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**COMPREHENSIVE EVERGLADES RESTORATION PLAN
CONSULTATION PROVISIONS**

January 07, 2005

Background:

The goal of the consultation process is to ensure that interested parties are appropriately involved in the implementation of the Comprehensive Everglades Restoration Plan (“Plan”). Although the Corps of Engineers and their non-Federal sponsors are responsible for the implementation of the Plan, successfully implementing the Plan requires extensive involvement by Tribes, Federal, state and local agencies, the public, and the South Florida Ecosystem Restoration Task Force (Task Force). Executive Order 13175 mandates government-to-government consultation with Tribes. Also, numerous laws and regulations require the Corps of Engineers and the non-Federal sponsor to consult with various Federal and state agencies prior to taking certain actions. Furthermore, the Programmatic Regulations require that the implementing agencies consult meaningfully and timely with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies as the Plan is implemented. (Programmatic Regulations §385.10) Pursuant to the requirements in the Water Resources Development Act of 1996, the Water Resources Development Act of 2000, and the Programmatic Regulations (33 CFR §385 (2004)), the Corps of Engineers and the non-Federal sponsor also are responsible for consulting with and receiving recommendations from the Task Force. While this paper provides an overview of consultation for the Plan in general, its main focus is how consultation will occur with the Task Force.

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In addition to the requirement to consult with the Task Force, there is a requirement, pursuant to the Water Resources Development Act of 1996 and the Programmatic Regulations for the Corps of Engineers and the non-Federal sponsor to provide input and information to the Task Force, the Florida-based working group, and advisory bodies, throughout the implementation process for the Plan; and for the Task Force to provide recommendations to the Secretary of the Army regarding the implementation of the Plan. This paper also provides an overview of these statutory and regulatory requirements.

Discussion:

A. Consultation Generally

The requirement to consult with Tribes, agencies, and the Task Force emanates from various statutes, Executive Orders, and regulations. The intent of the requirement to consult is to discuss issues with, and receive meaningful and timely advice from the Tribes, Federal and state agencies, and others as appropriate. With respect to the Plan,

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the Programmatic Regulations and the Water Resources Development Acts of 1996 and 2000 also require consultation with Tribes, the Task Force, and, under certain circumstances, relevant Federal and state agencies.

1. Consultation with Native American Tribes:

In accordance with the requirements of Executive Order 13175, as well as the consultation requirements of the Programmatic Regulations, §385.10(b)(1), the Corps of Engineers and the non-Federal sponsor are required to consult with the Tribes on a government-to-government basis to ensure meaningful and timely input regarding programs and activities covered by the Plan. This obligation is independent of, and separate from, the Corps of Engineers' and the non-Federal sponsor's obligation under the Programmatic Regulations to consult with the Task Force.

2. Consultation with Federal and state Agencies:

The Corps of Engineers and the non-Federal sponsor are required by numerous statutes, such as NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, the regulations implementing these laws, and the Programmatic Regulations §385.10(b)(2) to consult with Federal and state agencies in an appropriate manner. These consultation requirements are separate and apart from the Corps of Engineers' and non-Federal sponsors' requirements under the Programmatic Regulations to consult with the Task Force.

3. Consultation under the Programmatic Regulations:

Consultation is defined in the Programmatic Regulations as “a process to ensure meaningful and timely input in the development of a program and project activities, reports, manuals, plans, and other documents from Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida” (Programmatic Regulations §385.3).

4. Consultation involves reciprocal obligations:

The obligation to consult requires the Corps of Engineers and the non-Federal sponsor to involve agencies, Tribes, and the public at an early stage and in such a way as to ensure a meaningful exchange of views so that the perspectives of those consulted can be taken into account and given good faith consideration. In turn, the parties consulted are obliged to respond in a timely and meaningful fashion to ensure that implementation of the Plan is not jeopardized, and that delays do not result in adverse consequences to restoration of the natural system, the goals and purposes of the Plan, or the public interest generally (Programmatic Regulations §385.10(d)).

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5. Consultation and Concurrence are two different processes:

Again, the consultation process is intended to involve certain entities in the formulation of Plan activities and documents at an early stage in order to ensure a meaningful exchange of views so that the perspectives of those consulted can be taken into account and given good faith consideration. In contrast, concurrence is a specific procedure required by Section 601(h) (3) (b) of the Water Resources Development Act of 2000 and the Programmatic Regulations. Concurrence is defined in the Programmatic Regulations as “the issuance of a written statement of concurrence or the failure to provide such a written statement within a time frame prescribed by law or this part” (Programmatic Regulations §385.3). It should be noted that while consultation is an ongoing process, the concurrence procedure occurs as the final action after consultation is complete. Most importantly, the concurrence procedure is undertaken only by the specific parties outlined in the Programmatic Regulations; the Task Force as a body does not participate in this concurrence process.

