

# Miccosukee Tribe of Indians of Florida

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July 17, 2018

COL Jason A. Kirk  
Jacksonville District Commander  
U.S. Army Corps of Engineers  
701 San Marco Boulevard, Room 372  
Jacksonville, Florida

**SUBJECT:** South Florida Water Management District (SFWMD) Section 203, Post Authorization Change Report (PACR) for the Everglades Agricultural Area (EAA) Southern Reservoir and Stormwater Treatment Area (STA) and the Corps of Engineers (COE) Draft Environmental Impact Statement (DEIS), dated June 2018.

Dear Col. Kirk;

## **INTRODUCTION:**

The Miccosukee Tribe of Indians of Florida (Tribe) appreciates the opportunity to comment on the SFWMD's Section 203, "Post Change Authorization Report", dated May 2018 and the US Army Corps of Engineers (COE) "Draft Environmental Impact Statement (DEIS)", dated June 2018. The Miccosukee Tribe strenuously objects to the continued use of Tribal lands in the Everglades as a biological filter to treat upstream pollution. Specifically, the Tribes objections are summarized below:

The Miccosukee Tribe of Indians of Florida ("Tribe") is a federally-recognized and federally-protected Indian Tribe, whose members live and work within the Florida Everglades, whose land interests lie within the Florida Everglades, and whose cultural identity and way of life is dependent upon the natural Everglades. The Tribe exercising powers of self-governance under a Tribal constitution approved by the Secretary of Interior, pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476. The term "Everglades" as used herein refers to the areas presently identified as the Florida Water Conservation Areas (WCA) and Everglades National Park (ENP), although the Everglades ecosystem historically included a much larger area. The entire way of life of the Tribe and its members, including their cultural, religious, economic, and historical identity, is based upon the Everglades and upon the preservation of the Everglades in its natural state. The Tribe and its members rely upon the Everglades in its natural state to support both subsistence and commercial activities. Subsistence activities include gathering of materials, hunting, and fishing

within the Everglades. Commercial activities include frogging, airboat and other guided tours, and recreational and tourism facilities within the Everglades.

#### **TRIBAL RIGHTS:**

The Tribe has traditional, aboriginal, and statutory rights to use and occupy the Everglades and the Big Cypress Preserve. The Tribe's land interests and its natural resources (including its land, the flora and fauna living thereon, and the water flowing thereupon) lie within the Everglades. These interests include: (i) the Tribe's federal Indian Reservation; (ii) the Tribe's perpetual lease in WCA-3A (guaranteeing access, occupancy, and use in perpetuity under the terms of the Miccosukee Land Claims Settlement); and (iii) the Tribe's permit for use and occupancy of an area along the northern boundary of ENP, known as the Miccosukee Reserved Area. In their natural states and conditions, these areas sustain a unique balance of flora and fauna, dependent upon the natural flow of unpolluted water, which creates and supports the Miccosukee way of life. The alteration of the natural state of the Everglades and its permanent destruction as a unique natural ecosystem, including imbalances in natural aquatic flora and fauna, seriously threatens the Tribe's entire way of life, its traditional bases of subsistence, its commercial activities, and its natural resources including its land, the flora and fauna living thereon, and the water flowing thereupon.

#### **EFFECTS OF FEDERAL DECISIONS:**

Any United States agency policy, agreement, practice, or action (whether explicit or tacit) which accepts, permits, overlooks, or encourages in any way, whether directly or indirectly, the discharge of polluted water which creates or threatens to create imbalances of natural flora or fauna or otherwise upset, alter or destroy the natural ecosystem of the Everglades, or which fails to enforce United States laws protecting the Everglades, or which discourages enforcement of Florida state laws protecting the Everglades, directly and substantially injures, harms, and damages each and every Miccosukee interest identified previously herein; to wit, the Tribe's entire way of life (and that of its members), the Tribe's cultural, commercial, and historical identity (and that of its members), the Tribe's subsistence and commercial activities (and those of its members), and the Tribe's land and natural resource interests.

