1) Col. Miller
2) John Albion
3) [illegible]

Board of Collier County Commissioners

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November 7, 1997

Colonel Joe Miller
Department of the Army
Jacksonville District Corps of Engineers
P.O. Box 4970
Jacksonville, FL 32232-0019

RE: Memorandum of Understanding - Environmental Impact Statement (EIS) Southwest Florida

Dear Colonel Miller:

The purpose of this letter is to advise you that while convened in regular session on Tuesday, November 4, 1997, the Board of County Commissioners considered approval of a revised draft Memorandum of Understanding - Environmental Impact Statement (EIS) Southwest Florida, between the Army Corps of Engineers, Collier County and Lee County.

Although the Board of County Commissioners discussed this issue at length, we have not agreed to or rejected being a signatory on the Memorandum of Understanding (MOU). At this time, we are resubmitting the 46 questions posed by Commissioner John Albion of Lee County for a written response. I understand that some of the questions have been answered in public forum; however, we will be in a better position to make a determination on whether or not to agree to be a signatory on the MOU when we have those written answers.

We are also requesting that the Army Corps respond in writing to the County citing your specific authorization to conduct the EIS study. If David Weigel, our County Attorney, can be of any assistance to you, he can be reached at (941) 774-8400.

The current consensus appears to be that we are still interested in being a participant in the scoping process through the County Administrator's Office; however, we would like to make that determination when we have received the answers to the questions.

We are looking forward to a prompt response to the 46 questions we have provided you. If you should have any questions, please feel free to contact me.

Very truly yours,

Timothy L. Hancock, AICP, Chairman
Commissioner, District 2

TLH:sf
Enclosure

cc: Board of County Commissioners
David Weigel, Collier County Attorney
Jim Yaeger, Lee County Attorney

1. When, in your opinion, is an EIS required under NEPA?

2. Does NEPA require an EIS when there is "major federal action" and a significant impact on the quality of the human environment?

3. Are there any requirements other than major federal action and a significant impact on the quality of the human environment that must be met before an EIS is required? Do you agree that both are necessary to require an EIS?

4. What major federal action exists that compels the ACOE to do an EIS?

5. Isn't a major federal action typically a project that is done with federal funding, or a project that occurs on federal land, like the cutting of timber in the National Forest or the funding of a major roadway with federal highway dollars?

6. What federal funds or federal lands are being used for a project in Lee County that warrants an EIS?

7. If the airport expansion, which is being done with some federal funds, is the project, how can the ACOE do the EIS before the application is submitted? Why isn't this speculative? Can the ACOE do an EIS based on a speculative project?

8. If the airport expansion is the major federal project, why can't the scope of the EIS be limited to the effects of the airport expansion and the geographical area that would be impacted by the airport expansion?

9. If the airport expansion is the major federal project, why doesn't the MOU include language which indicates that the airport will not have to do another EIS when it submits for permits? If the airport expansion is the basis for the EIS, why isn't the airport master plan the preferred alterative? If the airport is the federal project, what impact does the airport have on Collier County that would require Collier County to execute the MOU?

10. As the MOU is currently written, wouldn't the airport still have to do its own EIS when the project is funded and permitted? Why, or why not?

11. What is (or are) the significant impact(s) to the human environment that is of concern to the ACOE and is the basis for the need to do the EIS?

12. Doesn't the ACOE already have an obligation to consider the impacts on the environment through the discharge of its responsibilities under Section 404 of the Clean Water Act?

13. Can you identify other instances where the ACOE has been required by a court of law to conduct an EIS for private projects on private land based solely on the cumulative impact of one or more dredge and fill permits? Please identify those instances so the BOCC can consider those circumstances. Can you also please identify the scope and the result of the EIS in those instances.

If these are too numerous to identify, can you please list eight of the most recent of which you are aware and which are comparable to the situation in Lee and Collier counties?

14. Why doesn't the MOU indicate that the comprehensive plans of the two counties are the ACOE's preferred alternatives? Why does the MOU only indicate that the adopted comprehensive plans are the preferred alternative of the state and the counties?