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6. Reasonable time limits for consultation:

In carrying out the Plan, the Corps of Engineers and the non-Federal sponsor will set reasonable time limits for consultation. The length of the time limits should be proportionate to the complexity of the decision. The Corps of Engineers and non-Federal sponsor shall provide timely and sufficiently detailed information regarding proposed decisions to allow for an appropriate level of understanding, meaningful review, discussion, and exchange of ideas. (Programmatic Regulations §385.10)

B. Consultation with the Task Force

Generally: Paragraph (e) of Section 385.10 of the Programmatic Regulations contains general guidance as to consultation with the Task Force. The purpose of consultation with the Task Force is to provide an opportunity for the Task Force, as a body, to express its views and opinions on implementation of the Plan. Consultation with individual members of the Task Force is not the equivalent of consulting with the Task Force as a body. The objective of consultation with the Task Force is to obtain the collective expression of the Task Force as a group, not individual responses from agencies, Tribes, or local governments. Separate consultation with these groups should occur where required in order to obtain the views and understanding of these individual entities. Consultation with the Task Force provides the Corps of Engineers and the non-Federal sponsor with a strategic review of the Plan and important activities. It also creates an opportunity for public education about the issues of concern to the Task Force, so that the public can provide input to the Task Force on these issues.

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Recognizing the valuable role that the Task Force, its working group, and its other advisory bodies play in the discussion and resolution of issues related to the South Florida ecosystem, the Programmatic Regulations provide that in addition to consultation with the Task Force specifically required in the Programmatic Regulations, the Corps of Engineers and the South Florida Water Management District shall consult with the Task

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Force, its working group, and its advisory bodies on other matters related to the implementation of the Plan, as the Task Force from time to time may request. (§385.10)

The Programmatic Regulations also contain specific and separate consultation requirements as to the Task Force for the Corps of Engineers and the South Florida Water Management District; the Secretary of the Army, the Department of the Interior, and the Governor of the State of Florida; and the Secretary of the Army and the Governor of the State of Florida. The duties of the parties, documents and activities requiring consultation, and the timing and manner of consultation are described below.

1. Duties of the Corps of Engineers and the non-Federal Sponsor with Respect to Consultation with the Task Force:

a. Consultation with the Task Force is to continue throughout implementation of the Plan: In accordance with the Programmatic Regulations §385.10(e), the Corps of Engineers and the non-Federal sponsor shall continue to provide information to, and consult with, the Task Force, and, as appropriate, its Florida-based working group and advisory bodies throughout the implementation of the Plan.

b. Selection of agency representatives to provide briefings as part of consultation: The representatives of the Corps and the non-Federal sponsor briefing the Task Force should possess the knowledge and expertise necessary to meaningfully discuss the issues presented to the Task Force as part of the consultative process.

2. Documents and Activities Requiring Consultation by the Corps of Engineers and the South Florida Water Management District:

The Programmatic Regulations specifically require the Corps of Engineers and the South Florida Water Management District to consult with the Task Force on the following:

- Development of the six program-wide guidance memoranda (§385.10)(§385.5);
- Preparation of Project Implementation Reports (§385.10)(§385.26);
- Preparation of Pilot Project Design Reports (§385.10);
- Preparation of Pilot Project Technical Data Reports (§385.10)(§385.12);
- Development and preparation of a Master Implementation Sequencing Plan (§385.10)(§385.30);
- Development of the technical assessment report (§385.10)(§385.31);
- Conducting an evaluation of the Plan (periodic CERP updates)(§385.10)(§385.31);
- Preparation of the Comprehensive Plan Modification Report (§385.10)(§385.32);
- Development of the pre-CERP baseline (§385.35);
- Development of interim goals and targets (§385.10);
- Development and execution of an Interim Goals Agreement (§385.38); and
- Preparation of reports to Congress on implementation of the Plan pursuant to §385.40 (§385.10) (§385.40).

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Guidance is set forth in this section for consultation on Project Implementation Reports, Feasibility Reports, and Pilot Projects.

a. Guidance for Consultation on Project Implementation Reports (PIRs) and Feasibility Reports: The Corps of Engineers and the non-Federal sponsor are required, at minimum, by the Programmatic Regulations to consult with and provide to the Task Force information about the alternative plans developed and evaluated for the PIR before completion of the draft PIR. Briefings on information about the alternative plans developed and evaluated for the PIR shall include the following:

- An overview of project features
- Project cost;
- Status of Project;
- Comparison of Alternatives;
- Comparison of Restudy Plan and Recommended PIR Plan;
- Summary of the rationale for the PIR Selected Alternative; and
- Summary of restoration benefits provided by the project.

As appropriate, Feasibility Reports shall be considered as PIRs for purposes of consultation. Feasibility Report briefings shall contain the above information for alternative plans developed and evaluated.

