



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
WASHINGTON, D.C. 20314-1000

REPLY TO  
ATTENTION OF:

MAY 25 2007

CECW-ZA

MEMORANDUM FOR THE ASSISTANT SECRETARY OF THE ARMY (Civil Works)

SUBJECT: Comprehensive Everglades Restoration Plan - Water Quality Improvements

1. PURPOSE. To forward my assessment of Federal participation in constructing water quality treatment features under the Comprehensive Everglades Restoration Plan (CERP) and address the specific matter involving clean up of phosphorus laden waters north of Lake Okeechobee.

2. BACKGROUND. The newly formed Policy Issue Resolution Board (IRB), established as part of the overall South Florida Everglades Program "Management Reset" in November 2006, received an issue paper jointly developed by the Jacksonville District and the South Florida Water Management District (SFWMD) addressing the formulation of water quality treatment, (i.e. storm water treatment areas), features in the Lake Okeechobee watershed and recommendations for Federal cost sharing. In addition, a paper entitled, "Cost-Share for Water Quality Improvement Features: CERP and Lake Okeechobee Watershed" developed by the SFWMD and the Florida Department of Environmental Protection" expressing the State's views on the appropriate role of the U.S. Army Corps of Engineers (Corps) in cost-sharing water quality improvement features of the CERP, including the Lake Okeechobee Watershed.

In short, both papers recommend a cost-sharing approach that is not in accord with law and current policy. Adoption of such recommendations would have substantive cost implications for CERP and the Corps Civil Works Program and may require legislative actions to adopt. These papers recommend 50-50 cost sharing between the Federal government and the SFWMD for construction and a greater non-Federal proportional cost-share for operation and maintenance (O&M) of water quality treatment features until the state achieves water quality standards. Once compliance with water quality standards is achieved, O&M cost sharing for water quality treatment features would shift to 50-50 consistent with the CERP authorization.

3. DISCUSSION. The consideration of WQ improvements features in the Lake Okeechobee Watershed Project reopened questions regarding the application of the long-standing WQ policy that has been established for CERP projects. That policy in brief is: In accordance with the cost sharing provisions of the Water Resources Development Act of 1996, the non-Federal share of the cost of WQ features generally shall be 100 percent. Before there can be a Federal interest to cost share a WQ improvement feature, the State must be in compliance with WQ standards for the current use of the water to be affected and the work proposed must be deemed essential to the Everglades restoration effort.

The CERP Plan described in the 1999 Central and Southern Florida Comprehensive Review Study (known as the “Restudy” or “Yellow Book”) which was adopted by Congress in Section 601 of WRDA 2000, identified this requirement as a baseline for considering a CERP project. The Yellow Book explicitly assumes “that the Clean Water Act and State/Tribal water quality standards are being met for existing water use classification . . . [and] that all reasonable measures within watersheds are in place to assure waters received by the C&SF Project canal system are of sufficient quality to meet published standards.” (Yellow Book page 9-63). The Yellow Book explicitly assumes that programs undertaken to meet requirements of the Clean Water Act would be in place and were expected to result in improvements necessary to comply with water quality standards. (Yellow Book page 5-5). Specifically, the Yellow Book noted total maximum daily loads (TMDLs) would be developed and set “at a level to implement applicable water quality standards with seasonal variations and a margin of safety,” but that, as of April 1999, no TMDL program had been implemented. (Yellow Book page 5-6). The requirement for the State to set and meet TMDLs was considered essential for restoration. (Yellow Book page 5-7).

In addition, the Corps current general policy with regard to such water quality features is consistent with the CERP requirements. The Corps Planning Guidance Notebook provides: "Water quality is an important component of ecosystem structure and water quality improvement can be considered as an output of an ecosystem restoration project. However, projects or features that would result in treating or otherwise abating pollution problems caused by other parties where those parties have, or are likely to have, a legal responsibility for remediation or other compliance responsibility shall not be recommended for implementation." (e.g., water quality actions are 100% a non-Federal responsibility; Planning Guidance Notebook, ER 1105-2-100 (2000) page 3-23. See also *id.* Page E-149. See also: Ecosystem Restoration - Supporting Policy Information, EP 1165-2-502 (1999) page 18.)

