

FACILITATING THE RESOLUTION OF INTERGOVERNMENTAL AND INTERAGENCY EVERGLADES RESTORATION CONFLICTS: STRATEGIES AND PROCEDURES

EXPERT PANEL¹ REPORT DRAFT

December 20, 2000

The Task Force should “facilitate the resolution of interagency and intergovernmental conflicts associated with the restoration of the South Florida ecosystem among agencies and entities represented on the Task Force.” [WRDA 1996, 528 (f)(2)(F)]

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FACILITATING THE RESOLUTION OF INTERGOVERNMENTAL AND INTERAGENCY EVERGLADES RESTORATION CONFLICTS: STRATEGIES AND PROCEDURES

EXPERT PANEL² REPORT DRAFT

December 4, 2000

The Task Force should “facilitate the resolution of interagency and intergovernmental conflicts associated with the restoration of the South Florida ecosystem among agencies and entities represented on the Task Force.” [WRDA 1996, 528 (f)(2)(F)]

I. OVERVIEW.

South Florida is among the leaders nationally in dealing creatively with inter-jurisdictional, natural resource restoration issues involving multiple sovereigns. Conflict resolution has been, is and will remain an essential condition in assuring progress and success in implementing ecosystem restoration in South Florida. This draft report summarizes the ideas and suggestions of an expert Panel assembled to propose ways in which the South Florida Ecosystem Restoration Task Force can help to resolve interagency and intergovernmental conflicts associated with the restoration of the South Florida ecosystem. The Task Force initiated the study in part to respond to a 1999 GAO report and Conference Committee appropriation language in FY 2000.³ The Panel notes that the mandate of the Task Force in regards to conflict resolution is quite general. As stated in the Water Resources Development Act of 1996, the Task Force is charged to, “facilitate the resolution of interagency and intergovernmental restoration conflicts,” among its members.

The challenge to the Task Force is to determine how to best perform its facilitative role within its broader role of coordinating 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 and

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³ In April 1999, the Government Accounting Office (GAO) released a report on Everglades Restoration titled, “South Florida Ecosystem Restoration: An Overall Strategic Plan and a Decision-Making Process Are Needed To Keep the Effort on Track,” (RCED #99-121, 04/22/99). The report reviewed the experience with two projects integral to the restoration effort and suggested the federal and state agencies involved are sometimes unable to agree on components of these projects and this has contributed to delays and cost overruns. The report concluded, “Given the scope and complexity of the initiative and the difficulties that have already been encountered, additional delays and cost overruns are likely to occur, and the participants' ability to accomplish the initiative's overall goals is at risk.”

The Conference Committee report language accompanying the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 2000, Public Law 106.113 provides in relevant part: “The timely resolution of disputes regarding South Florida ecosystem restoration is important to avoid cost overruns and unnecessary delays in attaining the goals and benefits of the initiative. The Secretary of the Interior is directed to develop recommendations for resolving the most difficult conflicts and submit recommendations to the House and Senate Committees on Appropriations by February 15, 2000...”

Working Group have no direct authority to impose solutions on parties involved in conflicts related to the South Florida ecosystem restoration effort. Rather, the authority they have resides in their roles to coordinate and facilitate the resolution of conflict. They draw their influence from the consensus they are able to build upon when they identify and work together towards shared restoration goals and the participating agencies' willingness to bring to the table issues related to achieving those goals. The Task Force and Working Group will be effective in the coordination and facilitation role when members use the processes to jointly create legitimate options that are mutually acceptable. To maintain its effectiveness in this role, the Task Force and Working Group must earn the trust of its members and of other stakeholders.⁴

The Panel recognizes the Task Force and Working Group have an important opportunity with the passage and the upcoming implementation of the Comprehensive Everglades Restoration Plan (CERP) and the transition in administrations to clarify and further define its role of facilitating the resolution of conflict.⁵ The Panel's recommendations are based on options suggested during interviews and meetings held with the members of the Task Force and Working Group (between April and December, 2000) and reviews of many source documents. The Working Group provided helpful insights about conflict resolution in its recent Lessons Learned Report (April 2000).

