



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

January 10, 2005

Dear Colonel Carpenter,

On behalf of the World Wildlife Fund (WWF) I am pleased to submit the following comments on the C&SF Project CERP Programmatic Regulations Six Program-Wide Guidance Memoranda, Master Implementation Scheduling Plan and Pre-CERP Baseline. Our combined comments have been divided into two parts, one on the MISP and one on the Pre-CERP Baseline and Guidance Memoranda.

We appreciate the opportunity to review and comment on these important documents and look forward to reviewing final versions which address the issues and concerns we raise in this letter.

Sincerely,

Shannon Estenoz
Senior Policy Advisor

Attachment

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Incorporating The Conservation Foundation. Affiliated with World Wide Fund for Nature.

PART 1 MASTER IMPLEMENTATION SEQUENCING PLAN

Comment 1: The MISP should not be finalized until a better understanding of the actual benefits that can be expected from it can be demonstrated.

World Wildlife Fund is concerned that the MISP is being finalized prior to the completion of the interim goals development process and without the benefit of incremental time-step modeling to measure its restoration performance across time. We understand that the assumptions underlying the MISP are based in part on the benefits outlined by the 1999 CERP Plan, which of course can provide only a blurry picture of expected benefits between the long term benchmarks modeled in that plan. WWF believes that this is an important point because, while WRDA 2000 makes it clear that achievement of the goals and purposes of the plan, including restoration of the natural system is the overarching purpose of CERP; the MISP is primarily a resource constrained schedule. The fact that we have, at the moment, much more detailed information about funding streams than we do about project benefits and restoration goals, while understandable, is not sufficient reason to base the MISP primarily on resource constraints.

WWF requests that the MISP remain in draft until interim goal and incremental time-step analyses can be performed on the schedule. Absent allowing the MISP to remain in draft form, WWF requests that language be added to the plan indicating that these analyses will be performed by no later than 6 months following completion of the “Initial CERP Update”, the results made available to the public, at which time the MISP will be revised to maximize its compliance with the overarching objective of CERP and reissued for public comment.

Comment 2: Generally speaking the MISP does not provide adequately detailed explanations of the analyses that produced the revised schedule, including Accelr8.

The MISP refers to a number of analyses including Project Sequencing Review, Task Duration Review, Component Packaging Review, Technical Constraints Analysis, Accelr8, etc. that together form the basis of the MISP as presented in this draft. WWF assumes that the lack of documentation in the MISP detailing how these analyses were conducted and the data inputs used for them results from a desire to keep the size of the MISP manageable. WWF certainly appreciates and understands this “keep it simple” impulse; however, we feel that the MISP is such a critical document that stakeholders and decision makers need to fully understand its underlying bases. WWF would prefer that the District and Corps err on the side of bulk rather than leave out details that might help interested parties fully understand the MISP and its ramifications for program benefits.

Comment 3: The MISP does not clearly state that it can and will be revised in the event that additional resources are made available to CERP.

The plan should include the following language adopted by the Water Resources Advisory Committee, on January 6, 2005.

“Development of the MISP included consideration of a variety of factors including technical relationships, the status of scientific research in various disciplines, and resources available to implement projects. A change in any one of those factors could have a significant effect on the final sequencing and scheduling of projects. The factor most likely to change in the future is the availability of resources, which also includes assumptions about future funding and staff availability. These assumptions were used to determine how many projects could be developed simultaneously, after taking into account technical relationships among the projects. There are projects scheduled in later bands that face significant issues with future land availability, including IRL Natural Areas and Everglades National Park Seepage Management. These projects have demonstrable benefits for the natural system and have significant stakeholder support. Such projects could have been at least partially scheduled earlier if resource assumptions were different. As CERP implementation moves forward, all of factors that influenced the final sequencing and scheduling, including resource availability, will be reviewed and when significant changes occur the MISP will be revised to reflect new realities. The MISP is only a snapshot in time and will need to be monitored, evaluated and updated as the implementation of CERP progresses and more is known about the both the natural system and project implementation.”

Comment 4: A unilateral state policy shift resulting from the advent of Accelr8 is inconsistent with WRDA 2000, and not well documented in the MISP.