Finally, both the Corps and the Department of Justice have taken a consistent approach to the issue in dealing with the *United States v. South Florida Water Management District*, No. 88-1886-CIV (S.D. Fla.) (*US v. SFWMD*) Consent Decree. The State is required to bring the water flowing into the Everglades Protection areas into compliance with water quality standards. This is an active litigation matter with a long history.

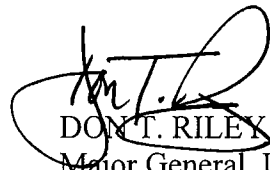
The State’s proposal is asking to interpret this cost share policy in a way that would allow the Corps to cost-share the construction and operation of project features which would in whole or in part be used to meet State water quality requirements - something that is clearly a State responsibility. The Lake Okeechobee Watershed project is one example. The State is not currently meeting WQ requirements for water that would flow into the proposed features and it is not likely to come into compliance for several decades. The State has asked for an exception to that policy for this project and others. This could have significant impacts on the *US v. SFWMD* litigation and CERP costs. Further, such adjustments to long standing cost sharing policies for water quality actions would have cost implications for the Civil Works Program by increasing Federal costs for many current and potential future Civil Works projects.

The exception being asked for is based on the inclusion of the Lake Okeechobee Watershed project in the Yellow Book plan. What the proposed exception ignores is that the Yellow Book as a general rule and in anticipation of this specific project based its inclusion on the State meeting its requirements. It will not meet them any time in the near future. The State proposal seeks to make the exception the rule. Beyond the consideration of this policy, the project is questionable as an economic investment. Cleaning water deemed essential to the Everglades restoration which then flows into Lake Okeechobee which has significant pollution issues and then to propose that the same water must be cleaned a second time as it flows out through canals from the Lake's several outlets calls into question the economic wisdom of the water quality features being considered in this project.

4. CONCLUSION. Given the clear history and precedent, it is difficult to justify legally, or from a policy perspective, how exceptions can be crafted without having significant impacts within CERP, the Corps Civil Works Program, and with regard to the litigation position taken by the US (including several agencies) requiring the State to act to bring waters into compliance. The 1996 Act established the general rule that non-Federal interests were to bear 100% of the cost of water quality features. The exception to this rule envisioned that the Federal Government would pay 50% of these costs in one limited instance -- that instance being where the water quality features are deemed essential to the CERP restoration effort. This determination must be based on some finding other than the project is a part of CERP and generally will aid the restoration effort. In the case of the Lake Okeechobee project, no such determination has been made. In fact, the Yellow Book specifically envisioned that the State would be responsible for meeting water quality standards. Based on discussions of the HQUSACE IRB, I intend to formalize the cost sharing policy for CERP WQ features and apply it to projects as they are developed and brought forward for review. Under the policy, the Lake Okeechobee WS project would not be eligible for cost sharing WQ features.

5. RECOMMENDATION: I have reviewed the Corps cost sharing policy, as it applies to water quality features of CERP, and have concluded that the policy is in accordance with law and the overall agency mission. As such, I recommend no changes to policy. CERP project actions should continue to be cost shared in accordance with the cost sharing provisions of the Water Resources Development Act of 1996 and 2000. That is, the non-Federal share of the cost of WQ features generally shall be 100 percent and before there can be a Federal interest to cost share a WQ improvement feature, the State must be in compliance with WQ standards for the current use of the water to be affected and the work proposed must be deemed essential to the Everglades restoration effort. Application of this policy means that the cost of water quality

features in the Lake Okeechobee Watershed Project, as currently formulated, would not be cost shared with the Federal Government, as the State is not currently meeting its water quality standards in the basin and, as a result, Federal participation would not be consistent with policy and authorizing legislation.



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