The Panel believes, based upon experiences in other complex natural resource collaborations, that the ability of the Task Force and Working Group to facilitate the resolution of conflicts is directly related to the exercise of strong facilitative leadership, engagement by affected parties, and incentives to do the hard work necessary to anticipate, prevent, manage and facilitate the resolution of conflicts.

II. PERSPECTIVE

The Panel observes that disagreements are inevitable in ecosystem restoration because of the complex mix of interests and jurisdictions inherent in restoration issues. When managed well, disagreements can contribute to creative problem solving and adaptive management. However, when disagreements become conflicts that inhibit planned action, they beg resolution. In general, conflict resolution options range from those that are essentially collaborative and in which the parties maintain control of the process (negotiation, facilitation, mediation, consensus building, etc.) to those that are administrative, legislative and judicial. In these latter instances, some entity, sometimes an neutral third party and other times an interested direct party, is empowered to resolve the matter or impose a solution on the disputing parties.

⁴ Trust is not usually a direct factor in interest-based problem-solving but touches on factors such as clear, inclusive communications, generation of options that both maximize potential gains and minimizes harmful cumulative and secondary impacts and the joint creation of criteria and standards to select final options. On the other hand a lack of trust is often a barrier to strategic alliances in both the public and private sectors and is manifested in forms such as intense skepticism, opposition to joint efforts, suspicions about the veracity of each other's data bases and the analysis of the data.

⁵ See the discussion under "Building Connections."

An important mission of the Task Force should be to help resolve conflicts by collaborative means whenever possible. If conflicts cannot be resolved by collaborative means, benefits will still occur. At the very least the issues in disagreement may be narrowed, working relationships maintained or improved, and remaining issues guided to the appropriate decision-making forum. Collaborative efforts should be undertaken with the recognition of the need to accommodate the diverse mandates and interests of the different members of the Task Force and Working Group. The Panel believes that a complex coordinating organization such as the Task Force requires strong executive and facilitative leadership. Many of those interviewed noted that, while many Task Force and Working Group activities can best be carried out by representatives from member agencies, adequate staffing is essential to manage coordination and to provide support services.

III. PRINCIPLES

The influence of the Task Force will rest upon its ability to build consensus and make available its “good offices” as a resource to parties in dispute. The Panel reviewed the May, 2000 principles⁶ suggested by the Task Force. Based upon these principles and other experience, the Panel proposes five core principles it believes are essential to the success of the Task Force in facilitating the resolution of conflict:

- **Respect Sovereignty.** Procedures should respect the sovereignty of participating members of the Task Force, and comity between participating agencies, while addressing the legitimate needs of all participants in order to achieve mutually acceptable solutions.
- **Voluntary Participation.** A core principle is the voluntary use of different conflict resolution methods by those represented on the Task Force and Working Group. The Panel supports the conclusion in the Working Group Lessons Learned Workshop in April, 2000 that, “conflict reduction and consensus building are appropriate and realistic goals for the Task Force and Working Group. Some conflicts will need to be resolved in judicial and legislative arenas when that is the choice of the parties who pursue such options.”
- **Consensus creates influence** for the Task Force and Working Group. The influence of the Task Force and Working Group is only as great as the participating agencies are willing to give it. The Task Force’s authority lies in its ability to build consensus among its members. The Task Force and Working Group must earn the trust of its members to be able to effectively facilitate the resolution of conflicts. Trust follows from the involvement of members in cooperative efforts which result in their recognition of the benefits of cooperation and the disadvantages of non-cooperation.

⁶ The May, 2000 Task Force Conflict Resolution Assessment and Discussion summary included the following principles: focus on common goals; promote dialogue not debate; treat each other with civility; clearly communicate interests, concerns and intentions; respect Federal/Tribal/State sovereignties; respect agency missions and authorities; respect private property rights; and make appropriate use of other dispute resolution and consensus building processes and procedures.

