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NATIONAL PARKS CONSERVATION ASSOCIATION  
NATURAL RESOURCES DEFENSE COUNCIL \*\*\* WORLD WILDLIFE FUND

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Dear Mr. Appelbaum,

On behalf of the undersigned organizations, we write to provide comments on the July 2007 Revised Final Draft Programmatic Regulations, Six Program-Wide Guidance Memoranda (“Final Draft GMs”).

The comments raised in the following letter are also intended to supplement the comments to the initial and first revised draft versions of the guidance memoranda submitted in January and June 2005 by the Natural Resources Defense Council (“NRDC”), National Parks Conservation Association (“NPCA”), and the World Wildlife Fund (“WWF”). All issues and concerns raised by NRDC, NPCA, and WWF in their January and June letters are included herein to the extent that they are not addressed by the Final Draft GMs as suggested in our letters and/or are not reiterated in this current set of comments.

Based on our review of the Final Draft GMs and our experiences reviewing draft and final Project Implementation Reports (“PIR”) thus far, we have the following additional concerns about the Final Draft GMs.

Assessment of effects of so-called “intervening non-CERP events.”

The Final Draft GMs continue to assert that implementation of the Comprehensive Everglades Restoration Plan (“CERP”) need not meaningfully account for harm to the natural system caused by “intervening non-CERP events.” *See, e.g.*, § 3.8 (discussing Savings Clause requirements). This ignores the law. The Water Resources Development Act of 2000 (“WRDA 2000”) binds the State and the federal government to ensure that water made available for the Everglades ecosystem by CERP projects is not “made unavailable” before appropriate reservations are in place. If Everglades water levels decrease significantly as a result of the permitting away of water under state processes or

other activities that occur after CERP was authorized but before specific project plans are in place, water eventually “made available” by the CERP projects will have been “made unavailable” for Everglades restoration purposes – instead of restoring the system as envisioned in CERP, water made available will simply replace the water lost in the intervening years.

As we have emphasized in our prior comments, the final GMs need to prevent this problem. To this end, the pre-CERP baseline should be used to verify that water is indeed available at the time the PIR is completed. If it is not available, the guidance needs to provide a process for how water that has been made unavailable will be recovered for the purposes of the PIR in question.

By contrast, all the current Final Draft GMs provide is that project managers must compare the existing conditions baseline to the pre-CERP baseline to determine if water that was originally available to the natural system has been lost to intervening non-CERP events. *See* § 2.6. If it has in fact been lost, project managers “may consider” changing system operations or developing other alternatives that might make more water available to the natural system. *Id.* We believe that at the very least, the guidance should *require* managers to look at alternative project designs or sizes, or changes in operating regimes (at the project or system level) that would help account for any water lost since WRDA 2000’s passage.

#### Identification and protection of water made available for the natural system

The Final Draft GMs fall short of what is needed to identify and protect the water that CERP projects will make available to the natural system. The Final Draft GMs appear to require protection/reservation of water for the natural system based on a comparison of initial operating regime (“IOR”) and the existing conditions baseline (“ECB”). This process means (as discussed above) that if existing conditions are worse than they were in 2000 as a result of so-called “intervening non-CERP activities,” there will be no reservation of the water that would have been made available by the project but for the intervening activities.<sup>1</sup> In addition, under this process, even if there are clear plans to change the operating regime, there is no protection of water slated to go to the environment *after* that change in operations. In some instances, interim operations may route water to other users pending a change in operations designed to direct that water to the environment, thus threatening the ability of water managers to, in essence, take the water back for the environment in the future. Final guidance should make clear exactly how any water the project is projected or planned to make available to the natural system over its lifetime will be protected so that it remains available for the natural system once changes to system operations are made.

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<sup>1</sup> The IOR appears to provide for ever-increasing demand projections; final guidance should make clear what levels of demand it has approved (*i.e.*, have updated demand projections been incorporated into a report that would allow the updated numbers to be considered? How do these numbers compare to those assumed in CERP formulation in 1995?)

Although the Final Draft GMs do require – in terms of *identifying* the water CERP projects make available to the natural system – an analysis comparing the water the project would make available under next added increment (“NAI”) conditions (a comparison of the NAI baseline and the NAI condition),<sup>2</sup> there is no discussion of *how* that information will be used to ensure that project water is still available for later reservation (*i.e.*, as noted above, if a certain group of users gets more water as a result of “initial” project operations than they would under later project operations, what happens to those users? Do they simply lose that water once the infrastructure is in place to send that water to meet environmental goals?) See § 4.6.1 (which discusses the fact that initial operations may not represent full project benefits, and that NAI comparisons should make clearer what the expected benefits would be).