Paragraph 6.1.3.1 makes it clear that non-Accelr8 projects are no longer priorities for SFWMD funding. Paragraph 6.1.3.2 provides a rationale for this approach as “[reducing] the demand on Federal funds and resources that were targeted for design and construction of the Accelr8 projects. This approach allows those funds and resources to be utilized elsewhere, including non-Accelr8 projects and required monitoring. The anticipated result is a general acceleration of project implementation and CERP benefits.”

WWF applauds the aspects of Accelr8 designed to infuse included projects with new resources and accelerate their implementation, and appreciates the state’s initiative in this regard. WWF also fully recognizes government’s right to accelerate projects and to establish new funding streams for CERP and aspects of CERP. Furthermore, WWF would obviously support “a general acceleration of project implementation and CERP benefits”, and would not be opposed to achieving that acceleration through resource shifting and scheduling. The problem is that the MISP does not document the analysis that produced the Accelr8 policy shift and the rationale provided by paragraph 6.1.3.2.

WWF is concerned that the policy shift embodied by Accelr8 is inconsistent with Section 601 (e)(2)(A) which states that “The non-Federal sponsor, with respect to a project described in subsection (b), (c), or (d), shall be – responsible for all land, easements, rights-of-way, and relocations necessary to implement the Plan;...” The subsections referenced in this section include non-Accelr8 projects. WWF does not believe that the state has the option to unilaterally shift its responsibilities as outlined in WRDA 2000 absent an act of Congress. Furthermore, codifying such a shift in a document that flows from the same federal law seems particularly inappropriate. As a practical matter, we are particularly concerned that members of Congressional Appropriations committees will look upon future requests for federal land acquisition funding, made necessary by the District’s shifting priorities, as unreasonable given the WRDA requirement quoted above.

Having said that, restoration results are paramount to WWF and we would not, out of a slavish devotion to the letter of the law, oppose policy shifts that legitimately produce better results, particularly because we feel strongly that Congress too holds restoration results paramount. We believe that a fuller explanation of the analysis that produced Accelr8 and the State’s priority shift as well as a fuller explanation of the anticipated benefits will be invaluable tools as we engage Congress in this new approach to implementing CERP. The absence of such explanations makes it very difficult for WWF to support abandonment of any WRDA 2000 provisions.

Comment 5: WWF agrees with the concerns raised by Audubon of Florida in its letter to Colonel Carpenter of the U.S. Army Corps of Engineers, dated January 3, 2006 regarding the scheduling and scope of the Biscayne Bay Coastal Wetlands project. WWF supports the recommendations made by Audubon in this letter.

Comment 6: WWF agrees with and supports the comments on and recommendations for changes to the MISP that were submitted by the National Parks Conservation Association dated January 10, 2005, the Natural Resources Defense Council dated January 10, 2005 and Audubon of Florida, January 10, 2005. WWF asks that the record reflect its concurrence with these documents and with the issues and recommendations contained within them.

PART 2
PRE-CERP BASELINE
AND
PROGRAMMATIC REGULATIONS SIX PROGRAM-WIDE GUIDANCE
MEMORANDUM

Pre-CERP Baseline

WWF supports the development and use of the Pre-CERP Baseline for purposes of determining Savings Clause and Project Benefits Agreement compliance. In addition, WWF strongly urges the state of Florida to execute an initial reservation of the Pre-CERP baseline for the natural system. Furthermore, WWF asks that the record reflect its concurrence with all comments and concerns regarding the Pre-CERP Baseline (and the Guidance Memoranda) raised by the Natural Resources Defense Council, the National Parks Conservation Association and Audubon of Florida in their submissions during this comment period.

Guidance Memoranda

Our review of the Six Program-Wide Guidance Memoranda (GMs) produced concerns that can be grouped into two categories, those that are overarching or apply to more than one Guidance Memoranda, and those that are specific to one GM or to a section of specific text in the document. WWF is not submitting a strike-through/underline edited version of the GMs, although we do include in our comments specific language edits that address some of our concerns.

Overarching Comment Number 1: The Guidance Memoranda should be revised based on this round of feedback, and then re-released in draft form for another round of public comment.

