

February 24, 2020

**VIA E-MAIL ONLY:**

**[EAARESERVOIR@USACE.ARMY.MIL](mailto:EAARESERVOIR@USACE.ARMY.MIL)**  
**[KRISTA.D.SABIN@USACE.ARMY.MIL](mailto:KRISTA.D.SABIN@USACE.ARMY.MIL)**

Department of the Army  
c/o Mr. Andrew LoSchiavo  
U.S. Army Corps of Engineers  
Jacksonville District  
701 San Marco Boulevard  
Jacksonville, Florida 32207-8175

and

Department of the Army  
c/o Ms. Krista Sabin  
U.S. Army Corps of Engineers  
Palm Beach Gardens Permit Section  
4400 PGA Boulevard, Suite 500  
Palm Beach Gardens, Florida 33410

**RE: United States Sugar Corporation's Comments on the Corps' Final Environmental Impact Statement for the Central and Southern Florida, Everglades Agricultural Area; and Comments on the Everglades Agricultural Area Southern Stormwater Treatment Area Permit Application, Corps File No.: SAJ-2018-03427(SP-KDS)**

Dear Mr. LoSchiavo and Ms. Sabin:

This firm represents United States Sugar Corporation ("USSC"), an interested stakeholder in issues related to the management of Lake Okeechobee ("Lake"), including the Comprehensive Everglades Restoration Plan ("CERP") and all of its incremental components. On January 24, 2020 and on January 28, 2020, the U.S. Army Corps of Engineers ("Corps") published separate notices seeking comments from the public regarding the above two above-referenced matters, the Final Environmental Impact Statement ("EIS") for the Everglades Agricultural Area ("EAA") Reservoir Project, and the permit application for the A-2 STA, collectively referred in this comment letter as the EAA Reservoir Project. On behalf of USSC, please include this letter in the EAA Reservoir Project's and the A-2 STA permit application's respective administrative records. USSC requests the Corps consider the following issues as it finalizes its decisions on the EAA Reservoir Project.

To be clear: USSC supports the EAA Reservoir Project, along with the other components and projects of CERP. The EAA Reservoir Project proposes new CERP infrastructure, authorized by the Water Resources Development Act of 2018. The comments in this letter are related only to the *operation* of the new infrastructure for the EAA Reservoir Project. Any representation by others that USSC does not support this project because of the submission of a comment letter is inaccurate, or worse, purposefully misleading.

As a landowner and farmer in the EAA, USSC has had a long-standing involvement in CERP and has a substantial interest in the proposed EAA Reservoir Project. USSC pays an agricultural privilege tax (a tax unique to the EAA) that support Everglades restoration. EAA farmers have invested more than \$400 million in restoring and preserving the Everglades and implement the most successful and well documented EAA Best Management Practices program, reducing phosphorus loads in stormwater runoff by a long-term average of 56 percent since the program began in 1996. USSC shares the concerns of other stakeholders, including the availability of water supply (which for farmers means irrigation water for their crops) and the success of water quality improvements in the system.

**USSC Supports the EAA Reservoir Project, Along with Every Other Component of CERP and Has Consistently Expressed Support for CERP, the Central Everglades Planning Project (“CEPP”), and the EAA Reservoir Project**

After close to a decade of analysis and consensus building, Congress enacted the Water Resources Development Act of 2000 (“WRDA 2000”), authorizing CERP, the framework for all environmental restoration changes to the Central and Southern Florida Flood Control Project (“C&SF Project”). USSC was part of this historic achievement in 2000 and has consistently supported CERP and the construction of a reservoir south of Lake Okeechobee, which is a part of the plan passed by Congress in 2000. As evidence that USSC has always been committed to the completion of CERP projects, including the EAA Reservoir Project, below are a few examples of USSC’s public expression of support for these projects:

- “USSC supports the proposed CERP project as described and approved in the Central Everglades Planning Project (“CEPP”) Post-Authorization Change Report (“PACR”).”

