



## SOUTH FLORIDA WATER MANAGEMENT DISTRICT

July 21, 2008

Colonel Paul L. Grosskruger  
U.S. Army Corps of Engineers  
Jacksonville District  
P.O. Box 4970  
Jacksonville, Florida 32331-0019

Dear Colonel Grosskruger:

**Subject: Comments on the Draft Environmental Impact Statement to Construct Stormwater Treatment Areas on Compartments B and C of the Everglades Agricultural Area dated June 2, 2008 ("Draft EIS")**

This letter constitutes the comments of the South Florida Water Management District (SFWMD) on the Draft EIS for the Compartments B and C Stormwater Treatment Area buildouts. As the applicant for the Clean Water Act Section 404 permit for these activities, the SFWMD wants to ensure that the Final Environmental Impact Statement contains the most accurate and reliable information concerning the proposed action. SFWMD provided comments on the preliminary draft of this Environmental Impact Statement on May 15, 2008, and we appreciate the efforts of the Jacksonville District Corps of Engineers staff and the third party contractor Tetra Tech to incorporate some changes in response to this letter and its attachments into the Draft EIS.

However, many policy and technical issues of importance to the accuracy of this document need to be addressed prior to publication of the final Environmental Impact Statement. SFWMD is continuing to work at the staff level to correct technical issues and a summary of those concerns is included in this letter along with a more detailed attachment of technical comments. Furthermore, SFWMD incorporates the comments contained in its May 15, 2008, letter to the extent that they remain unaddressed in the Draft EIS. SFWMD's major concerns with the Draft EIS in its current form are detailed below.

### **USACE Jurisdiction**

SFWMD continues to believe that the scope of the Corps jurisdiction under Section 404 of the Clean Water Act is limited because the Compartment B and C lands are "prior converted croplands" within the meaning of Clean Water Act regulations. Prior converted croplands ("PCC") are excluded from the Corps

jurisdiction under the regulatory definition of "waters of the United States." 33 C.F.R. 328(a)(8). The Compartment B and C lands meet the definition of prior converted croplands in that (1) prior to December 23, 1985, the lands were drained or otherwise manipulated for the purpose of making production of a commodity crop possible; (2) the lands are not inundated for more than 14 consecutive days during the growing season, and 3) the lands do not constitute pothole or playa wetlands. See Clean Water Act Regulatory Programs Final Rule, 58 Fed. REG. 45,008, 45,031(August 25, 1993). The SFWMD believes the current position taken by the Corps of Engineers, that a change in land use in and of itself ends PCC status, is inconsistent with federal rules and regulations. See 33 C.F.R. 328(a)(8). The Corps appears to be applying guidance set forth in the 2005 Joint Guidance between the Corps and the Natural Resources Conservation Service which states that a change in land use allows the Corps to make a determination as to wetland status under the Clean Water Act. However, the Joint Guidance itself states that it does not diminish, modify, or otherwise affect statutory or regulatory authorities of the Corps, and therefore cannot override binding Corps regulations. The Corps should reevaluate the scope of its jurisdiction based on proper application of the PCC exclusion.

Currently, the Draft EIS provides that impacts to wetlands within Compartment B and C footprints will be mitigated. Analysis of the mitigation ledger, hydrologic and water quality benefits to the downstream and surrounding areas, exotic vegetation removal and improvements within the stormwater treatment area ("STA") footprints should be considered. SFWMD believes it is appropriate to apply lift within the footprint of the STA as they are converted from a monoculture of sugarcane and invasive exotic plants, to native wetland species. Although the STAs are managed for nutrient load removal, they are routinely maintained to control undesirable vegetation. The existing STAs support an abundance of fish and wildlife species in areas that were previously agriculture and which did not provide appropriate habitat value for the region. The Draft EIS identifies benefits within the project footprint to a number of species.

