

**SEMINOLE TRIBE OF FLORIDA- ISSUE PAPER  
ON INITIAL DRAFT OF PROGRAMMATIC REGULATIONS (PR)  
DATED DECEMBER 2001**

**General Comments**

There are two underlying principles that the Tribe believes must guide the implementation of CERP, and the Tribe has applied in its review of the draft PR. The PR must recognize that CERP projects are impacting a regional system and that the existing components of the regional system along with the new components that will be built through CERP operate interdependently. Decisions made on a project level will affect the regional system. Some decisions that the regulations say will be made on a project-by-project basis need to have regional considerations blended into the decisions. The regulations must incorporate a balance between regional and project-based decisions.

The Tribe believes that it is critical to the long-term success of CERP that the federal and state governments maintain a broad base of support for CERP implementation. All affected parties (all levels of governments involved, urban uses not represented by government, agricultural users not represented by governments, and environmentalists) must have seats at the tables where decisions affecting the regional system are discussed. By doing so, the product of such decision-making is more likely to have the support of the participants. Such support will help promote CERP implementation - the success of which is of crucial importance to the Tribe for its future water needs. There are two main reasons for this position - the first is political and the second is legal. Politically, all stakeholders unite to maintain the high level of congressional support that now exists. Legally, while it is very important to have "enforcement" opportunities in the regulations, it is important to implement the regulations in a way to avoid new suits and their inevitable delays.

**Specific Issues:**

**Issue: The Programmatic Regulations must define what is meant by “Restoration of the Natural System.”**

The Draft PR discussion of restoration of the Natural System is very broad. In WRDA 2000 and in the Draft PR, “Natural System” is defined to include all federal, state, and tribal land that are designated and managed for conservation purposes within the boundaries of the South Florida Water Management District, including the Everglades, the Florida Keys, and the contiguous near shore coastal waters of South Florida. Webster’s dictionary defines “restoration” as returning to a former or normal state. The Comprehensive Everglades Restoration Plan (Plan) was designed to result in the recovery of the South Florida’s ecosystem. The Plan recognized that the Everglades will be different than the Everglades that existed before the Central and Southern Florida

Project. It also recognizes that there will be improvements in water deliveries to areas such as Florida and Biscayne Bays. However, it is important to note that the Plan will not result in return of the Bays to the state prior to existence of the C&SF project, nor will it result in complete restoration of certain areas in the Everglades. While the Plan relies on adaptive assessment to improve the performance of the Plan, the Plan in and of itself will not resolve all the problems throughout all the areas contained in the definition of Natural System. This issue becomes very important as performance measures are developed and interim goals are established. In summary, the PR should define restoration to accommodate the assumed limitations of the Plan.

**Issue: The Programmatic Regulations should clarify what is meant by an “existing legal source” of water as of the date of enactment of WRDA 2000.**

The Savings Clause in WRDA 2000 provides that until a new source of water supply of comparable quantity and quality is available to replace the water to be lost due to Plan implementation, existing legal sources of water cannot be eliminated or transferred. While the language of the Savings Clause specifically protects the Tribe’s entitlement, supply of the Tribe’s entitlement covers only the Tribe’s agricultural and human supplies. Water necessary for such diverse activities as the maintenance of canal levels and water for the natural areas on the Reservation, such as the Wetland Reserve Program areas should also be accounted for in the clarification.

**Issue: The Programmatic Regulations should reconsider the terminology “New Water.”**

The use of the term “new water” is misleading because there is a rising belief that there is some limit to the “new water” that is available to be used either by the Plan or by other storage projects. The focus should instead be on the “new storage” or “new sources” of water produced by the Plan. Keeping the discussion focused in that way leaves room for the development of other storage projects supported by the State or private entities to capture and make available additional water. Perhaps the addition of a definition as to new source/storage should be incorporated into the draft PR in the place of “new water.”

**Issue: The Programmatic Regulations deprive the Seminole Tribe of a meaningful consultation role as mandated in WRDA 2000.**

The consultation role of the Seminole Tribe and other listed parties is taken away by deferring to Protocols many issues which were identified in WRDA to be included in the PR. It needs to be made clear in the section discussing the development, adoption and revision of protocols that the Seminole Tribe will still be given a consulting role. Moreover, the definition of consultation is unacceptable. From the PR it would appear that consultation can be met by way of a phone call providing information. The Corps requirements for consultation with Indian Tribes are clearly spelled out in the Executive Order entitled “Consultation and Coordination with Indian Tribes” dated November 6, 2000. Section 5 of the order defines consultation as “an accountable process to ensure

meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The Tribe expects this type of process to be included in the PR.