In order to allow for timely and meaningful Task Force input, the Task Force should be given a status report, informed of critical issues, and offered a briefing during important stages of PIR and Feasibility Report development. For PIRs and Feasibility Reports, consultation should occur: during the NEPA scoping process; during development of alternatives in the plan formulation and evaluation stage of PIRs and Feasibility Reports, but prior to the identification of the selected alternative plan, and following public review of the draft PIR. It is understood that the Task Force may utilize its Working Group to provide support in the consultation effort in order to effect timely input into the PIR development process. By consulting in this manner, the Task Force will be given the opportunity to offer advice at the following critical input points: the development of the PIR through the NEPA scoping process; prior to selection of the recommended plan; and, after public comment on the draft PIR and on the draft Feasibility Report and Feasibility Report environmental documentation, but prior to the final report. Consultation with the Task Force will continue at appropriate points as the PIR is completed, through signing of the Record of Decision.

b. Guidance for Consultation on Pilot Projects: To provide for effective consultation on Pilot Projects, the Corps of Engineers and the non-Federal sponsor should consult with the Task Force during development of the Draft Pilot Project Design Report in accordance with the Programmatic Regulations §385.12. The Corps of Engineers and the non-Federal sponsor also should consult with the Task Force in preparing the Draft Pilot Project Technical Data Report in accordance with §385.12(d).

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3. Documents and Activities requiring consultation with the Task Force by the Secretary of the Army along with the Governor of the State of Florida and, as to the independent scientific review panel, the Secretary of the Interior:

The Programmatic Regulations require the Secretary of the Army, the Secretary of the Interior, and the Governor of the State of Florida to consult with the Task Force in the establishment of an independent scientific review panel, the review of the list of panel members prior to final establishment of the panel, and in their decision to exercise each five-year option to extend the agreement (§385.22).

The Programmatic Regulations require the Secretary of the Army and the Governor of the State of Florida to consult with the Task Force in the development of proposed interim targets (§385.39).

4. Timing and Manner of Consultation:

a. Consultation with the Task Force at regularly scheduled meetings: The Task Force regularly meets four times annually and has the ability to call special meetings either in person or telephonically as needed. The Corps of Engineers and non-Federal sponsor shall engage in timely consultation with the Task Force, at a minimum, on the required consultation areas set forth above. Consultation shall be coordinated with the Director of the Task Force. The Corps of Engineers and the non-Federal sponsor shall provide the Task Force with written briefing materials not later than two weeks prior to the regularly scheduled meetings as well as providing a briefing presentation at the meeting.

b. Consultation with the Task Force in addition to regularly scheduled meetings: If the Corps of Engineers and the non-Federal sponsor, in coordination with the Director of the Task Force, determine that additional briefings are necessary; the Corps of Engineers and non-Federal sponsor shall notify the Task Force Director as to the necessity of an additional briefing at least one month prior to the suggested meeting date to allow time for scheduling. The Corps of Engineers and non-Federal sponsor shall provide the Office of the Director with written briefing materials at least two weeks prior to the suggested meeting date. The Corps of Engineers and the non-Federal sponsor shall then provide a briefing presentation to the Task Force either in person or telephonically as advised by the Director.

c. Consultation process not to delay implementation of the Plan: The Corps of Engineers, the non-Federal sponsor and the Task Force recognize the importance of timely consultation and the importance of adhering to the consultation requirements of the Programmatic Regulations. However, if despite the best efforts of the Corps of Engineers, the non-Federal sponsor and the Task Force, comments of the Task Force are not received in time to be incorporated in one stage of the process, Task Force comments should be considered when received. For example, comments by the Task Force on selection of final alternatives for a PIR, which are not received prior to the publication of the draft PIR, should be considered in the final PIR; comments by the Task Force on the

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final PIR not received during the public comment period should be forwarded to the Washington level review process; and comments by the Task Force not received prior to the Chief of Engineer's Report should be considered during review by the Assistant Secretary of the Army for Civil Works and OMB.

C. Providing Information to the Task Force

In addition to the foregoing consultation requirements, the Corps of Engineers and the non-Federal sponsor are required to provide information to the Task Force. Pursuant to WRDA 1996, the Task Force is required to provide general input to the Corps of Engineers concerning implementation of the Plan. To comply with this requirement of WRDA 1996, the Corps of Engineers and the South Florida Water Management District regularly brief the Task Force on the Plan. The Programmatic Regulations contemplate the continuation of these regular briefings to the Task Force, the Florida-based working group, and advisory bodies to the Task Force throughout the implementation process for the Plan. (Programmatic Regulations §385.10(e)) Informational briefings may include documents, activities and issues outside the specific consultation requirements of WRDA 2000 and the Programmatic Regulations. The Task Force, in the manner described above for consultation, will provide timely input to the Corps of Engineers and the non-Federal sponsor.

The Corps of Engineers and the South Florida Water Management District will coordinate informational briefings with the Director of the Task Force and will provide written briefing materials and briefing presentations in the manner provided in Paragraph B(4) above.