The Final Draft GMs appear to require no identification (or protection) of water that individual CERP projects would make available for the natural system under “last added increment” or “future with CERP” conditions. That is, although the project’s benefits are to be determined (and alternatives are to be compared) based on the “future with CERP” conditions, there is no required project-level analysis identifying what water a project would make available to the natural system under full CERP build-out. As there is no identification of water made available under “full CERP” conditions, there is no discussion of how any such water will be protected so that it is available for the natural system once all CERP projects are on-line. Final guidance should require the identification of water each CERP project is projected or planned to make available to the natural system over its lifetime (as discussed above, the guidance must also make clear how that water will be protected so that it remains available for the natural system as additional CERP projects come online).

Finally, the Final Draft GMs suggest that revising of reservations of water for the natural system will be made only by way of updated PIRs. Final guidance should include additional detail as to how such a process would work and the projected timing for such a process. Although such a process might make sense where new CERP projects (accompanied by PIRs) make available additional water that was previously unavailable to the natural system (or unavailable at the right times), it is less clear how it would work where additional water is made available as a result of changes in project or system operations in the absence of a new CERP project and PIR.<sup>3</sup>

### Alternatives Formulation, Analysis, and Comparison

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<sup>2</sup> We also note that the description of the NAI baseline states that it includes only those CERP projects with “approved operating manuals;” the description fails to make clear, however, at what point a project’s operating manual is considered approved (*e.g.*, when it is included in a draft or final PIR, when it is updated and finalized at some later date). Additional clarification is needed.

<sup>3</sup>As discussed in more detail below with regard to Savings Clause analyses, volume-probability curves are inadequate to identify water made available. WRDA 2000 requires that water made available be identified in terms of quantity, quality, *timing* and distribution. To that end, at the very least, final guidance must require an identification of water made available for the natural system that looks not just at general volume probability curves, but also at the water the project would make available in wet and dry seasons and wet and dry years.

We have several concerns about the discussion of the process for evaluating alternatives.

First, the Final Draft GMs appear to contemplate a process that limits the extent to which project managers are required to seriously evaluate alternatives to proposed sizes and designs of CERP projects “if the project as described in the [CERP] will still achieve the benefits of the project as described in the [CERP] in a cost effective manner . . .” § 2.11. The GMs, however, fail to provide sufficient discussion of how to determine that such a criterion is met.

We are concerned that, without further guidance, project managers may decide to limit their alternatives analysis in inappropriate circumstances. For example, we believe (as noted above) that the availability of baseline water must be among the issues driving the formulation of alternatives to be examined as part of an adequate alternatives analysis. That is, if water available to the natural system at the time of CERP’s passage is no longer available at the time a PIR is being finalized, at least one alternative must be geared toward recapturing any baseline water lost. Similarly, we believe that at least one alternative should address, to the extent needed, problems in meeting environmental goals as a result of changes in projected consumptive use demands – *i.e.*, potentially making more water available to ensure that any such increased human demand does not interfere with the achievement of CERP’s restoration goals. In short, final guidance should make clear that project managers cannot engage in a truncated or limited alternatives analysis that ignores past increases in public water supply demands above and beyond what had been projected in CERP planning, or projected future increases in such demands; rather, the alternatives analysis should be seen as an opportunity to address such (potential) problems. We note that our prior comments concerning the Draft GMs provide extensive information relating to this issue.

We also suggest that final guidance needs to direct project managers to examine how much (beneficial) water different alternatives make available as part of the alternatives analysis. Evaluating the differing amounts of water that, for example, different sizes of reservoirs might make available would likely help water managers better understand small differences in different formulations.

Final guidance must direct project managers to consider alternate operating regimes, as appropriate, for CERP projects as part of the alternatives analysis that occurs before project construction begins. Many CERP projects generate their environmental benefits as a result of the operational rules chosen to allocate water made available among user groups such as agriculture and public supply, and the environment. In such circumstances, an alternatives analysis that ignores different operational regimes runs afoul of the law, not to mention common sense.<sup>4</sup>

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<sup>4</sup> The Final Draft GMs state (at § 3.3) that “[it] is anticipated that if more water is made available for the natural system in South Florida through implementation of the [CERP], more water should also be available for other existing and future uses.” Although this may be true as a simple, general statement – Congress envisioned that 80 percent of CERP’s water would be designated for the environment and 20

Finally, the Final Draft GMs essentially place the burden on the Project Delivery Team (“PDT”) with important decisions regarding savings clause and identification of water made available for the natural system during plan formulation process without true guidance as to how to make these determinations. WRDA 2000 did not provide for PDTs to make these decisions; rather, WRDA 2000 required that such decisions be addressed in the CERP programmatic regulations. It is also simply unrealistic to delegate these processes to the PDT without the necessary guidance as set out in WRDA 2000 and appropriate techniques to make such determinations.