Source: Letter from USSC to U.S. Army Corps of Engineers, October 7, 2019

- “U.S. Sugar will continue to support the EAA Reservoir project, the Florida Legislature, the South Florida Water Management District and the U.S. Army Corps of Engineers as they move forward to build and operate the projects that will store, clean and

convey more water south of Lake Okeechobee to reduce discharges, protect our coastal estuaries and the Florida Everglades”

Source: [USSC Press Release](#), November 29, 2018

- “Senate Bill 10 has been greatly improved, takes essentially no privately owned farmland, and even removes the threat of eminent domain. The House deserves credit for quickly passing legislation that can provide some protection for our water resources while also protecting our farming communities and vital food production.”

Source: [USSC Statement](#), May 17, 2017 following the passage of Senate Bill 10

- “We have and continue to support the Comprehensive Everglades Restoration Plan (CERP), Restoration Strategies, the Modified Water Deliveries projects, and the South Florida Water Management District’s priority projects.”

Source: [USSC Statement](#), June 9, 2016

- “The House vote was welcomed by members of the broad coalition that united behind the bill – environmentalists, the region’s powerful sugar industry, federal regulators and politicians of both parties. ‘We are proud to be part of this historic partnership,’ U.S. Sugar President Robert A. Dolson said in a prepared statement.”

Source: [USSC Statement](#) in Palm Beach Post, October 20, 2000

### **The Corps Is Required to Conduct a Savings Clause Analysis<sup>1</sup> Per the Mandates in WRDA 2000; The Savings Clause Analysis Included in the EAA Reservoir Project EIS Is Flawed**

CERP was authorized by WRDA 2000 as the framework to change the C&SF Project into a system that meets Congress’ “overarching objectives” of restoring the Everglades ecosystem while providing for South Florida’s other water-related needs, including water supply and flood protection.<sup>2</sup> CERP authorizes the Corps to modify operations of the existing C&SF Project and add new infrastructure to accomplish CERP’s overarching objectives.<sup>3</sup> Congress included legal assurances in WRDA 2000 to protect water supply and extensive procedures apply to insure CERP implementation adheres to these assurances.<sup>4</sup> On a parallel basis, Florida adopted laws to provide

---

<sup>1</sup> The federal Savings Clause is codified at Section 601(h)(5) of the Water Resources Development Act of 2000, Pub. L. No., 106-541, §601, 114 Stat. 2690 (Dec. 11, 2000). The Florida Savings Clause is codified at Section 373.1501(5)(d), Florida Statutes. The federal and State Savings Clauses are referred to collectively as the “Savings Clause” in this letter, unless otherwise more specifically limited by the terms ‘State’ or ‘federal’.

<sup>2</sup> WRDA 2000, P.L. 106-541, § 601(b)(1)(A).

<sup>3</sup> *Id.*

<sup>4</sup> WRDA 2000, § 601(h) and S. Rept. No. 106-362 (2000) and S. Rept. No. 106-363 (2000).

water users the same assurances - that Florida's water use permitting program, implemented by the South Florida Water Management District ("SFWMD") - would be protected while the State worked with the Corps to implement CERP.<sup>5</sup> These laws were, and remain today, the cornerstone of insuring CERP can be implemented successfully.

It is undisputed that the EAA Reservoir Project is a CERP Project. In order to finalize the EAA Reservoir Project, CERP laws require the Corps and SFWMD to perform a Savings Clause analysis to insure that water users' rights (i.e., issued water use permits) are not interfered with, as the two agencies work to achieve ecological restoration and provide new sources of water for Florida's future needs.

The federal Savings Clause requirement in WRDA 2000 states:

Until a new source of water supply of comparable quantity and quality as that available on the date of enactment of this Act is available to replace the water to be lost as a result of implementation of the Plan, the **Secretary and the 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) (emphasis added).

This requirement is further explained in the Corps' CERP Programmatic Regulations, where the Corps and the local sponsor, the SFWMD, were required to identify the pre-CERP baseline - the hydrologic conditions that existed in 2000 - in order to properly undertake the Savings Clause analysis. The baseline is defined as follows:

**... the hydrologic conditions in the South Florida ecosystem on the date of enactment of WRDA 2000**, as modeled by using a multi-year period based on assumptions such as land use population, water demand, water quality, and assumed operations of the Central and Southern Florida Project.

