and interim impacts are secondary in consideration to system-wide benefits. When projects result in local and interim impacts, it is incumbent upon an entity like RECOVER to ensure that CERP does not create unacceptable local or interim impacts. Decisions that result in such trade-offs must be made in an open and transparent process that is at a higher level than a project delivery team.

This section should also note that some projects could have a purpose other than environmental restoration, or multiple purposes such as water supply. Therefore, a statement should be added to this section that project teams should note that there may be instances when this optimization of system-wide benefits analysis may not be appropriate due to the purpose of the project.

2.7.1.1: The following statement seems to expand on Section 2.7.1: “The project team will formulate and evaluate an alternative that maximizes the achievement of local and system-wide goals and objectives of the Plan by considering various ranges and configurations of the project under consideration.” Is this how a project team will make decisions about optimizing system-wide benefits and costs while ensuring beneficial local and interim impacts? It seems that this is direction to the project teams on how to determine the best mix of system-wide benefits and local and interim impacts. If that is the case and this section proscribes that trade-off process, then the section should state it more clearly.

The last paragraph in this section states that alternative plans should include updated real estate costs. This issue has continued to be problematic in the implementation of CERP projects in that PIRs consistently are underestimating land costs. Perhaps more direction to project teams on the types of information and age of the information should be given to ensure more accurate updated real estate costs.

2.7.1.2: This section describes how the differences in the various alternatives can be compared in terms of cost. The direction to the project team is that a “best buy” plan should be determined through evaluation of the different alternatives. The criteria for determining a “best buy” plan should be developed and incorporated into this section. The criteria should be balanced to ensure that measured environmental lift occurs cost effectively. Without such criteria, “best buy” plans can be subjective in nature.

2.7.1.3: This section provides direction to PDTs on how to identify a selected alternative plan.

The section states that a recommended plan is chosen after “consideration of the various alternative plans, their effects, public comments, and success in meeting/exceeding all Federal/State/Local CERP requirements.” When identifying a selected alternative plan, project teams should be careful in how they determine how a project meets the various CERP requirements, interim goals and targets, performance measures and project-specific performance measures. How well a project meets the “goals and objectives of the Plan” should be the primary evaluation tool.

2.7.2: The second paragraph provides direction to the project team on what to do if a project is not justified under the next-added increment. The project team may need to consider combining the selected alternative plan with other CERP components to identify an alternative that can be justified on a next-added increment basis or to consider delaying the implementation of the selected alternative plan in order for the selected alternative plan to be justified on a next-added increment basis. This section should have some additional guidance on when it is appropriate to employ which strategy. Project teams should not be able to eliminate inefficiencies in a project or design simply by delaying, re-sequencing or adding it to a different group of projects.

The last paragraph describes the use of the next-added increment analysis in relation to the State’s Acceler8 program. This section should include a discussion of why it is important or necessary to analyze the selected alternative plan presented in each PIR for an Acceler8 project with the entire suite of other Acceler8 projects rather than the entire CERP. The entire group of Acceler8 projects is considered as an increment. It is not clear why the individual selected alternative plans no longer will be analyzed as a next added increment to CERP. The rationale for this strategy should be explained.

Guidance Memorandum #3: Identifying if an Elimination or Transfer of Existing Legal Sources of Water Will Occur as a Result of Implementation of the Plan

3.3: In this section, the document states that under some circumstances it is anticipated that existing legal sources of water may be partially or entirely eliminated or transferred to new sources as a result of project implementation. The section gets to the intent of the Savings Clause of WRDA 2000 in regard to flood protection in later paragraphs, but the language from WRDA 2000 should be included in the paragraph describing elimination or transfer of existing legal sources, therefore, the document should clearly state in the first paragraph of this section, that this elimination or transfer of an existing legal source cannot occur until a new source of comparable quantity and quality is available to replace the water lost as a result of implementation of the Plan.

3.5: The last sentence should clarify that the Pre-CERP baseline provides the results of a South Florida Water Management Model (SFWMM v.5.4) simulation based on assumptions necessary to simulate the pre-CERP hydrologic conditions which were in existence in December of 2000. While the Programmatic Regulations specifically state that the modeling utilizes a multi-year period of record, the Pre-CERP baseline assumptions for water supply and other uses have been based on actual demands in a single year-December 2000. This section should also clarify that all of the assumptions in the pre-CERP hydrologic conditions are not based on a multi-year period of record.