WWF understands that when a document the size and complexity of the GMs is authored by a number of people and released for broad review, a number of errors, omissions and other problems tend to surface almost immediately. This is both understandable and acceptable. The GMs contain a number of these kinds of problems that we are confident will be resolved in the next revision process. Unfortunately, some of these problems hampered the ability of interested parties to review the documents as precisely and insightfully as necessary. Figures printed incorrectly or were simply crafted incorrectly causing great confusion over already complex issues (e.g. Figures 4-2, 4-3 and 4-4). In addition, there are several instances where the document's multiple authors did not consistently use terminology or describe concepts and processes. Examples include mixing the terms "PIR Baseline" and "Existing Conditions PIR Baseline"; use of undefined terms such as "objectives" etc. WWF believes that the Corps, District and the

public should engage in a second round of drafting and review to ensure that these documents are accurate and reflect the full understanding of interested parties.

Overarching Comment Number 2: The GMs do not establish a goal oriented process for implementing CERP.

WWF has argued since 2001 that CERP should be implemented on a programmatic basis driven by the goals and purposes of the Plan as described and required by WRDA 2000. WWF argued that such a process is the best way to “ensure protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process” which WRDA lists as one of the requirements of the Programmatic Regulations. The process established by the GMs is project oriented rather than goal oriented. The resulting process ensures little more than that projects will be initiated and completed after being evaluated by a number of metrics, of which contribution to interim goals is only one, and not even among the most critical ones. 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 metric required by WRDA 2000 to be applied by the Programmatic Regulations, from which the GMs flow.

Overarching Comment Number 3: The GMs establish a process that inadequately executes the WRDA 2000 requirements for protecting water for the natural system before and after the advent of a PIR and PCA.

WRDA 2000 lays out requirements for identifying and protecting (including through reservations) water for the natural system. While it is true that the reservations element of these requirements is to be executed pursuant to state law, the requirement to do so exists in federal law. In addition to the provisions outlined in Sections 601 (h)4(A)(iii) (IV), (V) and (VI), Section 601 (h)(2)(A) requires that the state and federal government enter into a binding agreement wherein the state of Florida shall

“ensure by regulation or other appropriate means, that water made available by each protect in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under Sate law in accordance with the project implementation report for the project and consistent with the Plan.”

WWF is concerned that the process outlined in the GMs does not implement these provisions. We are concerned about three specific elements of the process described in the GMs.

1. Assuming that the “amount” of water to be reserved that is necessary to achieve the hydrologic conditions described in Section 601 (4)(A)(iii) (IV) and (VI) cannot be identified until a PIR has been initiated, that leaves the question of how the state proposes to protect water prior to the PIR being initiated. This is an important question because neither the concepts of “additional” nor “new” water 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 GMs indicate that the state is planning to establish an initial reservation, but there is no requirement or even expressed expectation that they do so. Furthermore, we are concerned that the GMs list other processes like CUP permitting and Water Shortage Restrictions as “protective”. We disagree with such characterizations as we discuss in further detail in the Specific Comments section of this letter.

2. The 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, 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 GMs should also include a process for how water that has been made unavailable shall be recovered for the PIR in question.

3. The GMs do not actually seem 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”. It seems that the GMs introduce the concept of “new” or “additional” water as being that water produced by the PIR above and beyond a moving baseline and identify *that* as the water to be “reserved”. WWF does not understand how such an approach is justified by WRDA 2000, the Agreement, or the Programmatic Regulations.

WWF recommends that the GMs 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 then the water must be restored to 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.

Overarching Comment Number 4: The GMs lack clarity or detail on a number of processes and analyses.

The following analyses are not adequately described in the GMs and/or are not accompanied by adequate guidance for project teams to execute 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 was so unclear that WWF does not feel capable of fully commenting on it in a meaningful way. However, we can say that in addition to being unclear, the explanations are also incomplete. If 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 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?”.

Generally speaking WWF considers the MNAI/NAI analysis to be, among other things, an attempt to distribute “risk” among the various beneficiaries of CERP. Because CERP is a long term program there is inherent risk and uncertainty at many levels including financial, political etc. Due to the lack of clarity and completeness of these draft GMs on these issues, WWF is not entirely certain what that risk distribution looks like at this point. However, WWF cannot support a “restoration” program that distributes risk evenly between the system that is to be restored and competing uses, and will oppose a program that imposes the greatest risk on the natural system. We do not oppose providing more certainty for other water related needs, but doing so cannot increase the amount of risk and uncertainty assumed by the natural system, which is meant to be the primary beneficiary of CERP.