15. What is a "consensus" alternative? What is it an alternative to? What impact will the adoption, creation or acceptance of a "consensus" alternative have on Lee and/or Collier County?

16. Since there isn't any proposed permit or action in this case, what does the ACOE assume to be the project for purposes of considering alternatives?

17. Who are all of the participants in the creation of the "consensus" alternative? How is a consensus reached if all of the entities with divergent opinions don't come to any meeting of the minds? How much do the opinions of the respective counties weigh in the consideration of the alternatives?

18. Will the ACOE refuse to issue permits for any dredge and fill permit which is inconsistent with the "consensus alternative"?

19. Will the ACOE, as part of the EIS, consider development only in wetland areas which are under the ACOE's 404 jurisdiction? Is the ACOE considering developing an EIS which affects uplands? If the ACOE is going to address development within the uplands, how does the ACOE propose to do this since it is outside of the jurisdiction of the ACOE?

20. Who will establish the methods and procedures for conducting the EIS? Won't this be established solely by the ACOE with input from the Council on Environmental Quality? Won't the counties input be considered with the same deference as any other input from the public?

21. The ACOE has indicated that they want the counties to assist, which the counties have indicated they will do. What kind of assistance does the ACOE want? Why is a MOU necessary to secure that assistance?

22 Doesn't all of the decision making authority for the scope and substance of the EIS rest with the ACOE? Will either of the counties have any decision making authority relative to the EIS by virtue of the execution of the MOU?

23. Various members of the County Commission have heard rumors to the effect that one of the primary reasons why the ACOE wants to do the EIS is because the National Audubon Society has threatened to sue if the ACOE doesn't do an EIS. Is there any truth to this rumor? Could you please share with us as exactly what is going on regarding the National Audubon Society's involvement in the request for an EIS? If you do an EIS because they want you to, will the ACOE also feel compelled to adopt the scope and the ultimate EIS that the National Audubon Society wants? Is the National Audubon Society, or any other national environmental group, contributing any funds or providing any technical assistance to the EIS?

24: Can the National Audubon Society, or any other national environmental group, challenge the scope or challenge the final EIS? What is the burden of proof or the standing needed to challenge the decision not to do an EIS? What is the burden of proof or the standing that must be established to challenge the scope of the EIS? What is the burden of proof or the standing that must be established to challenge the results of the EIS?

25. Is the Memorandum of Understanding binding and legally enforceable? Does the MOU give the County any binding control or input into the EIS scope or study? If the ACOE really wants the County to be a partner, why wouldn't the ACOE want to enter into a Memorandum of Agreement? What is the difference between a MOU and a MOA?

26. A representative of the ACOE indicated that the flooding problem in south Lee County is the major federal action that requires the EIS. Is the study currently being conducted by the South Florida Water Management District being done with any federal funds? If so, how much and through what grant, allocation, etc.? What federal permits are needed to undertake the work proposed by the District to reduce flooding? If the study isn't complete and no recommendations have been made yet, how has the ACOE determined that federal permits are needed? If no federal permits are needed, no federal funding is being used, and none of the improvements are being done on federal lands, what is the major federal action? What significant affect on the quality of the human environment is anticipated from a project that is aimed at rectifying a flooding problem? Isn't the SFWMD trying to rectify some of the alterations to the water flow that occurred prior to SFWMD permitting, which is purportedly one of the contributing factors to the flooding?

27. The ACOE has also indicated that it is the cumulative impact of several dredge and fill permits that creates the need for an EIS. Is the ACOE referring to past permits? Is the ACOE referring to speculative future permits? Exactly what grouping of permits create the major federal action? Doesn't the ACOE already consider the impact on the environment when it issues dredge and fill permits? Doesn't the ACOE already consider impact on habitats through its consultation with the U.S. Fish and Wildlife Service? Doesn't the ACOE already consider the public interest? Doesn't the ACOE already require minimization of impacts? Doesn't the ACOE already analyze the secondary and cumulative impacts of every permit request? Didn't the ACOE require Lee County to provide over a million dollars in CREW lands to address the secondary and cumulative impacts of Treeline? Is the ACOE required to do an EIS when the environmental questions that would be asked and answered though the EIS are already answered during the normal permitting process? If the answer to the last question is yes, could you please explain why and include the legal basis for that response?