3.7: This section describes the concept of intervening non-CERP projects. Attachments 3-A and 3-B provide examples of the various scenarios under which an intervening non-CERP project or CERP project must make up for lost benefits. These examples are very helpful in understanding the relationship between CERP and intervening non-CERP projects.

What is lacking is a discussion of the other legal protections that are available beyond the Savings Clause. Although there is some discussion of these other legal protections in Guidance Memorandum 4 and Attachment 3C for Everglades National Park and fish and wildlife, inclusion of the other protections will create a more balanced approach for PDTs in making determinations on the impacts of CERP.

There is no direction provided to PDTs that they will need to ensure that there is no elimination or transfer under both the Savings Clause and Section 373.1501, F.S. How will these protections be reconciled by PDTs if a CERP project creates an impact to a stakeholder under one analysis but not the other?

3.8.1: The document states that the assumptions for water supply for the Seminole Tribe of Florida as modeled in the pre-CERP baseline are those supplies actually used by the Tribe in 2000. The quantity of this supply used by the Tribe in 2000 is currently under debate and will be outlined more clearly in the Tribe's comments on the pre-CERP baseline.

Supply Side Management and local water restrictions were in place for at least a portion of that year and these types of operations and management tools are only used during drought years.

The STOF is concerned that using year 2000 conditions does not accurately represent an average year scenario that would not typically have these operations and management tools in place.

3.9.1: The last paragraph in the Section states, “Other analyses besides the Savings Clause will be undertaken for levels of service for flood protection in the PIR.” The document should list some examples and applications of these other analyses.

3.10.2: This section describes the intent of the Savings Clause that it does not prohibit an elimination or transfer of an existing legal source, but that a replacement sources of comparable quantity and quality needs to be identified and available prior to the elimination or transfer. This section should further state that PDT’s should list in the relevant PIR when that replacement source, including from what project the source will originate, comes on line and when the source elimination or transfer will be made. The section makes the distinction between “evaluation criteria” and “performance measures.” The section should explain the differences between the two and how evaluation criteria are to be weighted if they are not to be used as performance measures.

3.10.4: This section provides direction to the PDT’s that if an elimination or transfer occurs, it must be replaced with a source of comparable quantity and quality. Comparable is defined as meaning similar, but not exact. More accurately, this section should define comparable as water suitable and appropriate for its intended purpose. The section states that more than a simple change in water quality or quantity is necessary to rise to the level of an elimination or transfer. Project teams are directed to address this issue by considering all the facts. What a project team might construe as a “simple change” may result in a large economic impact to a provider of that quantity of water or additional costs in treating that water to a certain standard. These “simple changes” may also result in a downstream recipient of that water having to compensate for that change. For instance, a downstream recipient of a lesser quantity or quality of water may have to change its treatment technology or intake infrastructure. This section should be expanded to include some type of discussion about how project teams will analyze changes in water quality or quantity by considering all of the facts, including the economics of such a change.

3.10.5: The next section attempts to address the issues raised in Section 3.10.4, but misses the mark in only elaborating that differences in hydrological response under a Savings Clause analysis should be significant and adverse. Again, the section should be expanded to deal with the economic issues associated with changes in water quality or quantity as a result of a CERP project.

3.10.6: If implementation of a CERP project results in an elimination or transfer of an existing legal source, then the PIR will include an implementation plan that ensures the source or quality switch will not occur until the comparable water is available to replace it. More direction should be provided about what must be addressed in this implementation plan.

The section further lists various actions that can be undertaken if analyses show that operation of the project will result in an elimination or transfer of an existing legal source. Criteria should be listed associated with these alternative courses of action to provide some direction to the PDT on when to employ which strategy. Additionally, RECOVER should have some role in reviewing

the use of any of these strategies. RECOVER's role in this decision making process should be clearly articulated in this section.

3.10.7: This section should be expanded to provide some direction to the PDT that the economic ramifications of these considerations should be a part of the analysis in determining whether a replacement source is comparable on a case by case basis. The economic evaluation should be tied to the PIR cost estimate of the project to ensure that stakeholders do not bear the burden of unanticipated costs of CERP project or project team actions.

Attachments 3A, 3B and 3C: The Tribe believes that two important intervening non-CERP projects have a direct relationship to the Savings Clause analysis of CERP projects in that they provide building blocks for CERP and should be considered as part of the Guidance Memorandum 3 analysis. These projects include the Critical Projects, authorized in WRDA 1996, and the Everglades Construction Project. Because neither project was fully operational by the date of Enactment of WRDA 2000, the Tribe wants to ensure that project benefits are not reduced by a CERP project or conflict with a CERP project.