#### **EAA STORAGE RESERVOIR IMPACTS TRIBAL LANDS:**

Miccosukee Tribal waters (both the federal Alligator Alley Reservation and the Leased Lands) are located in northern WCA-3A. Outflows from the A-2 STA would be conveyed to the Miami Canal south of the existing G-373 divide structure. A-2 Reservoir outflows can also be conveyed to either the Miami Canal or North New River Canal via the intake canal; both of which directly flow into the Miccosukee Tribal Everglades (both the Federal Reservation and the Leased Lands). Consequently, the EAA Reservoir directly affects the downstream receiving waters of the Tribe. The Miccosukee Tribe has adopted, and EPA has approved, Water Quality Standards for the areas that will be impacted by these discharges. The Miccosukee Tribe does not allow a "Mixing Zone" in Tribal waters of the Everglades, which are a Class III-A waterbody and an Outstanding Miccosukee Water (OMW).

## **TRIBAL WATER QUALITY STANDARDS:**

The Miccosukee Tribe's Water Quality Standards apply to all Tribal Reservation surface waters, i.e., all waters within the exterior boundaries of the Miccosukee Tribe's Federal Reservation, including water situated wholly or partly within, or bordering upon Tribal Reservation Lands, whether public, private, or federally protected lands, e.g., National Parks or Preserves. The Miccosukee Water Quality Standards are the basis for regulatory enforcement against discharges outside the boundaries of the Federal Reservation pursuant to all applicable federal enforcement procedures as may be necessary to protect the quality of the water within the Federal Reservation. The Miccosukee Tribe's Water Quality Standards are consistent with Section 101(a)(2) of the Federal Water Pollution Control Act, as amended, [33 U.S.C. Section 1251 (a)(2)], which declares that "it is the national goal that, wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983..." The Miccosukee Tribe, the State of Florida and the US Environmental Protection have all determined that excessive nutrients - including total phosphorus (TP) - constitute one of the most severe water quality problems threatening the Everglades Ecosystem.

The Tribe affords highest priorities to the protection from further nutrient enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and to further nutrient loadings. The Miccosukee Tribe intends to prevent adjacent water users from using Tribal waters or vegetative communities within Tribal jurisdiction as a biological filter with respect to nutrient removal. We expect that our upstream neighbor will take into consideration the Miccosukee Tribe's Water Quality Standards and "provide for the attainment and maintenance of downstream waters", as required by the federal Clean Water Act. The Miccosukee Tribe's waters in WCA-3A have a nutrient standard consistent with natural oligotrophic levels (including a total phosphorus limitation of 10 parts per billion of water). It has always been the policy of the Miccosukee Tribe that the most stringent nutrient standards will be applied to the most upstream reaches of the Tribal waters. This policy prohibits the use of the WCA-3A as a "Mixing Zone". The Miccosukee Tribe has designated the waters of its Alligator Alley Federal Reservation which are contained within WCA-3A (North Grass and South Grass and Gap areas) Class III-A and "Outstanding Miccosukee Waters" (OMW).

## **EPA DETERMINATIONS:**

In 2012, the US EPA reviewed an "Assessment of the State of Florida's Everglades Water Quality Plan". At that time the EPA determined "The naturally nutrient-poor marshes of the Everglades are affected by both the concentration and the load of phosphorus. A "phosphorus load" is the amount (mass) of TP that results from the concentration of TP multiplied by the volume of water in which that concentration occurs. The loading of phosphorus is important to the ecosystem because the TP entering the Everglades remains within the marsh (for example, in soil and sediment) where it can continue to adversely affect aquatic flora and fauna and affect the TP concentrations observed in the surface water over the long-term." The EPA recognized that the Everglades marsh does not have a long-term net assimilative capacity above the TP criterion. The fact that the phosphorous loading damages the underlying soils is exactly why the WQBEL must be measured at the point of discharge and not at "networks of stations". The continued reliance

by Florida on the "networks of stations" and the "4 Part Test" results in the Tribes Everglades being used as a mixing zone.

#### **WATER QUALITY COMPLIANCE:**

There is a high risk that the EAA Storage Reservoir as presently planned and designed would not comply with environmental compliance requirements. Environmental policy compliance has not been validated at this time due to the fact that many of the environmental statutes still require the lead Federal agency to consult and coordinate. Unless the State abandons the 4 Part Test, and halts its use of the WCAs as mixing zones, it is almost certain that the Miccosukee Tribes Water Quality Standards will be violated. Since all federal agencies, including the COE and EPA, have a trust obligation and fiduciary obligation to protect the Tribes lands from being damaged thru their actions, this PACR must be rejected as not in the interest of the federal government.