28. Why can't the ACOE agree to the scope of the EIS now? What issues does the ACOE expect to include in the scope? What geographical area does the ACOE expect to include in the scope? What are the factors that would cause the list of issues or the geographic area to expand? Why can't the ACOE do the scoping effort prior to asking the County to execute either an MOU or an MOA, so the County will know all the terms of the agreement? Why doesn't the ACOE want to do the scoping effort first?

29. What affect will the EIS have on future ACOE permitting? Will the EIS have an affect on any other regulatory agency?

30. Is there any case law or precedence that provides that the issuance of several dredge and fill permits in a given geographic area rises to the level of a significant environmental impact? Is there any case law or precedence that provides that the issuance of several dredge and fill permits in a given geographic area does not rise to the level of a significant environmental impact? Could you please provide us with the particulars of no less than five of these examples?

31. If the ACOE has determined that an EIS is warranted and lawful, why does the ACOE want or need Lee County to execute an MOU?

32. How much money does the ACOE submit it will cost to do an EIS? How much money does the ACOE have budgeted to do the EIS?

33. If it takes longer than 18 months, and the County executes the MOU, what recourse does the County have against the ACOE for the delay?

34. Supporters of the EIS submit that the only thing that will change if the EIS is done will be a new requirement to avoid off-site impacts and to mitigate for unavoidable impacts. Will this be the only result? Doesn't the ACOE already require mitigation for unavoidable impacts? Doesn't the ACOE already consider off-site impacts in its consideration of secondary and cumulative impacts?

35 Is the ACOE submitting that it has done a poor job in the review and issuance of permits? The County's observation is that the ACOE has done a very thorough job and has very zealously exercised its responsibility to protect the public. This leads to the question of, what permits has the ACOE issued in Lee and Collier County where the ACOE didn't do a good job and where there was a significant environmental impact on the quality of the human environment?

36. Will the EIS result in any required changes to the comprehensive plans of the Counties?

37. What conflicts or inconsistency exists between the actions of the ACOE and Lee County if Lee County does not issue final permits until ACOE and SFWMD permits are obtained?

38. How will the EIS result in an absence of water shortages? How will the EIS result in an absence of water restrictions? These are two of the results promised as a result of an EIS by supporters and it would be helpful to understand how this will occur as a result of the EIS

39. Please identify what the ACOE submits is the deficiency in the amount of land set aside by Lee and Collier counties for preservation and open space?

40. What is the difference between a PEIS and an EIS?

41. Why doesn't the MOU include a commitment to provide for a general permit?

42. What is the basis for the contention that the environment will receive less protection in the future than what the law requires? Is the MOU suggesting that the Counties aren't providing the required protection, or that the ACOE won't provide the required protection, and why?

43. Don't both the ACOE and the SFWMD, as the designee of DEP, review and evaluate the impacts of development on wetlands?

44. The MOU indicates that alterations to historical drainage occurred prior to the current regulatory scheme, exotic infestation is spreading, and the need and opportunity for restoration of those areas should occur as mitigation for unavoidable impacts. Doesn't the ACOE already require restoration, along with the SFWMD, of areas that are negatively impacted as part of its mitigation requirement? Did you know that Lee County has already adopted a requirement which requires the removal of exotic species when a tract is developed, including the removal from any conservation and open space areas? What deficiencies in the current restoration work require the EIS? What do you anticipate will change in this regard due to the EIS?

45. Does the ACOE expect to identify large areas of Lee and Collier County as large mammal corridors that should be reserved for those animals with little or no development? Will the ACOE or the federal government be responsible for providing the land owners with compensation for the conversion of their land to animal habitat for the benefit of the public? If the ACOE or federal government is not going to compensate the landowners, who will?

46. What are the subsequent steps after the study that lead to the use of the study in regulatory and other decisions? What regulatory decisions? What other decisions? This question is based on paragraph 1.12, please refer to that paragraph for these terms.

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