



DEPARTMENT OF THE ARMY
SOUTH ATLANTIC DIVISION, CORPS OF ENGINEERS
ROOM 9M15, 60 FORSYTH ST., S.W.
ATLANTA, GEORGIA 30303-8801

REPLY TO
ATTENTION OF

RECORD OF DECISION

FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

**Interim Operational Plan
for Protection of the Cape Sable Seaside Sparrow**

Everglades National Park, Miami-Dade County, Florida

We have reviewed the Final Supplemental Environmental Impact Statement (2006 FSEIS) on the Interim Operational Plan (IOP) for Protection of the Cape Sable Seaside Sparrow (CSSS), a species listed under the Endangered Species Act (ESA). We have also reviewed all correspondence, including comments on the Draft SEIS, responses to comments on the Draft SEIS, comments on the Final SEIS, responses to comments on the Final SEIS and all pertinent documents for this project. Based on this review, and after our review of the views of other state and Federal agencies, Native American Tribes, non-governmental organizations, and the general public, I concur in the District Engineer's recommendation to continue implementation of the plan identified as Alternative 7R until a successor plan can be implemented following completion of construction of the project for Modified Water Deliveries (MWD) to Everglades National Park, expected in 2011. This Record of Decision (ROD) was prepared for the 2006 FSEIS. The following documents were incorporated into the 2006 FSEIS and are referenced in this ROD:

- US Fish and Wildlife Service Biological Opinion 1999 (1999 BO), amended April 2002 (2002 BO Amendment)
- Draft Environmental Impact Statement for the IOP for Protection of the CSSS February 2001 (2001 DEIS)
- Supplemental Draft Environmental Impact Statement for the IOP for protection of the CSSS September 2001 (2001 SDEIS)
- Final Environmental Impact Statement for the IOP for Protection of the CSSS (2002 FEIS)
- Record of Decision, Interim Operational Plan for Protection of the Cape Sable Seaside Sparrow, July 2, 2002 (2002 ROD)
- US Fish and Wildlife Service Biological Opinion November 17, 2006 (2006 BO)
- Draft Supplemental Environmental Impact Statement for the IOP for Protection of the CSSS (2006 DSEIS)

On March 14, 2006, Judge Moore issued a decision in a case brought by the Miccosukee Tribe of Indians challenging IOP [Miccosukee Tribe of Indians of Florida v. United States, 420 F. Supp.2d_1324 (S.D. FL 2006)]. While ruling in the Corps' favor on several claims, Judge Moore

directed the Corps to issue a supplemental environmental impact statement to incorporate modeling on 7R that was concluded after the Corps' 2002 ROD and to address incorporation of the "R Structures" (the S-332B North Seepage Reservoir; S-332B to S-332D Seepage Reservoirs; S-332B West Seepage Reservoir; S-332C Seepage Reservoir; S-332B/C Partial Connector; and Frog Pond Seepage Reservoir; S-356 Pump Station; and removal of the L-67 Extension Levee), features that were components of the previously authorized MWD Project and the Canal 111 (C-111) Project, in the final plan. The Corps filed the Final Court-ordered SEIS with the Environmental Protection Agency and circulated the document for public review in December 2006. The Notice of Availability was published in the Federal Register on December 22, 2006.

In conjunction with the preparation of the SEIS, the Corps reinitiated consultation under Section 7 of the Endangered Species Act with the US Fish and Wildlife Service (FWS) for affected listed species, including the Everglades snail kite and CSSS, and received a Biological Opinion dated November 17, 2006. In the 2006 BO, the FWS concluded that continued operation of the IOP Alternative 7R is environmentally preferable to other alternatives, is not likely to jeopardize the continued existence of the CSSS, Everglades snail kite, or wood stork, and is not likely to destroy or adversely modify designated critical habitat for the CSSS or Everglades snail kite.

Six alternative plans were developed and analyzed in the 2001 DEIS. Following release of the Draft EIS, the Institute for Environmental Conflict Resolution (IECR) facilitated the formulation of an alternative that met the criteria in the 1999 BO while providing for maximum protection of the resources and addressing concerns of the interested parties. This effort included the Corps, FWS, South Florida Water Management District (SFWMD), and Everglades National Park (ENP). The plan proposed during this process, Alternative 7, was modified in response to comments submitted by the public and other stakeholders during the 2001 NEPA comment period, and was described as Alternative 7R. Additional features now included in Alternative 7R are components of the C-111 project (S-332B North Seepage Reservoir; S-332B to S-332D Seepage Reservoir; S-332B West Seepage Reservoir; S-332C Seepage Reservoir; S-332B/C Partial Connector; and Frog Pond Seepage Reservoir) and the MWD project (S-356 Pump Station; and removal of the L-67 Extension Levee). The selected plan is presented in detail in 2006 FSEIS, and summarized in the Executive Summary, Table ES-1. These operations will utilize structures described in the 1992 General Design Memorandum and EIS on MWD and in the 1994 General Reevaluation Report and EIS on C-111. The Alternative 7R structural elements, which were authorized features of the MWD and C-111 projects, were not treated as proposed features of Alternative 7R. However, their construction was scheduled in conjunction with evaluation of Alternative 7R, and their construction and operation were addressed in the 2002 FEIS and are addressed in the 2006 FEIS. Pump capacity and systems operations will be assessed further under the Combined Structural and Operational Plan (CSOP) now under development and expected to be implemented as a successor plan to IOP upon completion of construction of the MWD Project in 2011.