33 C.F.R. § 385.35(a) (emphasis added).

Florida adopted a State Savings Clause that requires the SFWMD, as local sponsor on CERP projects, to protect water users. It states:

---

<sup>5</sup> Section 373.1501 and Chapter 373, Florida Statutes. The Corps solicited comments on the EAA Reservoir Project, we raise both WRDA 2000 and State law because the National Environmental Policy Act ("NEPA") requires analysis of whether state law will be violated by a project. *See, e.g.*, 40 C.F.R. § 1508.27(b)(10). In this letter, the Savings Clause analysis is the surrogate for protecting state water rights and is considered the minimum that must be done to demonstrate the federal government is not interfering with the State's water rights program.

(5) **In its role as local sponsor for the project, the district shall** comply with its responsibilities under this chapter and implement project components through appropriate provisions of this chapter. In the development of project components, the district shall:

...

(d) Consistent with this chapter, the purposes for the restudy provided in the Water Resources Development Act of 1996, and other applicable federal law, **provide reasonable assurances that the quantity of water available to existing legal users shall not be diminished by implementation of project components so as to adversely impact existing legal users**, that existing levels of service for flood protection will not be diminished outside the geographic area of the project component, and that water management practices will continue to adapt to meet the needs of the restored natural environment.

Section 373.1501(5)(d), F.S. (emphasis added).

The EAA Reservoir Project EIS, however, does not protect water users. It does not use the proper baseline as defined in the Corps' regulations and it does not analyze the proposed operations under the Savings Clause. Annex B in the EAA Reservoir Project EIS mentions the Savings Clause but falls short of providing the necessary analysis for water supply performance in place in 2000. The language in Annex B implies that neither the State nor the Corps will operate the EAA Reservoir Project in manner to meet the water supply performance that existed in 2000.<sup>6</sup> Rather than using the 2000 baseline, as mandated by Congress in WRDA 2000, the Corps has unilaterally revised the baseline to 2008, and the State appears to be quietly consenting. Specifically, the EAA Reservoir Project EIS proposes to take water that existed in Year 2000 away from existing legal users, with no written assurances on the replacement source. This is contrary to the above cited laws and inconsistent with the objectives and goals of the EAA Reservoir Project.

Nowhere has Congress or Florida's Legislature authorized this change in baseline (from 2000 to 2008). Neither federal nor state law (WRDA 2000 or Chapter 373, Florida Statutes) allows for water to be taken from permitted users' allocations and transferred to the environment, without having a replacement for that water. The Corps cannot avoid application of the 2000 water supply baseline by hiding behind the fiction that the Lake Okeechobee Regulation Schedule is an "intervening non-CERP activity." The Lake Okeechobee Regulation Schedule was always

---

<sup>6</sup> Annex B at B-67 states, "Some of the water utilized by agricultural users in the LOSA from Lake Okeechobee would be stored in the A-2 Reservoir when the TSP is implemented. This cannot occur until after the LORS is modified which would allow full utilization of the A-2 Reservoir."

contemplated to be a part of CERP. The Corps' recent rationale, that the Lake Okeechobee Regulation Schedule is only subject to CERP protections when storage north and south of the Lake is built, ignores the clear intent of the Savings Clause. The need to provide assurance to water users that their water supply performance in 2000 would not be impacted is the reason the Savings Clause was put into WRDA in the first place. Moreover, the EAA Reservoir Project was specifically designed in CERP to provide supplemental irrigation to Lake Okeechobee Service Area farms. To claim otherwise betrays the many businesses and public utilities who supported the ecological and water supply goals in WRDA 2000, supported the promise embodied in the Plan, and supported the Savings Clause that directed its implementation.

Because the EAA Reservoir Project is a CERP Project, WRDA 2000 is the only law that authorizes the Corps to achieve the ecological restoration goals described in the EAA Reservoir Project EIS. Likewise, the law that allows the State to participate in CERP projects as a local sponsor, requires the State to undertake a Savings Clause analysis. § 373.1501, F.S. The term "intervening non-CERP activity" is a creation of the Corps, which does not exist in any law or rule (it appears only in a draft guidance memorandum which does not have the force of law). These new interpretations of the CERP laws and its unilateral insertion of a new baseline appears aimed solely at allowing the Corps to avoid meeting the Year 2000 pre-CERP baseline for water supply.

CERP's goals and objectives are multi-faceted and include *both* ecological restoration and water supply protection. The Corps is not at liberty to pursue CERP's ecological goals at the expense of CERP's water supply protections. This proposed action is not within the spirit of CERP, and appears to undermine public trust for the entire plan. We can do better.