- **Good Offices.** The Task Force and Working Group can provide “good offices” or trusted forum for facilitating the resolution of interagency and intergovernmental conflict.
- **Good Faith.** All members of the Task Force and Working Group need to participate and negotiate in good faith to identify and solve problems and facilitate the resolution of interagency and intergovernmental conflicts.

IV. TASK FORCE ROLES

In interviews with members of the Task Force and Working Group, many suggested a variety of roles and activities they can undertake to facilitate the resolution of conflict. Following is a list of those potential roles plus several others the Panel has identified:

- Recognizing existing conflicts and anticipating potential conflicts;
- Selecting issues that require greater attention;
- Framing and summarizing conflict situations or potential conflict issues;
- Fostering a sense of interdependence, joint commitment and dialogue among parties;
- Enhancing coordination and collaboration among parties;
- Exploring the issues to identify and articulate underlying interests;
- Identifying obstacles and options for minimizing or removing them;
- Acknowledging scientific uncertainty and using adaptive management approach.
- Obtaining and sharing information;
- Initiating studies and reports;
- Promoting research on issues;
- Providing neutral forums;
- Evaluating the effectiveness of collaborative efforts and identify how they can be modified for future conflict situations;
- Encouraging mediation among parties who have reached impasse on disputes;
- Elevating disputed issues for others to address and resolve; and
- Suggesting possible solutions to those with decision-making authority.

The Panel observes that the Task Force (and its Working Group) has successful experience in filling some of these roles. The Task Force should continue to do what it does well. Its effectiveness can be improved, however, by being more expansive, clear, and strategic in selecting roles and in continuously enhancing its ability to carry them out. Some ways to do this are suggested below.

V. BUILDING AN INTEGRATED SYSTEM

The Panel has been asked to assist the Task Force in developing, “a more integrated set of strategies, approaches, and procedures to facilitate the resolution and reduction of interagency and intergovernmental conflicts.” This implies the need to craft a clearer, more systematic approach.

A. Effective Conflict Resolution Systems. What are the characteristics of an effective conflict resolution system? The Panel identifies the following features of successful conflict resolution systems based upon its experience.

- They provide a variety of procedures to apply at the most appropriate levels at the earliest time;
- They are designed in a manner that creates collaborative approaches that are cognizant of the legal responsibilities and authority of the participating parties;
- They are voluntary;
- They are assessed and updated regularly;
- They are flexible, adaptive and timely;
- They provide or are supported by strong incentives for those in conflict to participate;
- They require a commitment to the objective use of critical information;
- They allow participants to craft and agree upon technically sound consensus solutions; and
- They are supported with strong staff leadership and resources.

In addition to these features, successful conflict resolution systems are nourished and overseen by an effective organization, a matter which will now be discussed

B. Organizational Foundations. The ability of the Task Force to facilitate conflict reduction will enhance his function as a coordinating body. The better the Task Force and its Working Group work together, the more successful they will be in efforts to cooperatively assist in resolving disputes. To this end, the Task Force and the Working Group need to adopt and use operating procedures that promote effectiveness and productivity. The Working Group adopted a number of such procedures in 1997 that have proven to be beneficial for both the Working Group and Task Force. The Panel suggests that this is a timely period for the Working Group and the Task Force to review their operations, to identify procedures that have been most and least successful, and to determine how to strengthen their organizational capacity going forward.

C. Establishing Agreements for Issues in Litigation. Like many coordinating bodies, the Task Force often needs to discuss issues that are in litigation involving members of the Task Force. In the past, Task Force members have provided information on related or pending lawsuits to which they are parties. The Task Force should continue to encourage this ongoing communication as this has a bearing on their core task of to effectively coordinating consistent policies, strategies, plans, programs, projects, activities and priorities. In addition, the Task Force and Working Group have proceeded with informal joint fact-finding and education on science and technical matters to improve understanding of the factual basis for conflict issues. This has been helpful and should continue.

The role of the Task Force in facilitating the resolution of intergovernmental and interagency conflict requires an ability to openly engage in debate, dialogue and problem solving. This is a particular challenge in the face of ongoing of potential litigation. The Task Force needs to clarify how to best manage issues in the face of litigation. It is not unusual for attorneys to advise their clients to limit their participation in discussions of issues that are being adjudicated based upon the perceived need to limit the sharing of information that may used in developing a litigation strategy.