#### **Clarification of Project Purpose Statement**

The Draft EIS does not accurately set forth the purpose for the Proposed Action. Section 1.3 of the EIS contains multiple purpose statements. Determination of a clear project purpose is central to conducting a practicable alternatives analysis. *Sierra Club v. Van Antwerp*, 2008 WL 1991446, 1991457 (May 9, 2008). The Corps should utilize SFWMD's stated project purpose: "to utilize Compartments B and C to increase the treatment capacity of the existing Everglades Construction Project STAs in order to further reduce phosphorous levels in stormwater runoff entering the Environmental Protection Area from the Everglades Agricultural Area and other water basins by building STAs on District owned lands." As long as the applicant's project purpose is legitimate, the Corps

cannot substitute a project purpose that it deems more appropriate. *Alliance for Legal Action v. USACE* (314 F. Supp.2d 534, 548).

The conflicting and multiple purposes in the Draft EIS appear to stem from the Corps attempting to fulfill the National Environmental Policy Act (NEPA) requirements for its 404 permitting process and the Department of the Interior's (DOI) land use change. DOI is not the project applicant for the 404 permit and will not be bound by the permits conditions and requirements as SFWMD will. Because SFWMD and DOI have differing purposes statements, it is inappropriate for DOI to seek to fulfill its NEPA requirements as part of the 404 permit process. The Corps should limit the role of DOI to a cooperating agency as set forth in 40 C.F.R. 1501.6. Under this scenario, the DOI purpose statement is no longer relevant to this EIS in support of the Corps permitting action. If DOI seeks to use this EIS to satisfy its obligations under NEPA for the land use change, it must accept SFWMD's purpose statement for the proposed action.

#### **Additional Information for Alternative B**

SFWMD will supply the Corps with additional supporting information within the next two to three months for the proposed action Alternative B, SFWMD's preferred alternative. This information will allow the Corps to evaluate a wider potential range of operations for Alternative B as it will demonstrate that Compartment B can be operated independently of CERP features. Information will also be provided so that the Corps can evaluate the effects of these operations. Once received and reviewed, the Corps will have the opportunity to determine how this additional information will be incorporated into the NEPA process.

#### **Summary of Technical Comments**

Attachment A to this letter contains detailed technical comments on the Draft EIS. Following is a summary of the major technical concerns with the document.

The EIS needs to clearly set forth the standards that are being used to evaluate the alternatives. This should be done so that the public can easily recognize which of the alternatives meet the project purpose and needs statement. It is unclear what criteria the information contained in Table 4-10 is being benchmarked against. One criterion that must be considered is existing regulatory legal requirements such as discharge limits for the STAs. Alternatives C, D, and E could potentially overload STA-2, and Alternative E potentially overloads STA-3/4 and STA-6. The DOI, the Corps and the SFWMD have committed to the successful function of these STAs. The fact that these alternatives potentially place SFWMD in a position of non-compliance with its

Col. Paul Grosskruger  
July 21, 2008  
Page 4

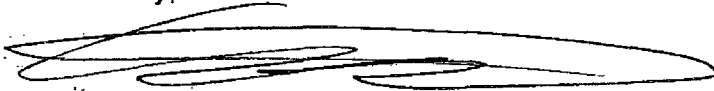
permits or other regulatory requirements needs to be clearly articulated as part of the analysis.

The descriptions of alternatives found in Section 2.1 should be clear and concise. These descriptions should include enough information to enable the public to understand the sources of water (e.g., runoff from specific basins within the Everglades Agricultural Area, or runoff from the C-139 basin), inflow locations, outflow locations, flow paths, and proper operations of STAs are within their design limits.

The conclusions reached in Chapter 4, Environmental Effects, need to be supported by information contained in the EIS. Moreover, there needs to be uniform criteria applied to all of the alternatives. The evaluation of Alternatives D1 and E is much more cursory than the other alternatives contained in the Draft EIS.

Thank you for the opportunity to review and provide comments on the Draft EIS. We look forward to working with your staff to resolve these outstanding issues prior to publication of the Final EIS for this action.

Sincerely,



Kenneth G. Ammon, P.E.  
Deputy Executive Director  
Everglades Restoration Resource Area

KGA/bcl

Enclosure

copies (without enclosure):

Eric Buermann, Governing Board Member  
Michael Collins, Governing Board Member  
Charles Dauray, Governing Board Member  
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Col. Paul Grosskruger  
July 21, 2008  
Page 5

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