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Jacksonville District
P.O. Box 4970
Jacksonville, FL 32232-0019
VIA E-MAIL

Re: Preliminary Comments by Miccosukee Tribe of Indians on Draft Programmatic Regulations

Dear Stu:

The Miccosukee Tribe of Indians provides the following preliminary general comments on the Corps of Engineers' December 2001 Initial Draft of the Programmatic Regulations authorized by WRDA 2000.

I. POSITIVE ELEMENTS

A. Clear Procedures

Unlike usual Corps procedures (which are for the most part murky to the public), these regulations for the first time clearly establish the steps which must be accomplished from project planning to project operation. This should be a great help in holding the Corps accountable for implementing the law and Congressional intent.

B. Integrated Planning, Design, and Operation

It is very important that the regulations provide for integration of planning, design, and operations. Prior Corps projects in the Everglades have consciously and explicitly separated planning and design (which are done first with an EIS) from development of operations guidelines and manuals (done separately with a later EIS). This approach makes no sense.

C. Concurrence with the Department of the Interior

The Programmatic Regulations wisely recognize the provisions in WRDA 2000 that provide that failure to take any action regarding concurrence or non-concurrence by the Governor or the Secretary of the Interior will serve as concurrence.

II. RECOMMENDED CHANGES/IMPROVEMENTS

A. Tribal Consultation Language Must Be Clarified and Strengthened and Must Recognize Federal Trust Responsibility to Indian Tribes

The programmatic regulations must recognize, and be consistent with, the federal government's trust responsibility to Indian Tribes required of all agencies (including the Army Corps of Engineers), as recognized under general principles of Indian law and the trust doctrine referenced in WRDA. The consultation provisions should reference all such duties (not just one executive order) and recognize that the tribal consultation role is a government to government relationship. Consultation must not be limited by the language "to the extent practical." Moreover, the consultation requirements should identify and recognize the consultation required with the Miccosukee Tribe as the promulgator and enforcer of EPA-approved Clean Water Act water quality standards in the Everglades.

As currently proposed, section 385.3 of the Programmatic Regulations defines consultation as "holding meetings, briefings, telephone conversations, and other outreach activities with Federal, State, tribal, and local agencies and governments to provide information or an exchange of views." Outreach is defined as "activities undertaken to involve or inform the public about the Plan and activities associated with implementation of the Plan." These definitions effectively equate tribal consultation with public outreach. This is unacceptable.

WRDA 2000 requires consultation with the Miccosukee Tribe and very clearly spells out in Section 601(h)(2)(C) that "In carrying out his responsibilities under this subsection with respect to the restoration of the South Florida ecosystem, the Secretary of the Interior shall fulfill his obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other applicable legal obligations." Executive Order 13175 (Dated November 6, 2000) states under Section 5, that an agency "shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

In the pre-rule section, under Administrative Requirements, the Corps should separately reference Executive Order 13175 instead of Executive Order 13084. Executive Order 13084, which is currently listed in this section, was revoked by Executive Order 13175.

B. NEPA Concerns

Section 385.11 (d), Categorical Exclusions of the Programmatic Regulations, is too broad and includes controversial, as yet undefined documents that should not be included. These exclusions prejudice whether an EIS or EA is required rather than using NEPA's standard on whether the action has a significant effect on the human environment. Particularly troubling are the exclusion of interim goals, plans and specifications for projects, operating manuals, quantification of water for the natural system, and methods of determining levels of flood protection. Such a list will work against those who are adversely affected by decisions made under these actions. Instead of starting with a default position of assuming no significant impact, the Corps should err on the side of caution and examine each action to properly determine the impact and effects on the environment. There is absolutely no doubt that implementation plans and operations manuals have the potential to significantly affect the environment and must be thoroughly examined under NEPA.

C. The Role of the South Florida Ecosystem Restoration Task Force Must be Recognized

The Task Force should be explicitly recognized in the Programmatic Regulations with a strong coordinating role, as authorized by Section 528(f)(2)(B) of WRDA 1996, which states that the Task Force "shall coordinate the development of consistent policies, strategies, plans, programs, projects, activities, and priorities for addressing the restoration, preservation, and protection of the South Florida ecosystem."

The Task Force should be responsible for approving and adopting interim goals and performance measures. In addition, the Task Force should receive and review all RECOVER recommendations on all aspects of restoration and should also play an important coordinating role in the independent scientific review required by WRDA 2000.

D. RECOVER 's Role Should be Reduced and Limited

In general, the role of RECOVER, which has no statutory authority, is too broad and ill defined. The Regulations should repeatedly clarify throughout that the role of RECOVER is advice and recommendations on science only. RECOVER is being given too much power without proper oversight or authority, and its work may be duplicative of other science groups already established.

To avoid Federal Advisory Committee issues, all advice and recommendations that come from RECOVER should be sent to the Task Force for review, after which the Task Force would adopt or send to the Secretary of the Army and other agencies, as appropriate. Section 528 (f)(2)(G) of WRDA 1996 states that the Task Force "shall coordinate scientific and other research associated with the restoration of the South Florida ecosystem." Yet, the role of the Task Force is ignored in the Regulations. Instead, the Programmatic Regulations give

RECOVER a great amount of authority to make recommendations on important issues that impact policy making such as performance measures, interim goals, adaptive assessment, and evaluations of plans during development of the PIRs, which usurps the role of the Task Force.