The Task Force should consider ways to encourage open dialogue on issues in litigation and support the development of concepts and options aimed at building consensus. This might take the form of specific agreements among members regarding communication on a conflict issue the Task Force and/or Working Group is helping to facilitate.⁷ These agreement can be reflected in issue action plans. The Task Force may wish to charge the Working Group with developing guidance for both the Task Force and Working Group on how to encourage ongoing discussion of issues that are in litigation.

D. Building Connections. There are many conflict resolution “resources” either in place or being developed within the complex web of activities that comprise the overall South Florida Ecosystem Restoration effort. These resources include:

- Task Force committees such as the Science Coordination Team and the CROGEE.
- The Technical Issue Resolution process being proposed by the Design Coordination Team as part of the Comprehensive Everglades Restoration Plan
- The issue resolution process being developed by the Comprehensive Plan Revision Team as part of the adaptive management system
- Cooperative groups organized around particular ecosystem areas or issues; and
- A wide array of professional associations, coalitions, and academic centers in South Florida that often serve as mediating institutions and neutral forums.

As a general strategy, the Panel suggests that, the Task Force and Working Group should encourage, establish or enhance relationships with these institutional and conflict resolution resources. The Panel believes the Task Force ought to direct the Working Group to examine and propose how best to assist and coordinate with these organizations to add value to the implementation of restoration efforts. In particular, the Task Force and Working Group should consider in consultation with the Corps of Engineers and the South Florida Water Management District how best to help in facilitating the resolution of conflicts related to the implementation of the Comprehensive Everglades Restoration Plan and in regard to the dispute resolution provision of the Water Resources Development Act of 2000.⁸

VI. ELEMENTS OF A CONFLICT RESOLUTION SYSTEM

The experience of the Panel has shown that there are three critical elements in establishing an effective dispute resolution system. They are 1) the manner in which the system itself is developed, 2) the “nuts and bolts” or operation of the system and 3) the manner in which the system is managed and adapted. Some of the general criteria under each of these critical elements are as follows:

⁷ It is common for parties engaging in dispute resolution in the face of litigation to reach formal agreements providing that information and proposals put forward in the dispute resolution process will not be admissible in any subsequent legal or administrative action.

⁸ In S2796 ES, Section 601 (i) Dispute Resolution, the Secretary of the Army and the Governor are charged with developing “an agreement for resolving disputes between the Corps of Engineers and the State associated with the implementation of the Plan.” There is guidance on how the mechanism should be designed for timely and efficient resolution of disputes.

1. Developing and Designing the System:

- Those who use the process should be involved in its design
- The process should be flexible, providing for the involvement of a variety of interests
- The process should be designed to meet the specific legal and administrative procedures present in the situation
- The process should build upon past successful experience
- Wherever possible, graft the process on to existing structures and entities that are broadly perceived to be legitimate
- Time should be provided to ensure acceptance of the process

2. The “nuts and bolts” of the system

- There should be incentives to use the process, such as access to decision-makers, funding, timeliness, etc.
- The process should be consensus based, with the use of such non-consensus tools as research, fact-finding, and arbitration based upon the agreement of the parties.
- There need to be clear criteria and procedures for selecting issues and identifying parties
- The process and its “manager(s)” need to be seen as impartial (This can be achieved by joining management of the process)
- The process should provide a level playing field in terms of access to information and decision-makers, ability to participate, etc
- The process should require the development of clear procedural understandings such as definition of issues, form of agreement, participants, access to information, confidentiality if appropriate, time-lines, ratification of agreements, etc.
- The process should provide support and incentives for implementation of agreements
- The process should be adequately funded and resourced
- Participants in dispute resolution processes should have the opportunity to receive training in dispute settlement skills

3. Managing the Process

- There should be pre-existing procedures for review, assessment and modification
- Oversight and policy direction should be provided by respected individuals representative of those using the process
- An oversight body should be established and regularly involved to provide access, credibility and advice
- The first cases should be selected with care as initial experience may define the future of the process
- There should be a limit on the number of matters addressed during an initial period

The Panel considered these general criteria as it undertook the process of developing and formulating its recommendations. The Panel believes that there are many practical steps the Task Force can take to create a more systematic and integrated approach in facilitating conflict resolution. The following suggestions are offered.