Overarching Comment Number 5: The GMs reference several Corps internal review processes that will be conducted during the PIR but do not indicate whether or not these will be accessible to the public.

Internal Corps processes such as the Feasibility Scoping Meeting and the In-Progress Review are given important roles in the PIR process. These forums will not only serve as check points for review by the Corps leadership, but will also be used to address unresolved issues including, but not limited to, trade-offs analysis. It is this resolution role that concerns WWF because there does not seem to be provision for public access to these forums. WWF believes that the CERP implementation process should avoid the perception or reality of “black box” decision making. Accordingly, public access to all process steps, pursuant to NEPA, where decisions will be made about project direction, alternative selection etc is of paramount importance.

SPECIFIC COMMENTS

Guidance Memorandum Number 1:

- Page 1-26: lines 42 – 46 provide for water to be made unavailable downstream in order to comply with existing or future water quality standards. WWF assumes this is an error because the amount of water that could fall into that category is quite large and could have a profound impact the achievement of CERP benefits. WWF supports non-CERP water quality improvement efforts, however, they should not be factored into the calculation of water available to the natural system for changes that occurred after December 2000.

Guidance Memorandum Number 2

- Section 2.5.3: lines 42-43 reference “State and Federal laws and policies [that] provide guidance as to what level of performance [for urban and agricultural water supply and flood protection] is expected.” These laws and policies should be specifically referenced in the GMs for the benefit of project teams and the public.
- Section 2.6.3: This section should include a requirement that project teams apply an analysis to determine whether or not water that was expected to be available based on the 1999 Plan, has been made unavailable. This is particularly important for water that has been made unavailable in violation of the President/Governor Agreement and WRDA. Provision then must be made for restoring as part of the PIR process water that was previously made unavailable.

Guidance Memorandum Number 4

- Page 4-2: lines 3, 4, and 5. Reference to WRDA 2000 should be deleted in this sentence as WRDA 2000 does not require that water for other water-related needs be identified. Perhaps the authors meant to reference state law which does contain such a requirement.
- Figures 4-2 and 4-3 printed incorrectly in the edition available to the public.
- Figure 4-4 should be revised to accurately reflect the concept described in the figure description.
- Page 4-10: line 3-5. Revise sentence to read: “For the purposes of quantifying water made available for the natural system, this quantification includes the total project water that is beneficial for the natural system.”
- Section 4.7 header (line 22): Insert “to be needed” between “anticipated” and “to meet”.
- Page 4-26: line 43: Define or otherwise explain the term “normalize” as it is used in this sentence.

- Page 4-51 lines 5-31: The State's Consumptive Use Permitting program is listed as a tool available to protect water resources. WWF does not believe that this program warrants inclusion in this document as a protective tool, particularly in the absence of a requirement that the efficacy of such tools be verified in the PIR process. The CUP permitting process does not contain provisions that can be legitimately thought of as protective in the context of a *restoration* program. For example, the CUP process does not provide for the meaningful evaluation of system operations necessary to make a permitted withdrawal possible. (e.g. we hold water levels high in Lake Okeechobee in the summer so that there is enough water for permitted users in the dry season. The harm to the resource is caused in the summer, not at the time of the withdrawal, but the CUP process only evaluates whether the withdrawal causes harm). In short, the state of Florida is free to offer up the tools it considers protective, but the federal government should apply some critical analysis of these tools and decide for themselves if such tools are truly protective in the spirit of WRDA 2000 and the President/Governor Agreement. A process for verifying the efficacy of these tools must be developed, peer reviewed and implemented. A similar argument applies to the validity of water shortage implementation as an adequately protective tool. Water shortage plans are intended to prevent severe environmental harm scaling back users in times of scarcity. Such plans are not a restoration tool, but rather an attempt to equitably distribute adversity in times of drought.
- Attachment 4-D line 31: delete the word "additional" which does not appear anywhere else in the law or regulations. Revise the entire sentence to read: "Prior to the execution of the Project Cooperation Agreement, reserve the water identified in this Project Implementation Report to be necessary to achieve the restoration goals and objectives for the [INSERT PROJECT NAME, LOCATION AND/OR/WATER BODY HERE] and the natural system."