As was stated in the 2002 ROD, it is not possible to simultaneously meet the level of expectations that each stakeholder group has for the Central & Southern Florida (C&SF) project. The Miccosukee Tribe continues to object to Alternative 7R water management operations based on concerns about effects on Everglades's snail kite and CSSS critical habitat as well as impacts

to the Tribal Everglades. The Department of Agriculture and Miami-Dade Department of Environmental Resources Management remain concerned about increased flood impacts to residential and agricultural areas. However, the majority of the stakeholders' operational requests would directly conflict with other planning objectives. The continued operational plan of Alternative 7R represents a cost-effective and environmentally acceptable plan for water management in the CS&F project.

In addition to consideration of all comments received on the Draft SEIS and Final SEIS, the Corps has also considered pleadings filed by the Miccosukee Tribe in the ongoing litigation. To the extent the tribe's pleadings might be construed as comments on the final SEIS, they were received after the close of the comment period noticed in the final SEIS. Nevertheless, the Corps has considered them and finds that they lack merit.

The Tribe has asserted that the Corps incorrectly assumed that it was operating under Test 7 with the S-12 gates open in 1999. In fact, the S-12s were open during portions of 1999. Conditions in WCA-3A were dry during the spring and early summer of 1999 and required no regulatory releases, but in late June, when stage in WCA-3A exceeded the regulatory schedule, the S-12 structures were opened in response under Test 7, prior to the end of the CSSS nesting season. Hurricane Irene, hit in October and WCA-3A levels peaked in November 1999. Operations to protect the CSSS were triggered by wet conditions due to Hurricane Irene and began in December 1999.

The Tribe further contends that stages in WCA-3A in 1994-1995 and following Hurricane Irene in 1999 would have been higher under IOP than they were under the preceding Experimental Program of Water Deliveries. The Corps disagrees. IOP modeling results on the public website show that the conditions would not have been exacerbated by IOP in 1994 and 1995. Moreover, there are a number of features of IOP designed to mitigate for S-12 closures that would address impacts to WCA-3A (e.g., Zone E-1 releases out of WCA-3A, pre-storm draw downs, and releases to the SDCS). Additionally, in the case of an event as unusual in both magnitude and timing as the 1994-1995 event, the Corps would consider a deviation to IOP if the CSSS nesting season would not be adversely affected. In fact, IOP specifically provides for recommendations by the Chairman of the Tribe for changes to operations of the S-12 structures, and the Corps would work with the Tribe and agencies to address high levels.

The Tribe also points out that the Corps has acknowledged "stages in WCA 3A have exceeded 10.5 feet (3.2m.) in 10 of the past 13 years, while there were only about 4 such occurrences of stages exceeding 10.5 feet (3.2m.) during the period from 1953 to 1993." This warrants explanation. The WCAs were not constructed until the mid 1960's. Prior to construction of the impoundments, elevations in the WCAs did not reach 10.5 ft. The 1970's and 1980's were a dry cycle period. The 1990s and into 2000s, have been characterized as a wet cycle period (due to El Nino and AMO influences). The three highest WCA-3A stages that occurred in the 1990's (prior to implementation of ISOP and IOP) were more than a foot higher than all previous high stages. Attributing high water levels to operations for the protection of the CSSS ignores rainfall data.

Finally, the Tribe takes issue with the FWS' conclusions with regard to the CSSS. On May 16, 2006, via teleconference, the FWS confirmed that the pleadings filed by the Tribe, the

declaration of Dr. Post in particular, do not affect the conclusion contained in the 2006 BO. The FWS also confirmed that the November 2006 presentation by Dr. Wiley Kitchens to Corps and FWS staff does not affect the conclusions in the 2006 BO. In sum, none of the arguments raised in pleadings filed by the Tribe after the formal comment period constitutes significant new information concerning effects of the action that have not been previously considered or that are otherwise relevant to environmental concerns. Thus, no further ESA consultation or additional NEPA analysis is warranted.

The FWS has concurred that Alternative 7R is a reasonable and prudent alternative to avoid jeopardy to the CSSS. All practicable means have been employed to avoid or minimize potential adverse environmental impacts from implementing the recommended plan. Environmental monitoring will be performed to ensure regulatory compliance, to document snail kite and CSSS impacts, and to confirm the environmental impact analysis.

As ordered by the Court, the Corps' 2006 SEIS fully addresses impacts of construction and operation of the "R Features" and incorporates the 2002 modeling results that were completed after the 2002 ROD, and this analysis confirms the conclusions in the 2002 FEIS. Thorough investigations have shown Alternative 7R incorporates the principles of flexible and sound water management capable of adapting to severe storms, to unusual wet or dry weather, and to new information from real-time monitoring of actual conditions. The flexibility provided by Alternative 7R and the principles of adaptive management incorporated in Alternative 7R provides advantages over the prior operation plans. Given the constraints of the current project features and requirements under the ESA that water management operations not jeopardize the continued existence of the endangered CSSS or its critical habitat, Alternative 7R provides the best practicable means to avoid and/or minimize adverse impacts.

All applicable laws, Executive Orders, regulations, and local government plans were considered in the evaluation of the alternatives. Based on review of the SEIS and the associated documentation, I find that the public interest would be best served by implementing the Alternative 7R as the Interim Operating Plan for Protection of the Cape Sable Seaside Sparrow as described in the documents referenced herein.

29 May 2007

Date

for Benjamin G. Butler, Col
JOSEPH SCHROEDEL
Brigadier General, US Army
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