#### **APPROVAL OF FEDERAL AGENCIES:**

This Section 203 PACR requires, at a minimum, the approval of the US Environmental Protection Agency (EPA), the Department of Justice (DOJ) and the Federal Courts to ensure compliance with water quality requirements of the Total Phosphorous Rule and Appendix A of 1991 Settlement Agreement in U.S. v. SFWMD, Case No. 881886-CIV-Moreno. Any water quality costs associated with treatment of existing polluted water (polluted water shifted from the coastal estuaries to the Everglades) is solely a state responsibility. The US Army Corps of Engineers should not cost share this project as there is no over-riding federal interest in shifting Florida's pollution problems from the coastal estuaries to the Everglades. Participation in a 50-50 cost share with the State of Florida for a project that further pollutes Tribal lands, invites the Corps of Engineers to become entwined into the on-going litigation problems of the State of Florida. Any Federal investment for construction and O&M of water quality features associated with this and other similar projects could be precedent setting across all of USACE. As you may recall, the DOJ representing the ENP, US Fish and Wildlife Service, and COE took the position in federal court the phosphorous load reduction requirements of United States v. SFWMD, Case No. 881886-CIV-MORENO (U.S.D.C., S.D. Fla) were prescriptive and not descriptive. This PACR represents a major departure; from 80% phosphorous load reduction requirement to a 36% phosphorous load increase. Any agreement between the State of Florida and COE that condones a 36% phosphorous load increase on Tribal lands is not in the best interests of the federal government, the Miccosukee Tribe or the Everglades and should not be funded by the federal government.

#### **EFFECTS ON C&SF SYSTEM:**

The SFWMD preferred plan predicts an increase of 160,000 acre-feet of water (75% more volume) than the approved 2016 CEPP. This additional storage volume will have impacts on the adjacent Miami and North New River Canal systems, as well as infrastructure in WCA-3A and WCA-3B. The proposed EAA Storage Reservoir will put much higher volumes of water into the Miami/North New River Canal (through seepage) as well as high volumes/stages of water through the WCA's to the south that were never designed to account for this much water moving south. This fact gives the Tribe a high level of concern for flooding of Tribal lands. Tribal tree islands are inundated every year because there is an inability to move water south. Flooding of Tribal lands can only

get worse under this proposal and have a devastating effect on existing wildlife and bird populations. There is a high risk of failure associated with flowing additional water on downstream infrastructure that was never designed to handle the additional flows. Improvements to the downstream infrastructure as well as analysis to ensure flood conveyance capacity of the Miami and North New River Canal systems must be quantified. There is a currently an inability for the SFWMD and the COE to maintain the "Regulation Schedule" for WCA-3A. The addition of 160,000 acre-feet of water will certainly drown the tree islands in WCA-3A unless additional conveyance precedes the construction of the EAA Storage Reservoir. At a minimum, the state should identify how they intend to meet the COE Regulation Schedule for WCA-3A, considering they are not meeting it now.

**HYDROPATTERN RESTORATION:**

The CEPP PACR did not anticipate conveyance capacity limitations associated with the additional flows sent to the Everglades. The Section 203 PACR states that, "These additional flows are delivered with a timing shift that favor dry season flows in addition to CEPP when downstream infrastructure has adequate capacity to convey the flow." The PACR achieves an increase in flows south by storing a larger volume and delivering more flows, further into the dry season, extending hydroperiod within the Everglades system. The PACR increased flow south is realized not by increasing the peak discharge in the wet season but by opportunistically delivering dry season flows utilizing available system capacity that becomes available as the wet season flows subside.

