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February 24, 2020

U.S. Army Corps of Engineers
Jacksonville District
Attention: Mr. Andrew LoSchiavo
701 San Marco Boulevard
Jacksonville, Florida 32207-8175
EAAReservoir@usace.army.mil

U.S. Army Corps of Engineers
Jacksonville District, Palm Beach Gardens Permit Section
Attention: Ms. Krista Sabin
4400 PGA Boulevard, Suite 500
Palm Beach Gardens, Florida 33410
krista.d.sabin@usace.army.mil

Re: Comments on the Final Environmental Impact Statement, Central Everglades Planning Project, Everglades Agricultural Area Reservoir, and Proposed Permit No. SAJ-2018-03427 (SP-KDS) for EAA A-2 Stormwater Treatment Area

Dear Mr. Thompson and Ms. Sabin:

Please accept the following comments on the U.S. Army Corps of Engineers ("Corps") Final Environmental Impact Statement for Central and Southern Florida, Everglades Agricultural Area ("EAA"), Florida, dated January 2020 ("Final EIS") and on the Corps' proposed initial Clean Water Act Section 404 permit for the EAA Reservoir Project, which would authorize construction of the Stormwater Treatment Area ("STA") component of the Project. These comments are submitted on behalf of Florida Crystals Corporation and its affiliates, including Okeelanta Corporation and New Hope Sugar Company, which are existing legal water users affected by the EAA Reservoir Project.

Florida Crystals Supports the Comprehensive Everglades Restoration Plan and the EAA Reservoir Project

Florida Crystals has been a strong supporter of the Comprehensive Everglades Restoration Plan (“CERP”). CERP is an ambitious and balanced plan to modernize the Central and Southern Florida Project (“C&SF Project”) to achieve environmental benefits while providing for and protecting the other water-related needs of the region. When Congress approved CERP in the Water Resources Development Act (“WRDA”) of 2000, it directed that CERP serve as the framework for all modifications and operational changes to the C&SF Project that are needed to restore, preserve, and protect the South Florida ecosystem. Hence, Florida Crystals’ guidepost in evaluating the EAA Reservoir Project, and other proposed modifications to the C&SF Project, is that such proposals should be consistent with CERP, as approved by Congress in WRDA 2000.

Florida Crystals supports the EAA Reservoir Project. For years, Florida Crystals has stated, and the record reflects, its support for construction of a CERP reservoir in the EAA. In 2019, Florida Crystals voluntarily gave up valuable leases on land to be used for the EAA Reservoir Project – on an expedited basis and pursuant to a construction schedule set forth by the South Florida Water Management District (“SFWMD”), and Florida Department of Environmental Protection – to facilitate construction of the project.

The comments herein relate to a fundamental and critical issue that has been discussed numerous times with all parties involved, including the Corps, and has yet to be resolved. That is, assurance by the Corps that the EAA Reservoir Project will be operated properly – consistent with how the project was modeled and originally designed -- and that the Corps properly considers and evaluates compliance with the law and requirements applicable to preserving water supply needs of stakeholders such as Florida Crystals.

Our comments should not be interpreted as an intent to delay or otherwise interfere with the agreed-to construction schedule, as our release of the lands for the project is not rescindable and we have already made arrangements not to farm the lands needed for the construction. Rather, our comments are directed at how the project will be operated once it is built.

The Corps Must Implement the EAA Reservoir Project in a Manner that Addresses Water Supply Needs

CERP includes an EAA reservoir to improve water deliveries to the Everglades and to reduce EAA farmers’ reliance on Lake Okeechobee for water supply. The original CERP design called for approximately half of the water stored in the EAA reservoir to be used to meet agricultural irrigation demands. See Comprehensive Review Study, Central and Southern Florida Project, Final Integrated Feasibility Report and Programmatic Environmental Impact Statement, at 9-9 (April 1999). The reason the reservoir was intended to provide agricultural water supply was to reduce the reliance of EAA farmers on Lake Okeechobee, which, in turn, would allow the Corps to modify its management of the lake to improve ecological conditions in the lake and in the Northern Estuaries.

We are pleased that the Final EIS indicates that the current design of the EAA Reservoir Project will improve water supply for the EAA. See, e.g., Final EIS, at 4-34. However, it is written in a way that suggests that the Corps and SFWMD may not actually operate the EAA Reservoir Project to achieve the water supply benefits that are a fundamental and critical purpose of the reservoir. The Final EIS and underlying documents recount hydrological modeling for the proposed reservoir showing that it will provide improved water supply compared to current conditions. See, e.g., *id.* Such modeling had to make assumptions as to how the reservoir will be operated under different conditions in order to estimate the water supply effects. But nowhere in the Final EIS does the Corps identify what operational assumptions were used in that hydrological modeling. And, although this might be buried in some technical document, a simple description is important because one of the purposes of preparing environmental impact statements is to disclose proposed agency actions in non-technical language so that the public at large can understand the issues. Preserving the water supply of our company and other long-time water users is a critical consideration that must be adequately addressed in the final EIS.