**Issue: The Master Implementation Sequencing Plan, the Establishment of Interim Goals and the Project Operating Manuals should not be Categorically Excluded from NEPA.**

The categorical exclusions section of the Draft PR includes items for which additional environmental review may be contemplated and where public input into the process should be included. For example, changes to the Master Implementation Sequencing Plan will effect the availability of water for the both the natural system and other water related needs of the region. The establishment of interim goals similarly will affect the availability of water depending on the goals that are selected and the target dates for their achievement. Finally, the Project Operating Manuals will need to be subject to appropriate review. While the initial project operations will be specified in each PIR, as additional projects come on line, the original operations of each Project may change. These changes should be subject to appropriate NEPA review.

**Issue: A clear process for development of the protocols needs to be set forth in the Programmatic Regulations, including specific timelines for their completion and a meaningful consultation role for the Seminole Tribe.**

The Draft PR identify seven different issues that will be addressed in protocol papers, including formulation and evaluation of alternative plans and their cost effectiveness; RECOVER protocols to carry out its duties (such as Adaptive Assessment): Development of the format and content of Project Implementation Reports; contents of operating manuals; and how to reserve water for the Natural System. Many of these topics involve issues that are very complicated and controversial. A clear process for development of the protocols needs to be set forth in the Programmatic Regulations, including specific timelines for their completion. It is essential that all parties involved in CERP be given the opportunity to participate in a meaningful way in the development of these papers. Effective implementation will require the support and involvement of all stakeholders over the lifetime of the Project. It is also essential that the time be taken to develop these documents correctly, and that they be developed within a timely manner.

**Issue: The process for development of the Project Implementation Reports set forth in Section 10.3 of the CERP should be included in the regulation and not in a separate protocol.**

The CERP at Section 10.3 discusses the process for developing PIRs and what should be included. This process should be followed. Section 10.3 should be repeated in the programmatic regulations; as a result, the need for a separate protocol is eliminated.

**Issue: The federal and state concepts of water reservation need to be explained with particularity. Identification of the reservation in the Project Cooperation Agreement may not be appropriate and the requirement that there be approval from the Department of the Army for any diminishment of that reservation is wholly inappropriate.**

The Programmatic Regulations should make the distinction between the federal and state concepts of water reservation. WRDA 2000 contemplates that a reservation will be made on a project by project basis as each PIR is completed. The purpose contemplated by this reservation is to set aside water for the natural system so that it cannot be allocated for other uses under State law. The state concept of reservation set forth in Fl. Stat. Sec. 373 is different. This concept can best be described as identifying the end goal ecotypes within an ecosystem through means of a hydrograph or other like mechanism. It involves scientifically establishing the appropriate quantity, timing and distribution of water for the protection of an ecotype, similar to the science based approach that was used to establish the appropriate Minimum Flows and Levels for the Everglades.

The intent of this section of the Programmatic Regulations appears to be to ensure that a reservation has been set for the natural system by the State prior to execution of the PCA. This approach can work if the following occurs: the State adopts end goal reservations for different parts of the natural system, such as a specified hydrographs for areas of the Everglades; then as each PIR is developed for a project it can identify how much water is being produced by the project and how much of that water is to be used to meet the end goal reservations for the natural system and whether the water produced from the project is source switching water. This approach involves considering the system from a regional perspective. This type of process is more likely to achieve the end goal of restoration for the natural system than a process which tries to tie water for specific areas of the natural system to specific projects.

However, if the intent of this section is to ensure that the State adopts project specific reservations (note there may be enabling legislation problems with this approach) the PR must allow for the ability to amend the reservation to account for discrepancies between the amount predicted to be produced at the PIR stage and the amount the Project actually produces when it is operable. It will probably be very difficult to anticipate how much water will actually be produced by a particular project at the PIR phase and a reservation may be left unfulfilled.

**Issue: The scope of the Protocol for identifying the appropriate quantity, timing distribution of water dedicated and managed for the natural system needs to be clarified.**

As discussed above, there is a difference between the federal and state reservation concepts. The end goal reservations for specific ecotypes fall within the purview of the state, and the state should be responsible for developing and identifying the appropriate quantity, timing and distribution of water for these ecotypes.

WRDA 2000 requires that each PIR identify the appropriate quantity, timing and distribution of water dedicated and managed for the natural system on a project specific basis. The protocol should address how the water from each PIR will enter the regional system and whether the water will be used as replacement water for existing legal sources.

**Issue: The Programmatic Regulations should specifically state that if a component Project does not produce the amount of water predicted in the PIR, the resulting shortfall will be shared equitably amongst the natural system, replacement sources, and other water related needs of the region.**

The success of CERP will depend on balancing all the water related interests of the South Florida ecosystem throughout the implementation process fairly and equitably. If actual operation of a Project produces a shortfall of water, the purposes and goals of CERP require this shortfall be apportioned evenly between the natural system, the replacement source, and other water related needs of the region. This should be done until the water shortfall is addressed, either through modification to the current Project or through changes to future projects to address the shortfall.