**Table F-3. WCA 3A inflows and loads for ECB, FWO, and TSP**

WCA 3A Average Annual Flow (thousand ac-ft/yr)			
	ECB	FWO	TSP
WCA 3A Inflows	1,470	1,637	2,105
Change from FWO	-10%	n/a	29%
Change from ECB	n/a	11%	43%
TP Load Discharged into Northern WCA 3A			
Total Load (mt/yr)	36	38	49
Change from FWO	-5%	n/a	30%
Change from ECB	n/a	5%	36%
TP Concentrations Discharged into Northern WCA 3A			
FWM TP Concentration (ppb)	20	19	19
Change from FWO	5%	n/a	0%
Change from ECB	n/a	-5%	-5%

*43% INCREASE IN FLOWS*

*36% INCREASE IN PHOSPHOROUS LOADING.*

**Notes:**

1. Flow volumes are from Regional Simulation Model - Glades LECSA (RSMGL) model for 41 year simulation period.
2. ECB Average flow-weighted mean TP concentrations applied using available period of record grab sample data (Northern 3A 2006-2018), S11x (2006-2017), S9x (2003-2017), S140 (2008-2018), S190 (2008-2017) multiplied by daily simulated flows.
3. FWO, TSP (C240A) TP loads for Northern WCA 3A inflows calculated using DMSTA predictions adjusted to 12 ppb minimum annual outflow concentration. Estimated loads for the remaining structures were computed using historic period of record FWM TP concentrations applied to the 41-year simulated hydrology.
4. Loads based on flow-weighted mean calculations.

Table F-3 compares the flows and TP loads expected in the Existing Conditions Baseline (ECB), FWO, and the SFWMD'S tentatively selected plan (TSP) scenarios at the northern boundary of WCA 3A.

The Section 203 states that the “new water” provided by the TSP is critically important to the health of Everglades and therefore “essential” to Everglades restoration. Piggybacking off the CEPP Plan, the SFWMD concludes that the additional “new water” provided by the TSP is essential to restore: “...water depth, duration and distribution in WCA 3A, WCA 3B, and ENP and will serve to recreate a landscape characteristic of a pre-drained system that will support a healthy mosaic of plant and animal life. The restored hydrology of the Everglades ecosystem will more closely resemble a naturally occurring rainfall driven system with wet and dry cycles essential to flora and fauna propagation. Improved water depths and sheet-flowing distribution will begin to re-establish the unique ridge, slough and tree island micro-topography that once provided sustenance to the vast diversity of species inhabiting the Everglades.” The original CEPP PIR approved by the Secretary and authorized by Congress determined that the first 210,000 acre-feet of additional CEPP flows are essential to Everglades restoration. However, the CEPP PIR determined that water quality treatment was essential to ensure that the “new water” was compatible with the needs of the Everglades ecosystem. CEPP assumed that the Everglades would receive 10 ppb total phosphorous water. The federal court has already rejected the argument that the benefits of “hydropattern restoration” outweigh compliance with water quality requirements. The same polluted water that the SFWMD admits is “undesirable” flowing to the estuaries will be sent south into the Everglades where they say it is “essential”.

The States Section 203 PACR actually admits that there will be increased phosphorous in the northern WCAs which is exactly where Miccosukee lands are located. The Section 203 PACR states: “Due to improved hydropattern as a result of the TSP there would be reduced incidence of dry out of the northern marsh in WCA 3A which would limit peat oxidation and nutrient remobilization, potentially leading to lower downstream nutrient concentrations in southern WCA 3A. The increased flows within WCA 3A resulting from the TSP compared to expected changes in flow and flow patterns for the TSP would likely cause a negligible increase to nutrient loading in northern WCA 3A.” It is clear that the State of Florida intends to continue to use the Tribal lands in northern WCA-3A as a mixing zone. And on page ES-8 of the EIS it states: “...there is a potential for slightly degraded water quality conditions in the new Lake Okeechobee water that would be discharged to WCA 3A if the STA features are undersized. A sensitivity model run regarding settling rates would need to be performed, with a settling rate of zero, for the reservoirs to ensure water quality standards would be achieved”.

The Environmental Impact Statement admits on page 4-28, paragraph 4.20.1, that Tribal Water Quality Standards are likely to be violated “The Recommended Plan as presented in the SFWMD Section 203 report Annex F, Phosphorus Assessment, has the potential for slightly degraded water quality conditions from discharges into WCA 3A if the STA/WQ treatment features are undersized. Additionally, if STA diversions are not eliminated, untreated water bypassed to WCA 3A will degrade water quality. The Recommended Plan as presented in the SFWMD Section 203 report Annex F, assumes a settling rate of 2.5 m/yr. Water quality experts from the Department of Interior (DOI) proposed a settling rate of zero and suggested that without vegetation, assuming a settling rate of 2.5 m/yr for a deep reservoir is very optimistic.” It is unconscionable that either the COE or EPA could approve such an increase in phosphorous loading into the Everglades and knowingly violate the Tribes Water Quality Standards.