### **Project Purpose Is Not Achieved in the EAA Reservoir Project EIS**

The EAA Reservoir Project EIS's project purpose is to improve water supply for users as well as improve deliveries for the natural system.<sup>7</sup> Yet, the EAA Reservoir Project EIS's analyses concludes that it is not providing such water for users,<sup>8</sup> and therefore, the proposed project does not meet the project's purpose. Project operations are integrated with the Lake Okeechobee Regulation Schedule and occur in two phases. First, the Corps' schedule requires the A-2 STA, "... be constructed and operational prior to completion of the A2 Reservoir."<sup>9</sup> Later, the A-2 STA will receive water from Lake Okeechobee in conjunction with the EAA Reservoir, "if"<sup>10</sup> and when built.

---

<sup>7</sup> EAA Reservoir Project EIS at p. 1-4. The CEPP PIR likewise states the Project Purpose and Need included "increasing water supply for municipal, industrial and agricultural users." See CEPP PIR at pp. 1-2-1-3.

<sup>8</sup> Annex B of the EAA Reservoir Project EIS at p. 7-9 states: "Based on the analysis, the level of service for the LOSA **water supply has not improved**, nor has it been degraded by the project. Therefore, no water was quantified for other water related needs in the LOSA. However, by virtue of additional water being stored in the A-2 Reservoir, additional water may reach water users located in LOSA." (emphasis added)

<sup>9</sup> EAA Reservoir Project EIS at p. 3-19.

<sup>10</sup> EAA Reservoir Project EIS at p. 1-4.

The EAA Reservoir Project was intended to reduce estuarine discharges, supply water to the environment, and increase water supply for municipal, industrial and agricultural users. These purposes will not be met with the project as proposed in the EIS. The EAA Reservoir Project EIS is flawed because it relies on LORS 2008 to provide water for the EAA Reservoir Project, but never recognizes that water lost under LORS 2008 must be restored for Florida's water use permittees and for maintenance of the Lake's minimum level under state law.<sup>11</sup> Even though CERP and Florida's water laws require these water rights be restored, the Corps does not express operational constraints that are applicable now or under any new Lake schedule. While general parameters are stated, there is no enforceable operational plan defining the recovery of water rights. The EAA Reservoir Project EIS states its first priority is to deliver water to the environment. It includes vague and non-committal language<sup>12</sup> (e.g. "may" or "when excess capacity is available is available beyond restoration flows") to describe the potential water supply for human use.<sup>13</sup> Meanwhile, Lake deliveries to the EAA Reservoir Project appear unrestrained, further risking the limited Lake supply source remaining available for permitted use, and contrary to the project purpose.

The Corps and the SFWMD must undertake the proper Savings Clause analysis using the correct baseline established in Year 2000 and revise the analysis that is currently included in the EAA Reservoir Project EIS. Coupled with this revision, and because of the sequencing of the A-2 STA, the Corps must include clear operational conditions in the A-2 STA permit to provide assurances to water users their water supply will be protected.

### **The A-2 STA Permit Must Include Operational Conditions to Protect Water Supply**

The Corps' effort to define A-2 STA operation as a "stand-alone" CERP facility, without the Reservoir, is an important step. We recommend that as a next step, the A-2 STA Section 404 permit include enforceable operational conditions.<sup>14</sup> The EAA Reservoir Project EIS describes volumes of water directed from Lake Okeechobee to the A-2 STA during an Initial Operating Period as being capped by plant growth needs and correlated with historic agricultural water use.<sup>15</sup> The EAA Reservoir Project EIS explained the A-2 STA's interim operating period is limited to only vegetation establishment, not water treatment, and excluded water treatment from the A-2

---

<sup>11</sup> EAA Reservoir Project EIS at pp. 3-10, 3-11; Annex B at pp. B-40, B-41, 1-7, 1-9, 2-18, and 2-19; and Annex C at p. C-25.

<sup>12</sup> EAA Reservoir Project EIS at pp. ES-5; 5-15; Annex B at pp. B-21; B-66.