Specifically, the Big Cypress Critical Project will result in the restoration of wetland areas in Big Cypress on and off Reservation lands. Because the Critical Project is to provide the infrastructure to make better use of inflows into these areas, the conveyance systems to restore these lands did not exist in WRDA 2000 and are under construction currently. If a CERP project adversely affects flows that the Critical Project is planned to utilize and convey for restoration purposes, the Critical Project itself will not result in the benefits anticipated in early project planning and authorization. This scenario seems to fit under examples (5) or (6) in Attachment 3A depending on the level of the elimination or transfer. If the CERP project eliminates or transfers the source beyond those levels in WRDA 2000, then this would result in a Savings Clause violation. If the elimination or transfer would result in some reduction of the benefits provided by operational changes or other intervening non-CERP projects, but not beyond those levels in WRDA 2000, then this would not be a Savings Clause violation. The Tribe wants to ensure that its vested interest in the Critical Project will not be reduced by future CERP projects in order for the project to operate as planned. There should be clear direction to PDT's that authorized projects such as the Critical Projects in WRDA 1996 should not be adversely affected and should consider all impacts of CERP projects on the benefits to be received by these projects.

The Everglades Construction Project is another example of an intervening non-CERP project that was not operational on the date of enactment of WRDA 2000, but stands to significantly impact the flow of water south from Lake Okeechobee. The Stormwater Treatment Areas ("STA") themselves will become water users to ensure the health of the vegetation that will provide a water cleansing function, which will result in a reduction of flow south. CERP projects could further reduce water flowing south from these facilities. This further reduction in flow by a CERP project would constitute an elimination or transfer if the reduction in flow lessens the amount or quality available in 2000 under example (4) in Attachment 3A. Delays and changes in project planning in the STA construction might provide a skewed interpretation of the amount of water that was available downstream of these facilities in 2000. The effects of the changes on project construction for the STAs should be clearly factored into a Savings Clause analysis by a

PDT, to ensure that CERP projects do not further erode recipients of downstream flows.

These attachments should be broadened to reflect parity amongst water users and stakeholders in CERP. Attachment 3C, in particular, should use the same format as Attachments 3A and 3B by providing examples of the impacts of intervening non-CERP projects beyond the Modified Water Deliveries project. Specifically, the title of Attachment 3C should be changed to reflect the broader philosophy that some of these intervening non-CERP projects provide a foundation for CERP to build upon.

Additionally, Attachments 3A and 3B should incorporate a discussion of the other legal protections for users such as those listed in Attachment 3C because these additional legal protections apply specifically to water supply and flood protection.

Guidance Memorandum #4: Identifying the Appropriate Quantity, Quality, Timing and Distribution of Water to Be Dedicated and Managed for the Natural System and for Other Water-Related Needs

This section should include a definitions section for such terms as “beneficial existing water”, “water made available by a project”, “total water made available by the plan”, “additional water made available by a project”, “all water made available”, and any other key terms.

A section should be added to GM 4 that clearly outlines and articulates the process for flexibility or making changes to reservations. The programmatic regulations discuss the process for changing a reservation § 385.27(c) and therefore, there should be direction to PDT’s about the fact that this process exists and what it entails. PDT’s may find, even during project development, that there may exist a need to review a reservation in the future due to the relationship to another CERP or non-CERP project.

4.3: The third paragraph in this section states that “While the reservation or allocation of water is a process solely undertaken by the State, WRDA 2000 and the programmatic regulations require that this reservation or allocation be based on the identification of water made available for the natural system outlined in the PIR.” The preceding two sentences allude to this point, but it should be clarified in the third sentence. This statement should be revised to clearly show that the State’s obligation under WRDA 2000 and the programmatic regulations is to reserve or allocate this *project* water.

The fourth paragraph in this section should reflect that the State is undertaking an initial reservations rule process, under current state law, which will provide a foundation for later CERP project water reservations.

4.4.2: This section describes the General Methodology for identifying the water for the natural system and other water related needs of the region. The second paragraph describes the process by which the water identified in the PIR will be reserved by the state by using the modified next added increment method with the provision that the *proportion* of water delivered to the natural system and for other water-related needs, as predicted through the next-added increment method will be maintained. In this section, or the sub-sections to follow, there is no provision for how this “proportion” of water is to be determined or incorporated as part of the procedure for identifying water in Section 4.4.3. This direction to the PDT’s should be clearly outlined in this or the following sub-sections. Additionally, in this section, there should be a discussion or explanation of how this methodology was derived and why it was necessary.