## **JUDGE GOLD – CLEAN WATER ACT LAWSUIT:**

This is not the first time that the State of Florida has attempted to justify polluting the Tribal Everglades in the name of “Hydropattern Restoration”. The concept of substituting “Net Improvement” or “Hydropattern Restoration” for actual water quality compliance was incorporated into the now infamous “Everglades Forever Act of 1994” (Chapter 373.4592 of the Florida Statutes (F.S.)). After extensive litigation, Judge Gold totally rejected Florida’s attempt to justify phosphorous pollution of the Everglades in the name of “Hydropattern Restoration”. Nevertheless, the State is attempting the same tactic again in this Section 203, PACR which expressly attempts to avoid compliance with existing water quality standards.

Judge Gold Ruling: Case 1:04-cv-21448-ASG Document 323 Entered on FLSD Docket 07/29/2008. Judge Gold stated, in relevant part:

“...These subsections establish “moderating provisions” which permit discharges into or within the “impacted areas” of the Everglades Protection Area until December 31, 2016 “using net improvement” and beyond that date in unimpacted areas for hydrorestoration purposes. Under this provision, the numeric phosphorus criterion becomes a “planning goal.” Instead of meeting the 10 ppb criteria, discharges into impacted areas “shall be permitted” using net improvement as a moderating provision. Even if the phosphorus numeric criterion (and the narrative criterion) are not met in accordance with the Rule’s achievement methodology, the Rule is unequivocal that “[n]o action shall be required, provided the net improvement or hydropattern restoration provisions of subsection (6) below are met.” No action translates into “no enforcement” of the protective 10 ppb criteria. The phrase “net improvement” is not defined in the Rule, but the Rule provides that “[i]mplementation of BAPRT will result in net improvement in the impacted areas of the EPA” regardless of whether such “net improvement” causes an imbalance of Everglades aquatic flora and fauna. F.A.C. § 62-302.540 (6)(a)(3). To use an example, if a discharge was at 50 ppb but reduced through BAPRT to 40 ppb, there is a net improvement, although the “net improvement” is not protective at the established 10 ppb as accepted by the EPA. Nonetheless, the Rule is unequivocal that “Until 2016, . . . permits shall include technology-based effluent limitations consistent with the Long-Term Plan.” This section must be read in para materia with subsection (5)(b)(3) which provides that “discharges into the EPA will be ‘deemed’ in compliance with state water quality standards upon a demonstration that . . . discharges will comply with moderating provisions of this rule.” Thus, even if the phosphorus levels in the discharge will not be at or below the phosphorus levels set forth in the Rule (see subsection 5(b)(1)), or even if such discharges will cause or contribute to exceedences of the phosphorus criterion set forth in the Rule (see subsection 5(b)(2)), the discharges will be allowed so long as such discharge complies with moderating provisions. This “blanket exemption,” without the State first performing a “use attainability analysis” is contrary to the CWA.”

In another part of Judge Gold’s decision, the follow observation is made:

“The Rule provides for a second form of moderating provision dealing with discharges into or within “unimpacted areas.” These type of discharges are permitted for “hydropattern restoration purposes” if a permit applicant can show that (1) the discharge will be able to implement or cause to be implemented BAPRT; (2) the environmental benefits of establishing the discharge clearly

outweigh the potential adverse impacts that may result in the event the phosphorus level in the discharge exceeds the criterion; and (3) the discharge complies with anti-degradation requirements. Unlike the moderating provisions for impacted areas, there is no date comparable to 2016. The clear inference is that moderating provisions for unimpacted areas can be permitted indefinitely, regardless of whether the 10 ppb criteria is achieved.”

Clearly, the Section 203 PACR attempts to use the same failed argument that the “benefits outweigh the potential adverse impacts”. This was solidly rejected by the federal courts.