A. Establish Criteria for Selecting Issues. Disagreements and conflicts will arise continuously during the restoration process in the coming years. The challenge to the Task Force is to

determine which conflict issues it should address and how to do so. It is recommended that the Task Force adopt criteria to use in selecting candidate issues of conflict worthy of their attention. The panel suggests consideration of the following criteria for the selection of candidate issues that may interfere with or critically impact the implementation of the restoration strategy:

- An issues or action that may interfere with or critically impact the implementation of a restoration strategy;
- An issue or action that may threaten the restoration schedule;
- An issue that has been pursued through routine agency administrative channels without needed resolution.
- An issue that is not being addressed adequately elsewhere and can benefit from interagency/intergovernmental review.
- An issue that is likely to have significant negative secondary and/or cumulative impacts.

It is proposed the Working Group identify and the Task Force approve a set of criteria such as those above to be applied when selecting issues for a conflict resolution approach and assistance.

B. Adopt Procedures For Selecting and Reviewing Issues. At any given time, there may be scores of disputes related to ecosystem restoration in South Florida in need of resolution. The establishment of selection criteria will be a cornerstone tool to help the Working Group select from among the many conflict issues that exist. In addition, the Working Group will need to be clear about what procedures to use in applying criteria and in developing issue action plans. To this end, the panel proposes that the Working Group propose and the Task Force adopt protocols and procedures to address questions such as the following:

- Who can nominate issues and how?
- How will candidate issues be reviewed?
- What support materials need to be made available?
- How will issues be selected and agreed to?
- Who provides support materials?
- How will disagreements be managed in selecting issues?
- How will facilitation plans to resolve conflicts be developed and approved?
- How will facilitation plans be implemented?
- Who is responsible for overseeing implementation?
- How will progress be reviewed and reported?
- How can interested parties not members of the Task Force or Working Group be be involved?
- How can experts be consulted and how?
- How will improvements be made to ongoing facilitation efforts?
- When and how are facilitation efforts concluded?

C. Frame Issues Adequately. In order to select conflict issues to help resolve and to develop plans for facilitation requires clear understanding of the issues in dispute. The Working Group needs to ensure that adequate documents are made available to frame the issues under

consideration, to provide accurate and sufficient information about them, and to clarify plans for facilitative efforts. The Panel proposes that the Working Group review its experience in preparing “Directives” for organizing issue groups in the past; and to consider what, if any, additional procedures and/or formats should be adopted going forward to help the Working Group and Task Force in the many roles that they may play in facilitating the resolution of conflict.

D. Prepare and Revise a New Section of the Annual Work-plan on Facilitating the Resolution of Conflict. Each year the Working Group prepares a Work Plan. Until now, the annual plans have given little attention to identifying the issues about which it and the Task Force should be concerned in facilitating the resolution of conflict. The panel proposes that beginning in 2001 that the Working Group identify a limited number of existing or potential issues it will work on helping to resolve. During the year the Task Force should review and, as appropriate, revise and/or add to the list of issues. The Working Group will then develop, and communicate to the Task Force, its plans to guide its facilitative efforts.

E. Provide Adequate Staff Support. To develop an effective integrated and systematic approach to facilitate the resolution of conflict, the Task Force will need to obtain a greater level of resources than are presently available. The Office of the Executive Director will, in all likelihood, require additional professional resources to carry out its responsibilities in support of the Working Group and the Task Force. Notwithstanding this reality, participating agencies should also be willing to provide the necessary levels of leadership participation and staff support to assure Task Force success.