4.4.2.1: This section does not include a discussion of why it is necessary to base the analysis of water to be identified for the natural system on the Modified Next Added Increment methodology. It appears that assuming all built or authorized CERP projects and all non-CERP projects that have approved operating plans as of the time the PIR is initiated would accurately reflect the state of reality at the time the water is identified for the natural system and other water related needs in the PIR.

4.4.2.2: Similarly, this section should include a discussion of why it is necessary to base the

determination of the proportion of water delivered to the natural system and for other water-related needs on a Next Added Increment methodology.

4.4.3: This section outlines the process for identifying water. Step (6) of this process should be revised to reflect that the identification of water for the natural system occurs based on the Modified Next Added Increment methodology. A Step should be added under the next section for other water-related needs that reflects the need to determine the proportion of water going to the natural system and other water related needs using the Next Added Increment methodology. Finally, a section or steps should be added before the final section that procedurally outline for a PDT what is to be done with the proportion determination once it is made. Attachment 4-B should be revised corresponding to these additional steps.

The eleven (11) step process also appears to be based on the presumption that a project will result in water being produced or that enough water to meet restoration and other water related needs will be produced. The process must build in the fact that this may not always occur. For instance the project may simply change the distribution or timing of water deliveries or it may present a shortfall in the amount produced. More specific direction must be given to the PDTs about what to do if these situations arise.

4.5.1: This section describes beneficial water for the natural system. The second paragraph states, “The sum of the beneficial water in the modified next-added increment and additional beneficial water together make up the total beneficial water for the natural system.” What is additional beneficial water? Is this additional *existing* water? Where does the additional beneficial water come from? Water identified to be reserved is based on the water in the modified next-added increment so it is unclear what “additional beneficial water” actually is. This sentence should be clarified.

4.5.2: The last paragraph in this section states, “...this quantification includes any changes the project makes in the quantity, timing or distribution of water from the pre-CERP condition that is beneficial.” Is the pre-CERP condition synonymous with pre-CERP baseline? If not, pre-CERP condition should be defined.

4.7: This section discusses the concept of identifying all water made available by a project. The last paragraph states that it is difficult to ensure that water is not required to support project benefits to natural systems, or other water-related needs and that it may be necessary to support downstream systems. This section should add some type of factors, criteria or process that PDT’s can use to help determine whether or not water is needed by another downstream user.

4.12: This section refers to three categories of water. Section 4.5.2 defined two categories. These two sections and these categories of water should be reconciled.

The inclusion of “Model Language” in every PIR runs counter to the delicate partnership that has been established between the State and the Federal government for CERP. The STOF believes that sufficient assurances exist within Federal and State law to ensure that reservations are made and program assurances are carried out. Further, the STOF believes that this ‘Model Language’

is problematic for the following reasons.

Issues regarding Guidance Memoranda #4 Model Language

1. The non-Federal and Federal sponsor should both be responsible for maintaining an appropriate quantity, quality, timing and distribution since both parties have control over various operational schemes and regulation schedules.
2. The first paragraph describes consistency with “natural system restoration goals and objectives of CERP.” This terminology seems to introduce a new concept. How are these “natural system restoration goals and objectives” different from the “goals and purposes in the Plan” as referenced in WRDA 2000 and the Programmatic Regulations? Natural system restoration goals and objectives could be something different. Additionally, who makes the determination that the “maintained” water referred to in the introductory paragraph is consistent with these natural system restoration goals and objectives? The Tribe suggests broadening this language to track the language in WRDA 2000 regarding the “goals and purposes in the Plan.”
3. Again paragraph 1 refers to “restoration goals and objectives.” It appears that achieving the restoration goals and objectives could be something different than achieving the goals and purposes of the Plan.
4. Paragraph 2a. refers to these same restoration goals and objectives for the (project name) and the natural system. Again, from a consistency standpoint, what are restoration goals and objectives for the natural system and are they different than the overall goals and purposes of the Plan? The language “and the natural system” should be struck and the sentence should end with “necessary to achieve the goals and purposes of the Plan.”
5. The same comment applies to paragraph 2b.
6. Paragraph 3 describes a requirement of a written certification. What would this written certification entail?
7. Paragraph 4 requires notification and consultation on “any change” in the reservation of water or “other legally enforceable means of protecting water.” We are concerned that the use of the term “other legally enforceable means of protecting water” could be misleading and be interpreted to be overly broad. While we understand that the intent is encompass all the tools the State may use to fulfill its obligations to protect water, we do not believe it is appropriate for the Secretary of the Army to be notified and consulted on any change to “other legally enforceable means of protecting water”, such as the issuance of consumptive use permits. This falls outside the scope of the Federal interest which is ensuring that the reservations are made on a project by project basis. This is very open-ended and could lead to this notification and consultation requirement to have far reaching consequences for the State in managing its regulatory programs. Finally, what criteria will be used to determine whether or not a changed reservation or legally enforceable means of protecting water conforms to the State’s obligations under this paragraph? This paragraph needs to be clarified to reflect the true intent which is to notify and consult on a change in the mechanism of protecting water, such as a reservation, not the issuance of a consumptive use permit.