#### **WQ LITIGATION:**

The original CEPP plan authorized by Congress was produced in consultation with U.S. DOJ and U.S. EPA regarding water quality and Clean Water Act (CWA) compliance permitting in the area of the project. Before any PACR could be approved those Federal agencies will need to be consulted on the impacts of the proposal to the State’s compliance with a number of legal requirements, including compliance with the Tribe’s water quality standards.

Total phosphorous concentrations in discharges from SFWMD STAs have been subject to ongoing Federal and state litigation currently managed under State and Federal consent orders. These include 2012 state Consent Orders issued to SFWMD by FDEP to build additional water quality improvement projects, including the A-1 FEB. The SFWMD preferred alternative includes the construction of a new 6,500 acre foot STA to treat the water quality of the increased water flow contemplated, and a reservoir in the A2 FEB footprint integrated into the A-1 FEB, the latter of which is a state “Restoration Strategies” feature subject to the state consent orders.

The water quality of flows entering the Everglades Protection Area, including WCA-3A and ENP, have also been subject to litigation at the Federal level involving the United States, represented solely by the DOJ. This is currently subject to a Settlement Agreement entered in *United States v. SFWMD*, Case No. 88-1886-CIV (U.S.D.C., S.D. Fla) establishing long-term water quality limits for water entering areas that will receive flows from CEPP (Appendix A). SFWMD’s Section 203s specific rules concerning Total Phosphorus are also subject to the continued oversight and review of the EPA through a Framework Agreement between the EPA and Florida’s Department of Environmental Protection (DEP) to ensure compliance with CWA and water quality requirements flowing into the Everglades, and through an Amended Determination by the EPA developed under separate litigation in Federal court (“Judge Gold litigation”).

#### **PHOSPHOROUS LOADING:**

Table F3 of the PACR indicates that this EAA Reservoir will result in a 43% increase in flows into Tribal lands with a 36% increase in phosphorous loadings. This fact alone is reason enough for the federal agencies to reject the PACR from federal matching funds. The Miccosukee Tribe was assured an 80% phosphorous load reduction during the Settlement Agreement and Consent Decree.

The Special Master Report opined on January 4, 2011 that the phosphorous load reduction requirements does not create an enforceable obligation to reduce phosphorous in WCA-2 and WCA-3 but does have an enforceable obligation with respect to phosphorous load reductions in



WCA-1 and ENP. The Miccosukee Tribe and the DOJ disagreed vehemently with this mischaracterization. In fact, if the phosphorous load reduction did not apply to the Tribal lands, the Miccosukee Tribe would never have settled the Judge Hoeveler Case. The Special Master erroneously agreed with the SFWMD's argument that the load reductions were descriptive and not prescriptive. On September 28, 2011, federal Judge Moreno adopted the Special Masters Report. Judge Moreno stated, "Like the Special Master, the Court is also persuaded that there is no enforceable obligation as to the load reductions because the Consent Decree contains no recourse in the event the load reductions are not met". The Miccosukee Tribe continues to believe that the Settlement Agreement and Consent Decree mean exactly what they say. This is just another broken agreement to the Miccosukee people. Now that SB-10 was passed in the Florida legislature, the necessity of having this interpretation becomes clear: The State of Florida intends to discharge a 36 percent INCREASE in phosphorous loading onto Tribal lands, rather than the agreed 80% reduction. The Tribe will continue to use all legal means to protect their homelands and expects that federal agencies who owe a trust obligation to the Tribe will assist and not hinder their efforts.

#### **FEDERAL COST SHARE:**

Corps Policy Memorandum states: "It is expressly against Federal policy to recommend for implementation 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... for CERP projects where inflows do not currently meet water quality standards the Corps will evaluate the benefits of any water quality features in Project Implementation Reports (PIRs) and if the benefits are determined to be essential to Everglades restoration, then the Corps may recommend to Congress in a PIR that it be given specific statutory authority to build and cost share the subject water quality features to both help achieve water quality requirements and provide additional restoration benefits critical to the successful implementation of CERP. The cost of operating and maintaining (O&M) such features would be allocated so that the costs of bringing the inflowing water into compliance with pre-project water quality requirements would be born 100% by the Non-Federal Sponsor." Additionally, the ASA office and USACE policy guidance is that the COE has been directed not to cost share on any water quality projects or features associated with restoration/water resource projects for Lake Okeechobee. Since the water for this project's reservoir is coming from Lake Okeechobee, cost sharing for water quality features under current guidance is prohibited. The federal government absolutely should reject any request by the State of Florida to cost share in this project until the State comes up with a plan to meet existing water quality standard of 10 ppb total phosphorous as measured at the end of pipe. Anything less is a tacit approval to continue to pollute the Greater Everglades and Tribal lands.