<sup>13</sup> EAA Reservoir Project EIS at pp. ES-5; 5-15. Figure 3-3 of the draft Project Operating Manual depicts allocation of water for the environment and EAA, but this depiction does not lend itself to real-time operations enforceability.

<sup>14</sup> USSC previously commented on SFWMD's pending 404 permit application (SAJ-2018-03427(SP-KDS)); this EAA Reservoir Project EIS is part of the Corps' application review. We incorporate by reference USSC's comment letter dated October 7, 2019 and appreciate the opportunity to comment on A-2 STA operations in both the CERP planning and Corps 404 permit application contexts.

<sup>15</sup> EAA Reservoir Project EIS at p. 3-19.

STA's purpose and need.<sup>16</sup> The following suggestions can help strengthen this language and create permit conditions to provide certainty to users that their water rights will be not violated.

While "interim operating period" is referenced in the EAA Reservoir Project EIS, consider building on this by defining the interim operating protocols and duration. This section also notes ". . . the A2 STA will be operated in accordance with the SFWMD Operations Plan that will be included as a condition of the regulatory permit."<sup>17</sup> This is encouraging, but the SFWMD's interim A-2 Operations Plan was not provided to the public for review and comment.<sup>18</sup> Without this critical document for review, we are unable to assess the impact of these interim operations on our interests. It is also unclear if the Corps can issue the Section 404 permit without such a plan. Please provide a copy of the SFWMD's A-2 Operations Plan for the public's review and comment.

Likewise, information provided in the Annex C Draft Project Operating Manual casts uncertainty by stating, "At this time, interim operations during construction cannot be determined. Later, when is [sic] time to develop interim operations during construction, consideration needs to be given to implementation of an initial growing period with minimal water depths (0.5 ft) before construction is complete, to help establish vegetation. This period will start as soon as levees facing the A-2 side are complete."<sup>19</sup> Adding to this uncertainty, the Corps did not model the A-2 STA as a "stand-alone" facility or as a facility operating in conjunction with the connected A-1 FEB. Without the SFWMD's Operations Plan provided to the public, coupled with the Corps' own statements regarding the operational uncertainty of the A-2 STA, we are left with no meaningful assurances regarding how the State intends to operate the A-2 STA and how it intends to comply with the Savings Clause.

Therefore, including permit conditions that dictate that the operations of the stand-alone A-2 STA cannot violate the pre-CERP hydrologic baseline in place in Year 2000 would fill this gap. Permit conditions that assure that the interim operations do not violate existing legal users water rights are appropriate, even necessary under the law. The SFWMD, as permittee to the A-2 STA permit and the agency charged with issuing and protecting water use permits, should implement these conditions.

### **Conclusion**

For the reasons stated above, we look forward to the Corps revising its analysis in the EAA Reservoir Project EIS and including the permitting conditions discussed above in the A-2 STA permit. USSC incorporates by reference and adopts the comments of aligned farmers and water

---

<sup>16</sup> EAA Reservoir Project EIS at p. 3-19.

<sup>17</sup> EAA Reservoir Project EIS at p. 3-19.

<sup>18</sup> The EAA Reservoir Project EIS documents posted on the Corps' website (<https://www.saj.usace.army.mil/About/Divisions-Offices/Planning/Environmental-Branch/Environmental-Documents/>) included 24 documents with different dates, including 2018 dates and in some instances referring back to the 2014 CEPP Final PIR / EIS.

<sup>19</sup> EAA Reservoir Project EIS Annex C at p. C-37.



U.S. Army Corps of Engineers  
February 24, 2020  
Page 9

users regarding on the EAA Reservoir Project. USSC remains committed to ensuring that CERP projects, including the EAA Reservoir Project, are implemented successfully, on time, and in manner that will achieve all the goals and objectives of CERP that we all worked together to accomplish.

Sincerely,



Luna E. Phillips  
Gunster Law Firm  
*Attorneys for the United States Sugar Corporation*

cc: Colonel Andrew Kelly, U.S. Army Corps of Engineers  
Lieutenant Colonel Todd F. Polk, U.S. Army Corps of Engineers  
Mr. Gib Owen, U.S. Army Corps of Engineers  
Mr. Drew Bartlett, SFWMD Executive Director  
Mr. Chauncey Goss, SFWMD Governing Board Chairman  
Mr. Noah Valenstein, FDEP Secretary  
Client