**Issue: The Programmatic Regulations need to identify an ongoing forum for creating consensus on CERP that involves participation by all stakeholders, and should set forth the basic guiding principles for this group.**

The PR need to identify one specific body with the role of creating broad consensus on issues relating to CERP. Some potential candidates are the Working Group, WRAC or RECOVER. All stakeholders should then be able to have appropriate participation on this body.

The key guiding principle should be that all the stakeholders should receive the benefits of CERP incrementally so that all stakeholders continue to support the CERP implementation process throughout the life of the project.

**Issue: The Programmatic Regulations need to include an oversight body to ensure that projects are meeting their original design goals prior to the PIR being completed.**

The PR need to identify an oversight body composed of all stakeholders to review whether the intent and purpose of each component project as contemplated by the Plan is being met prior to the PIR stage. If changes are proposed to the intent and purpose of a project, it is essential for a group involving all stakeholder be made aware of the proposed changes and be given the opportunity to recommend or deny that the changes be adopted. The Tribe recommends that the Task Force fulfill this role.

**Issue: A process needs to be established in the Programmatic Regulations to define how the recommendations produced by RECOVER will be utilized.**

The Tribe agrees with the statement that the recommendations produced by RECOVER not be self executing and that these recommendations are to be considered by the Corps and the SFWMD in consultation with DOI, DEP, the Tribes and other federal, state and local agencies. However, the process for determining how this information will be approved for utilization needs to be clearly defined. According to the Draft PR, RECOVER's role is to provide advice and recommendations to “decision-makers.” “Decision-makers” needs to be more clearly defined. Standards should be set to determine what type of information may be approved at the staff level, and what type of information requires the approval of the ultimate decision makers for the Federal and Non- Federal sponsors. The Seminole Tribe recommends that the South Florida Water management District Governing Board and the Corps District Engineer be identified as the ultimate decision makers.

**Issue: The Programmatic Regulation must include the concept of Adaptive Management.**

The PR must include the concept of adaptive management along with adaptive assessment. The PR introduces the concept of adaptive assessment which is not specified in WRDA 2000. This concept seems to imply a passive role involving monitoring and examining how the projects are functioning on a system wide basis after they are operational. WRDA 2000 talks about the process of adaptive management. Adaptive management implies a much more active role, and includes the concept of introducing new scientific and technical information into the Plan.

**Issue: The Interim Goals definition needs to be revised.**

Both the General section on interim goals in the Draft PR and the definition of “Interim Goals” appears to narrow the meaning of interim goals to facilitate interagency planning and provide a means by which the restoration success of the Plan may be evaluated throughout the implementation. The overall purpose of the interim goals should be to evaluate whether on an incremental basis all the goals and purposes of the Plan are being achieved throughout implementation. Moreover, interim goals for all purposes of the plan should be included, such as water supply and flood protection. It is key for the success of CERP that the interim goals provide incremental benefits to all stakeholder groups involved in CERP implementation.

**Issue: The Programmatic Regulations should provide some specific mechanism requiring a detailed analysis and a specific plan of action when an Interim Goal that is established is not met.**

The Interim Goals should serve more than just “to facilitate interagency planning.” Interim goals are to serve as checkpoints along the roadmap to successful implementation. If an interim goal is not met in the timeframe established (assuming the

goal is still valid), the PR should establish a defined procedure for evaluating why the goal was not met, and for requiring preparation of a plan to achieve the goal within a reasonable time frame.

**Issue: The Programmatic Regulations should set timelines for development of the initial set of Interim Goals and the signing of the Interim Goals Agreement.**

The PR should require RECOVER to develop the first suite of goals within a time certain from the date the PR are promulgated. The PR should also require that the Interim Goal agreement be developed in a specific amount of time from the date of receipt of the final report and set of recommendations from RECOVER.

**Issue: The “Ensuring Protection of the Natural System” section of the Programmatic Regulation needs to include an additional concept.**

The PIR process needs to account for the projects that do not make any additional water available, but instead use water.

**Issue: The Pre-CERP baseline paragraph under the “Ensuring Protection for the Natural System” section should be corrected to include the appropriate period of record.**

**Issue: The Programmatic Regulations needs to add a section addressing maintaining the original purpose of each component of the Plan over time.**

The PR need to ensure that the projects being constructed as alternate storage continue to be operated as such in perpetuity. These areas are being created in order to reduce the impacts on environmental areas currently being used as storage. The concern is that these new areas may over time become habitat themselves and then be in jeopardy of no longer being operated for storage purposes.