Guidance Memorandum #5: General Content of Operating Manuals

5.3.1: The first paragraph describes the concept that Draft Project Operating Manuals (“POMs”) will be updated and revised for subsequent phases of project implementation, including construction. Will this be a function of RECOVER? The document should state who is responsible for the updating and revising of the POMs.

The last paragraph of this section discusses how the development of POMs will be carried out in a public process within the framework of NEPA and other applicable laws and regulations. Will this public process include public hearings, workshops or other mechanisms for public input? This public process should be described in more detail.

5.4.1.1: Specifically in this section, this sentence should be revised as follows: Coordination between the project team and the modelers should be focused on ensuring that the modelers clearly understand the objectives of the project features articulated in the PIR, and how the operations of each feature are intended to meet ~~the~~ those objectives.” These project features should be listed in the PIR and the project should focus on meeting those specific objectives.

5.4.1.2: This section discusses the public review process as updates and revisions to the POMs occur. What forum or group will these updates and revisions occur in? This section should be expanded to clarify how public review of these updates and revisions will occur.

5.4.2.1: This section addresses consistency of the POMs with water reservations and allocations. The last paragraph in the section describes the process whereby project teams will develop operating criteria to simulate operations of structural features of the selected plan and to “maximize natural system benefits and other regional benefits from the selected alternative plan.” This section should reflect that this exercise to maximize these benefits must be completed consistent with the goals and objectives of the Plan and for the project.

5.4.3: This section provides more detail regarding the relationship between operational flexibility and adaptive management. The range of examples of this operational flexibility includes spillway headwater stages and the decision tree for the Water Supply and Environment (“WSE”) Regulation Schedule. The section should state that the POMs must include enough information so that a stakeholder reading the POM will have some understanding about the parameters of this operational flexibility.

The last sentence in this section lends itself to this same concept. Determining whether or not operational modifications fall inside or outside the scope of the operational flexibility in the POM can only be done if those analyzing the operational modification understand the parameters of that flexibility. The parameters must be specific enough to determine if the operational modifications are inside or outside of the scope of the POM.

5.5: This section outlines the circumstances under which POMs are updated. The clarity of the points for updates and revisions provides clear direction on anticipated updates. The section also describes the need or desire to revise the POM based on additional scientific information, new CERP or non-CERP project being implemented, new CERP updates, etc. There must be a

process to update the POMs to account for this new information as it affects the operations of a particular project, but this process could also be endless. These updates should only be necessary if these revisions cannot be captured within the operational flexibility determined for the project. The development of the operations must strike a balance between providing enough operational flexibility to account for reasonable changes, but be specific enough so that stakeholders can determine how project operations will affect their interests. We suggest that these updates be linked to the State's water supply planning process to capture all modifications to operations and, at a minimum, POMs would be revisited at least every five years to correlate with the updates to the individual five regional water supply plans.

5.5.1: This section describes the Draft POM that will be included in a PIR. The section states, "Water management operations in the Draft POM will consider operations of existing or planned project, including both CERP and non-CERP project that may influence operations of the subject project." How will the PIR consider future planned projects if their operations are unknown? Does the PIR simply raise the issue that there may be a linkage when the future planned project is implemented or does the PDT analyze potential scenarios based on predicted future operations? It would appear that the PIR can only raise potential issues but not necessarily "consider" future planned projects when developing operations for the current project. This section should provide more detail to a PDT on how they are to "consider" these future planned projects when developing the POM.

Figure 5.2: This figure should be revised to show what entity is responsible for what stage of the process in developing the POM.

5.5.5: This section describes the process to revise the POM during long-term operations and maintenance. The section states that this will be done in accordance with the programmatic regulations. This section should provide more details on this process as outlined in the programmatic and applicable USACE regulations.