### Savings Clause

The Final Draft GMs suggest that a Savings Clause violation (or, rather, a need for further analysis of whether there is a Savings Clause violation) occurs only where there is a “significant” reduction from the existing conditions baseline or the pre-CERP baseline<sup>5</sup> – a limitation that appears nowhere in WRDA 2000. The Final Draft GMs need to do much more to explain how significance will be determined. There is some discussion of the factors that managers may consider with regard to flood protection analyses, but nothing at all in the context of water supply Savings Clause analyses.

One way to determine the significance of a change would be to focus on wet and dry seasons and wet and dry years to determine the times during which a CERP project changes the amounts of water going to various parts of the historic Everglades. Another would be to examine the extent to which changes move in the “right” or “wrong” direction, based on a comparison to modeling of the historic natural system. At the very least, this type of analysis must be required as a general rule to ensure there has not been any Savings Clause violation. As it stands now, though, the Final Draft GMs appear to suggest such an approach only where an initial broad brush analysis (looking at volume-probability curves for a large number of years) suggest there has been a “significant” change – as a means of showing that any change that has occurred is not “significant.” Indeed, when selecting a model for a saving clause analysis, the Final Draft GMs permit a PDT to only model a “subset of the full period of record”<sup>6</sup> rather than an entire period of record.

In determining the Saving Clause requirements for flood protection, the Final Draft GMs provide very limited guidance to the PDTs. It provides that “Generally, it should not be necessary to conduct Savings Clause analyses below [the level of service defined in the Programmatic Regulations].”<sup>7</sup> Does this envision that a PDT may choose to go below that level and provide increased flood protection than what was required under CERP?

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percent for other water-related needs – the alternatives analysis should be the place to assess what allocation of project benefits makes the most sense on a project by project basis.

<sup>5</sup> Again, we emphasize that WRDA 2000 simply does not allow project managers to ignore the effects of intervening activities, such as increases in consumptive use permitting, in CERP project implementation.

<sup>6</sup> See 3.9

<sup>7</sup> See 3.11.1

Further guidance should be provided to the PDTs in determining the level of flood protection required under the Savings Clause.

### Project Planning and Preparation of Project Implementation Reports

#### *Determining Land Costs*

The Final Draft GM states that under current Corps policy, land values “*regardless of when the lands are acquired*” are to be used to determine project costs and for crediting local sponsors. This approach grossly inflates project costs to the point of eliminating much more environmentally beneficial alternatives. Therefore, we support the current language to allow the PDT to “use actual acquisition costs in plan formulation and cost estimating”<sup>8</sup> in determining an alternative’s cost.

Further language should be added to apply this policy only for lands that were purchased with the intent for use within a CERP project. We believe that lands purchased prior to CERP authorization for conservation or other purposes by state or local government, or other non-federal entities should not be used in defining project costs, provided that current and future land uses are consistent with the restoration objectives of CERP.

If the Corps has concerns about the fate of these non-federal conservation lands if incorporated within the project footprint, these concerns can be adequately addressed within the Project Cooperation Agreement between the Corps and the non-Federal sponsor.

#### *Project Management Plans*

One of the two conditions necessary for activities to be included in these plans is to “verify that the project is functioning as designed.”<sup>9</sup> This should be rewritten in such a way as to ensure that project monitoring verify that the restoration objectives defined for the project are being met.

#### *Acceler8 Projects*

The Final Draft GMs indicate that for those PIRs that include an Acceler8 project, project managers have the option of considering this Acceler8 project as either an alternative or encompassed within at least one of the alternatives considered in the PIR. It is essential that an Acceler8 project comply with WRDA 2000 requirements before it is folded into the plan formulation process and that an Acceler8 project not move forward in the first place in the absence of WRDA 2000 assurances being satisfied.

#### *Recreational considerations*

The Final Draft GMs mandate the PDT “determine whether the selected alternative plan affects existing recreational features and the appropriateness of mitigating adverse effects on existing recreational facilities.”<sup>10</sup> While we recognize the importance of recreation

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<sup>8</sup> See 1.10.1

<sup>9</sup> See 1.15

<sup>10</sup> See 1.19

within restoration projects, it is not clear why PDTs are *required* to look at these effects and mitigation for those effects. This should be an option, not a requirement. In addition, the PDT should consider the benefits to other recreational opportunities that will come from project implementation in selecting an alternative.

Thank you for the opportunity to express our concerns for this final draft of the Guidance Memorandum.

Sincerely,

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