#### **ISSUE OF WILLING SELLERS ONLY:**

COE policies do not require land to be in public ownership to be considered as potential sites for management measures. COE regulations state that the District Commander shall consider utilization of both public and private lands, and select the lands that represent the best balance of costs, effectiveness, and acceptability consistent with incremental cost analysis. The COE is to "identify potential project lands, other public lands, and separable private lands determined

suitable for applying each candidate management feature. The identification of potential mitigation sites should not be constrained for analysis purposes. This analysis should focus on determining the management potential of each candidate site relative to its ability to meet mitigation objectives. For the purpose of analysis preference shall not be given to the management of project and other public lands over the use of suitable private lands.” The Miccosukee Tribe understands that the COE has not conducted an “Alternatives Analysis” of this plan. Before any cost sharing arrangement can even be considered, the COE should conduct an independent alternatives analysis. The prohibition of using private lands, and only lands south of the lake, and the “willing seller” provision are not constraints on the COE alternatives analysis. The Tribe believes that if such an alternatives analysis were conducted, the COE would determine that storage north of Lake Okeechobee is preferable (where the phosphorous loading originates). Use of the Rotenburger and Holy Land tracts as STAs should be considered. In short, SB-10 is badly flawed and the COE is not constrained by SB-10 provisions. Federal laws and policies should supersede state laws and policies. The Tribe agrees with the statement in the EIS: “The SFWMD Section 203 planning process was restricted with regard to lands under Laws of Florida, Chapter 2017-10, which prohibited the use of eminent domain. The Corps planning process would not include such constraints.” Large tracts of former Everglades lands are currently managed by Florida for a single species (deer hunting). Since the COE is not constrained by SB-10 restrictions, the COE should consider all options during their Alternatives Analysis. In any event, this recommended plan should be rejected as not in the federal interest.

#### **ENVIRONMENTAL JUSTICE:**

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”, requires the federal government to achieve environmental justice by identifying and addressing high, adverse and disproportionate effects of its activities on minority and low-income populations. The disproportionate adverse impact of Miccosukee Tribal Everglades receiving an additional 36% phosphorous load would violate the federal governments Trust Responsibility and the Executive Order.

#### **FLOODING AND FLOWS:**

The Section 203 PACR claims that it will also help maintain microtopography throughout WCA-3A and ENP because the additional volumes of water will allow velocities to occasionally reach 2.3 cm/sec, which will resuspend floc. The lack of flow has caused the entire Everglades to either get relatively deep (e.g., WCA-1) or to flatten out and lose its distinctive slough patterning (e.g., WCA-3A-North). The occasional redistribution of floc and slough bottom sediments will reduce the flattening of the system, provide resilience against droughts and increase the restoration of wading birds. While flow is important to the Everglades it is not the only consideration. Water quality below the oligotrophic criterion of 10 ppb total phosphorous is equally important. Increases of phosphorous loading with water in excess of 10 ppb TP will degrade the northern Everglades habitat and load the muck sediment with phosphorous which may take over 100 years to remove. Another important factor is excess water depth. Without the capacity to pass the new water out of WCA-3 into the ENP, the water will stack in WCA-3, inundate the tree islands and cause loss of tree islands as occurred in WCA-2.

## **VIOLATION OF SAVINGS CLAUSE:**

In accordance with the Savings Clause provisions of the CERP authorization in WRDA 2000 (Sections 601(h)(4) and (5)) and applicable State and Federal standards, the following constraints were applied to the SFWMD Section 203 Project, many of which were included in the 2014 CEPP planning and implementation: (1) Not reduce levels of service for flood protection that were in existence on the date of enactment of WRDA 2000, (2) Not eliminate or transfer existing legal sources of water until a new source of comparable quality and quantity is available, (3) Meet applicable State water quality standards, and (4) Not affect the Tribal Compact. It is clear from the Section 203 PACR and the EIS that 3 of the 4 constraints are going to be violated with the Recommended Plan. Not only will the Tribes Water Quality Standards be violated, but the additional water will raise water levels on the federal Reservation and violate the Saving Clause of WRDA.