More concerning is the language in the Final EIS suggesting that the agencies may decide not to operate the reservoir to meet water supply needs. The Final EIS states, “Water Supply – Additional water supply may be available for agricultural/municipal water supply with the CEPP New Water Modification, but the purpose of the reservoir is environmental restoration and water supply for the environment receives first priority.” Final EIS, at ES-5. This statement conflicts with the original CERP plan that designed the EAA reservoir to meet water supply needs so that the Corps could have more flexibility in its management of Lake Okeechobee. That language also could be read to suggest that the Corps will not operate the reservoir consistent with the hydrological modeling that shows it will improve agricultural water supply.

Therefore, to have a valid project, the Corps must address these errors. We ask that the Corps do two things in its Record of Decision. First, the Corps should indicate exactly how the agencies assume the EAA Reservoir Project will be operated for purposes of its hydrological modeling of its water supply effects. This would allow the stakeholders to know in the future whether the agencies are operating the reservoir as designed, and whether the modeling assumptions remain valid. Second, the Corps should explicitly commit to manage the EAA Reservoir Project consistently with the operational assumptions it used to demonstrate that the project will improve agricultural water supply.

The water supply benefits of this project all depend on how it is operated, and committing to manage the project as modeled will provide assurance to stakeholders that the projected water supply benefits are not illusory. If the Corps does not want to make such a commitment, then it must explain how its hydrological modeling is a valid description of the water supply effects of the project.

The Corps Must Demonstrate that it Has Complied with the WRDA 2000 Savings Clause

Critically, we also believe that the Final EIS and related documents do not demonstrate compliance with the Savings Clause of WRDA 2000. The Savings Clause

provides that “[u]ntil a new source of water supply of comparable quantity and quality as that available on the date of enactment of this Act [December 11, 2000] is available to replace the water to be lost as a result of implementation of the Plan, the Secretary and non-Federal sponsor shall not eliminate or transfer existing legal sources of water, including those for ... an agricultural or urban water supply.” WRDA 2000, § 601(h)(5)(A)(1). While we appreciate the fact that the Final EIS and attached documents address whether the EAA Reservoir Project meets the Savings Clause, there are several gaps in that analysis that must be corrected.

Stand-Alone Operation of the Stormwater Treatment Area. There does not appear to be an adequate analysis of the water supply effects of the EAA Reservoir Project during the first phase of construction and operation.

The EAA Reservoir Project has two primary components: a reservoir and a STA. FEIS, at 1-3. 3-5 to 3-7. The reservoir will store water currently in Lake Okeechobee, to supply either the downstream Water Conservation Areas or urban/agricultural users. The STA will remove phosphorus from the water, because elevated phosphorus concentrations limit the ability to deliver water to the Water Conservation Areas.

These two components appear to be on very different timelines. The Final EIS indicates that the “SFWMMD proposes to construct and operate the STA area component of the project prior to execution of a Project Partnership Agreement for the Federal project.” Final EIS, at 1-3. The reservoir component cannot be built before execution of a Project Partnership Agreement (also known as a Project Cooperation Agreement), and even after that agreement is executed, it may take years to actually build the reservoir due to funding limitations. This means that the STA component will likely be operational for a substantial period of time before the reservoir component is operational. If there is no reservoir, then any Lake Okeechobee water treated in the STA component will not be stored but instead discharged to the Water Conservation Areas.

This split timeline for the two project components critically affects the Savings Clause analysis. That is, the Corps and SFWMMD have evaluated compliance with the Savings Clause based on modeling operation of the reservoir and STA components together. The agencies determined that the combined project will increase agricultural and urban water supply over current levels because the reservoir component will store water. The Final EIS did not analyze Savings Clause compliance if only the STA component is built.

It is apparent that if there is no place to store additional water, then the STA component could simply increase the amount of water delivered from Lake Okeechobee to the Water Conservation Areas, effectively eliminating an existing source of water supply for long-time legal users before replacing that supply with a functional reservoir component. To correct this gap, the Corps should conduct a Savings Clause analysis of only the STA component of the project before finalizing approval of the STA component, consistent with WRDA 2000 and the CERP Programmatic Regulations, 33 CFR §§ 385.26(a)(3)(x), 385.36(a).

A related concern is that the SFWMD proposes to build and operate the STA component before execution of the Project Cooperation Agreement. Final EIS, at 1-3. The Project Cooperation Agreement is the document that actually requires that there be no violation of the Savings Clause. 33 CFR § 385.27(d). If the STA component is going to be operated before execution of the Project Cooperation Agreement, then there will be no assurances that the Savings Clause compliance will be a requirement during the interim period.

We recommend that the Corps address this issue by including a condition in the Clean Water Act permit for the STA component requiring compliance with the Savings Clause, tracking the language in WRDA 2000. Specifically, the condition should provide that until the reservoir component is operational so that it can replace water taken from current sources of water supply for urban and agricultural users (i.e., from Lake Okeechobee), the STA component shall not be operated to eliminate the existing legal sources of water that were available on the date of enactment of WRDA 2000 (December 11, 2000). This would be a practical and efficient way to ensure compliance with the Savings Clause in the STA's operation.