F. Learn from Experience. The adaptive management philosophy that guides South Florida ecosystem restoration should also apply to the efforts of the Task Force to facilitate the resolution of conflict. The Panel proposes that the Task Force adopt procedures to assess and learn from its effort in helping to resolve disputes including the following elements:

- Assess the progress and results of each facilitated conflict resolution initiative of the Task Force
- Conduct an annual “lessons learned” survey of its facilitated conflict resolution activities
- Conduct with the Working Group an annual review of lessons learned and their implications for Task Force policies and procedures in facilitating conflict resolution.

G. Clarify Responsibilities. To advance its systematic and integrative abilities in facilitating the resolution of conflict, the general areas of responsibilities of the Task Force, its Working Group, and its Office of Executive Director should be agreed upon. The panel suggests the following distribution of responsibilities.

Suggested Task Force Responsibilities

- Approve criteria to be used in selecting conflict issues
- Approve procedures and protocols to be used in selecting conflict issues.
- Review and accept issues for conflict resolution proposed by the Working Group.

- Advise the Working Group of its preferences in developing action plans to facilitate the resolution of a conflict.
- Identify and propose to the Working Group issues for which to develop a facilitation plan.
- Approve the conflict resolution facilitation portion of the annual work plan and review it periodically.
- Review annually lessons learned .
- Participate in conflict resolution activities, as appropriate.

Suggested Working Group Responsibilities

- Propose an annual conflict resolution facilitation Work Plan to the Task Force.
- Propose selection criteria and protocols for facilitating the resolution of conflict to the Task Force
- Review and propose to the Task Force conflict issues the Task Force should help resolve
- Prepare directives for facilitating conflict resolution
- Participate in conflict resolution activities as appropriate
- Engage in an annual “lessons learned” review of conflict resolution initiatives

Suggested Responsibilities of the Office of the Executive Director

- Prepare preliminary assessment reports of conflict issues to consider
- Assist the Working Group in preparing directives about conflict issues it has decided to help resolve
- Assist the Working Group in developing the conflict resolution section of the annual work plan
- Manage or oversee plans approved by the Task Force to facilitate the resolution of conflict
- Manage and staff an annual review of Working Group efforts to facilitate the resolution of conflict.
- Undertake an annual lessons learned survey and prepare a report to the Task Force and Working Group.

VII. NEXT STEPS AND RECOMMENDATIONS

The Panel sought and received Working Group input on this draft at its December meeting. We are inviting responses from the Task Force between now and January 2, 2001. The Panel will meet January 3 and review comments and incorporate them into a final draft that will be sent to the Task Force at the end of the first week in January prior to the January 8 Task Force meeting. This draft recommends the following assignments to the Working Group and Executive Director in 2001:

- Each year the Working Group prepares a Work Plan. Until now, the annual plans have given little attention to identifying the issues about which it and the Task Force should be concerned in facilitating the resolution of conflict. The Panel recommends that beginning in 2001 that the

Working Group identify a limited number of existing or potential issues it will help to resolve during the year.

- The Panel recommends that the Working Group be tasked to identify a set of criteria to be used in selecting conflicts to help resolve and that the Task Force review and approve these criteria.
- The Panel recommends that the Working Group propose and the Task Force adopt protocols and procedures for selecting and reviewing issues to address.
- The Panel recommends that the Task Force and Working Group compile their agreements on operational procedures they adopt for enhancing their ability to work together more effectively and productively into a set of “ground rules” which can serve as a reference and assist in the orientation of new members.
- The Panel recommends that the Working Group review its experience in preparing “Directives” for organizing issue groups in the past; and to consider what, if any, additional procedures and/or formats should be adopted going forward to help the Working Group and Task Force in the many roles that they may play in facilitating the resolution of conflict.
- The Panel recommends the Task Force charge the Working Group to develop guidance on how to deal with ongoing litigation in the context of its efforts in facilitating the resolution of conflict.
- The Panel recommends that the Working Group should determine how to best work with the Corps of Engineers and the South Florida Water Management District in helping to facilitate the resolution of conflicts related to the Comprehensive Everglades Restoration Plan and in regard to the Dispute Resolution provision of the Water Resources Development Act of 2000.