## **UNDERSIZED STA AND BYPASS :**

Again, the Environmental Impact Statement admits on page 4-28, paragraph 4.20.1, that Tribal Water Quality Standards are likely to be violated: "STA bypasses and significantly less uptake of phosphorus by the deep FEB's than predicted could result in a worsening of downstream conditions in WCA 3. Water quality treatment features may need to be more conservatively designed in PED (i.e. more treatment capacity to address uncertain Adaptive Management, adjusting flows to reduce/eliminate bypass events, and the addition of new treatment areas). By over estimating the uptake of the A-2 FEB, the STA may be undersized, which would lead to more water bypasses of the STA before being discharged into WCA 3". The under sizing of the STAs could potentially be solved if the Corps determined that the Rotenburger and Holey Lands were necessary to treat an additional 240,000 acre feet of water. Another option could involve the COE determining that northern lake storage is needed so that the 23 foot deep reservoir is unnecessary. Either way, it is a near certainty that a 23 foot deep reservoir cannot possibly provide the same water quality treatment as a shallow water reservoir.

## **DAM SAFETY REQUIREMENTS:**

The SFWMD's tentatively recommended plan's reservoir design does not adhere to USACE dam safety policy/requirements for potential failure mode and life loss consequence analysis. Hurricane Katrina and New Orleans should come to mind when the COE hears that the State intends to build a 23 foot deep reservoir. The Section 203 PACR did not determine the consequences of failure for the proposed EAA Storage reservoir. The risk to human life must be considered when evaluating any plan to build a deep water reservoir. WRDA 1986 requires such an analysis: "Any report that is submitted to the Committee on Environment and Public Works of the Senate or the Committee on Public Works and Transportation of the House of Representatives by the Secretary, or the Secretary of Agriculture acting under Public Law 83-566, as amended, which proposes construction of a water impoundment facility, shall include information on the consequences of failure and geologic or design factors which could contribute to the possible failure of such facility."

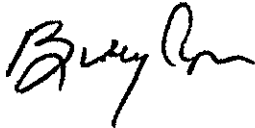
## **CULTURAL RESOURCE IMPACTS:**

The Miccosukee Tribe remains very concerned with the proposed plan on the cultural resources located within the area. The EIS acknowledges the presence of these resources but does nothing to assure the Tribe that these sites will not be inundated: "The Recommended Plan may result in major long-term adverse effects on cultural resources sites 8PB16039 and 8PM16040. Mitigation of effects for historic property 8PB16039 potentially reduced to no effect. Mitigation of effects for culturally significant site 8PM16040 is unknown."

## **CONCLUSION:**

When the Corps of Engineers submits the Section 203 PACR and the EIS to the US Congress, they should specifically recommend that there is no federal interest in shifting pollution from one area into the Everglades. The Tribe requests that the COE highlight Tribal concerns that this plan will further pollute the Tribe's Everglades. Should the US Congress entertain a cost sharing arrangement on this severely flawed plan, they should direct the COE to conduct an Independent Alternatives Analysis which includes alternate sites and water depths for water storage. While Florida agencies (such as the SFWMD) may be required under Florida law to shift phosphorous loading from the northern estuaries to be discharged into the Everglades, it is not good environmental policy. This is what happens when legislators pretend to be scientists. The impacts of additional phosphorous loading to the northern Everglades will be felt disproportionately by the Miccosukee Tribe. The COE should identify the many technical, policy, and legal concerns with this PACR to the US Congress and recommend rejection. Primary among the Tribes concerns is a 43% increase in flows and a 36% increase in phosphorous loading to the northern Everglades (where the Tribe's Federal Reservation exists) and a continuing violation of the Tribes Water Quality Standards.

Sincerely yours,



**Billy Cypress**  
**Tribal Chairman**

cc: **Business Council**  
**Gene Duncan, Water Resources Director**  
**Jeanine Bennett, Esq., In-House General Counsel**