Analysis Using the Wrong Baseline. Further, the Savings Clause analysis incorporated into the Final EIS should be revised to use the correct baseline. As quoted above, WRDA 2000 provides that the Corps and SFWMD cannot eliminate or transfer an existing legal source of water supply available at the time WRDA 2000 was enacted in December 2000. The CERP Programmatic Regulations require the Corps and SFWMD to identify the pre-CERP baseline, i.e., conditions that existed at the time WRDA 2000 was enacted. 33 CFR § 385.35(a). The pre-CERP baseline is defined in the regulations as “the hydrologic conditions in the South Florida ecosystem on the date of enactment of WRDA 2000, as modeled by using a multi-year period of record based on assumptions such as land use, population, water demand, water quality, and assumed operations of the Central and Southern Florida Project.” *Id.* § 385.4. The regulations provide that “[t]he Corps of Engineers and the non-Federal Sponsor shall determine if implementation of the project will cause an elimination or transfer of existing legal sources of water by comparing the availability of water with the recommended project with the pre-CERP baseline.” *Id.* § 385.36(a).

In 2005, the Corps and SFWMD identified the pre-CERP baseline. Most relevant for the EAA Reservoir Project, which will take water currently stored in Lake Okeechobee, the pre-CERP baseline document indicates that the baseline operations for Lake Okeechobee would be the “Lake Okeechobee Regulation Schedule WSE according to WSE decision trees.” Pre-CERP Baseline, at 14.

The Savings Clause analysis appended to the Final EIS does not compare the water supply performance of the EAA Reservoir Project using the pre-CERP baseline. Final EIS, Annex B-9 to B-10. Instead, it used a different baseline that assumed much lower water supply performance than was delivered under the WSE schedule. This violates the CERP Programmatic Regulations.

The Final EIS and accompanying documents ignored the requirements in the Programmatic Regulations based on a 2007 draft guidance memorandum. Final EIS, Annex B-10. We believe that this is improper, for several reasons.

First, a guidance document does not override legal requirements in a regulation. The CERP Programmatic Regulations are rules: They create legal rights and obligations that must be followed by the Corps. A guidance document by definition does not have force of law. The Corps stated when it promulgated the CERP Programmatic Regulations that the guidance memoranda were only to “provide internal guidance to the agencies.” Final Rule, Programmatic Regulations for the Comprehensive Everglades Restoration Plan, 68 Fed. Reg. 64200, 64203 (Nov. 12, 2003). The Corps cannot change the legal obligations in a regulation by issuing a guidance document.

Second, the guidance memorandum referenced in the Final EIS is only a draft. It was prepared in 2007 – thirteen years ago – and was never finalized. Since the memorandum was never actually issued, the Corps cannot use it as the basis for its analysis. The CERP Programmatic Regulations provide that “[u]ntil guidance is issued, issues involving existing legal sources of water should be resolved on a case-by-case basis considering all factors that can be identified as relevant to decisions under the savings clause.” 33 CFR § 385.36(c). The Final EIS, and attached annex, simply treat the old draft memorandum as final, when it is not, and fails to consider all of the factors relative to the water supply issue on a case-by-case basis.

Third, the discussion of the Savings Clause in the old draft memorandum is simply wrong. That guidance would exempt a whole series of actions from the requirements of WRDA 2000 by calling them “intervening non-CERP activities.” Nowhere in WRDA 2000 or the Programmatic Regulations is there any reference to such a term. The concept is also inconsistent with the basic logic of the Programmatic Regulations, which provides that the effects of new projects should be compared to the pre-CERP baseline. Comparing the effects of a project to some other baseline is inconsistent with the regulations.

WRDA 2000 requires that the Corps follow the principles set forth in that statute for all modifications or operational changes to the C&SF Project intended to achieve environmental objectives, and it would be contrary to, and undermine CERP for the Corps to pick and choose which activities are subject to Congress’ requirements. In particular, we disagree that changes to water regulation schedules for Lake Okeechobee somehow can be exempted from compliance with the Savings Clause, when the Lake is the hydrological center of the C&SF Project and drives water supply issues for nearly all components of CERP.

For all of these reasons, the Corps should correct its analysis under the Savings Clause which we believe it is required to do, and which can be done in a timely manner. We are optimistic that the EAA Reservoir Project can achieve its goals once completed and, hence, continue to support it, and believe that it can increase available urban and agricultural water supply if it is operated consistent with CERP and WRDA 2000.

Conclusion

We stress that our comments here are intended to ensure that the agencies properly analyze the Savings Clause issues, and that they operate the project as planned and modeled. Hence, we incorporate by reference and adopt the comments of aligned farmers and water users regarding the EAA Reservoir Project. We fully support the project, which is why Florida Crystals last year gave up its leases and facilitated the transition of lands on which the project will be built.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew P. Coglianese", with a large, sweeping flourish extending to the right.

Matthew P. Coglianese
Environmental Counsel
Florida Crystals Corporation