In Section 385.18, the Programmatic Regulations even state that RECOVER will be providing advice to policy makers. The Tribe is concerned that as established in the Programmatic Regulations, RECOVER does not properly comply with the Federal Advisory Committee Act. If RECOVER is to exist, its role should be limited and defined, and it should be placed under the Task Force, which is specifically exempted from FACA, as an advisory committee.

E. Interim Goals/Performance Measures

1. Role of Task Force in Determining Interim Goals/Performance Measures

The Task Force should play an active role in the development of interim goals and performance measures. The goals and measures should receive thorough review by the Task Force as the overall inter-agency (federal, state, local, and tribal) coordinating group. The Task Force should receive recommendations from RECOVER, other agencies, and interested parties, but should be responsible for the adoption of interim goals and performance measures (or recommend such goals and measures to the Secretary of the Army). As currently written, the Regulations give RECOVER too powerful a role in the creation of interim goals by allowing RECOVER to act as a quasi-public agency by developing recommendations, overseeing public comment, and preparing final recommendations.

2. Interim Goals/Performance Measures Should be Included in the Regulations Insofar As they Establish a Process Only, not Specific Goals

The Regulations should establish a process for adopting interim goals and performance measures, but the goals and measures themselves should not be in the Regulations. The inclusion of detailed interim goals could hinder progress to timely implementation of CERP. Interim goals and measures are too important, and too laden with significant policy choices, to adopt in the time frame required for these regulations. Poorly chosen interim goals and measures can have a severe negative impact and drive the effort from overall restoration toward subordinate, sub-optimal goals promoted by narrow agency or special interest agendas.

3. Restoration Definition (Hydroperiod and Water Quality) and the Danger of Deviating Interim Goals

CERP aims to re-establish natural hydroperiod (quantity, location, and timing) and water quality. Re-establishment of natural Everglades conditions will follow from hydroperiod and water quality restoration. Interim goals which focus prematurely on assumed biological or ecological characteristics, or expect other ecological or biological characteristics to respond too quickly, threaten to divert and even block hydroperiod and water quality restoration. The track

record of Everglades restoration to date exhibits numerous examples of such subordinate, sub-system, short-term goals and measures overriding the real goal of overall, long-term, ecosystem-wide restoration.

4. The Senate Report “Discussion”

The Corps should not reference the Senate Committee Report 106-362. Courts recognize that legislative “intent” is relevant only if statutory provisions are vague or unclear, and even then, such “intent” is looked upon with great reluctance and disfavor. Senate Report 106-363 is an outstanding example of the wisdom of this policy. The Report’s recitation of the WRDA’s provisions relating to the programmatic regulations (WRDA section 601(g)(3)) properly makes no reference to interim goals or performance measures (as there is no such reference in the bill). But the “discussion” section of the Report says what the Corps “should” do (adopt such goals), even though no such mandate (or even suggestion) can be found in the bill. The consensus endorsement of the bill by a broad array of parties was based on the negotiated terms of the bill, including the specific exclusion of interim goals in the programmatic regulations. The bill limits the regulations to process and procedures only. Thus, the Senate Report illustrates the old adage that statements often appear in a congressional report because its proponents could not get those statements in the bill. Accordingly, courts and even Members of Congress pay little attention to such reports, and Senate Report 106-363 should be no exception.

F. Level of Flood Protection Needs Clarification

Section 385.31 references the date for evaluating the level of service for flood protection “in existence”, but the regulations need to better define what “existing level” of flood protection means. The Tribe proposes that the existing level means that level of flood protection authorized by law, whether or not that right has been exercised, not the level to which that authorized level of flood protection has deteriorated over the years. Furthermore, many local governments have enhanced flood protection for certain areas in South Florida, and the Regulations should make clear whether that enhanced level of flood protection is also protected.

The Regulations must assure that it does not deviate from WRDA 2000, § 601(h)(5)(B) by expanding or contracting requirements for flood protection. When not inconsistent with restoration goals, the Regulations should permit improved flood protection.

G. Cost Control

In order to ensure that false expectations are not created and to prevent surprises years down the road, a section needs to be incorporated which makes it clear to everybody how Section 902, WRDA 1986 (as amended) will be applied. Without this, the Corps will leave itself open to severe criticism down the road because of costs that exceed the \$7.8 billion authorized funding.

H. Independent Scientific Review - § 385.20.

Section 285.20 is vague and should be clarified to avoid “drive-by science” slowing down the restoration process. Independent scientific review should be instituted in a way that ensures that it is responsive to the needs of restoration and the Task Force should have the coordinating role to ensure this.

I. Role of DOI

Certain groups have advocated that the Department of the Interior be given a stronger role in the Regulations. The Tribe cautions that the role of DOI must be totally consistent with the requirements of WRDA 2000. As written, the Regulations appear to recognize the proper role of the DOI.

J. Reservation of Water

The water reservations must be made consistent with state law. However, these reservations are meaningless without a water control plan (which is created by federal agency action). The Tribe’s view is that the water control plan shall determine the operations of each project and the amount of water which is available to meet the state’s reservation. This interaction between state and federal control should be detailed in programmatic regulations. The only logical and non-controversial way to ensure that the state’s reservation of water is consistent and complementary with CERP, is to base it on a water control plan for each project, consistent with state law.

Please let me know if you have any questions or need clarification on any of the comments made. We look forward to the next draft.

Sincerely,


Dexter Lehtinen