

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.

07-80444

NATURAL RESOURCES DEFENSE
COUNCIL, INC., NATIONAL WILDLIFE
FEDERATION, and SIERRA CLUB

Plaintiffs,

-v.-

LT. GEN. ROBERT L. VAN ANTWERP,
in his official capacity as Commander
and Chief of Engineers, United
States Army Corps of Engineers, and
PETE GEREN, in his official capacity as
Acting Secretary of the Army,

Defendants.

CIV-MIDDLEBROOKS

**MAGISTRATE JUDGE
JOHNSON**

CLERK OF COURT
U.S. DISTRICT CT.
S.D. OF FLA - MIA
2007 MAY 23 AM 9:20

COMPLAINT

1. This action is being filed to ensure –as required by Congress – that the flagship project of the multi-billion dollar federal Comprehensive Everglades Restoration Plan (“CERP”) is actually used to restore the Everglades. When Congress authorized the project in question – a huge water reservoir in historic Everglades wetlands south of Lake Okeechobee – as part of the Water Resources Development Act of 2000 (“WRDA 2000”), it was concerned that the reservoir, as well as other CERP projects, would be subverted into simply providing more water supply for Florida’s burgeoning population or its agri-businesses, such as the sugarcane plantations in the Everglades Agricultural Area (“EAA”) where the reservoir is located. To safeguard against such a disastrous outcome, Congress included numerous safeguards in WRDA 2000, including the

requirements that the United States Army Corps of Engineers (“Corps”), the lead federal agency implementing CERP, finalize a “project implementation report” (“PIR”) and a “project cooperation agreement” (“PCA”) for each of the authorized projects. These documents would provide both crucial details on how the project would be designed and operated to benefit the Everglades and binding commitments to deliver these benefits. Most central to this case, WRDA 2000 requires that the PIR and PCA be completed and approved *before* starting each CERP project.

2. The EAA reservoir project is the first CERP reservoir project to move into construction. Approximately 16,000 acres of historic Everglades wetlands, purchased for hundreds of millions of taxpayer dollars, are in the process of being dredged, flooded and/or buried under limestone levees. *But neither a final PIR nor a PCA have been prepared* (a draft PIR released in 2005 remains unfinalized). As a result, the public and the Everglades have not been provided the assurances that Congress demanded: that, when the reservoir is filled up for the first time, the Everglades will be the significantly better off for it. The Corps’ unconcealed disregard for Congressional mandates is in violation of WRDA 2000 and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.*, as well as the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321, *et seq.*, and that law’s implementing regulations.

Jurisdiction and Venue

3. This action arises under NEPA, 42 U.S.C. § 4321, *et seq.*, WRDA 2000, and the APA, 5 U.S.C. § 701 *et seq.*

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, which grants the district courts “original jurisdiction of all civil actions arising under the . . . laws . . .

of the United States,” and 28 U.S.C. § 1361, which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

Jurisdiction is also found under the APA, 5 U.S.C. §§ 704, 706.

5. This Court may issue a declaratory judgment in this case pursuant to 28 U.S.C. §§ 2201-2202, and may grant relief pursuant to the APA, 5 U.S.C. § 706.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (e) because a substantial part of the events and omissions giving rise to these claims occurred in this District and a substantial part of the property that is the subject of this action is situated in this District.

Parties

7. Plaintiff Natural Resources Defense Council (“NRDC”) is a non-profit membership corporation with approximately 529,000 members, including approximately 29,000 members in Florida. NRDC is dedicated to the preservation, protection and defense of the environment, public health, and natural resources. NRDC and its members are actively involved in efforts to protect and restore South Florida’s ecosystem, including the Everglades, and to ensure compliance with State and federal mandates for protection and restoration of these areas.

8. Plaintiff the National Wildlife Federation (“NWF”) is the nation’s largest non-profit conservation advocacy and education organization. NWF’s mission is to inspire Americans to protect wildlife for our children’s future. A major concern of NWF is the protection and restoration of the Everglades. NWF has approximately one

million members, and has 48 affiliate organizations in states and territories, including in Florida, and ten regional field offices.

9. Plaintiff Sierra Club is a non-profit corporation with approximately 750,000 members in chapters and groups in all 50 states, including approximately 30,881 members in Florida. Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth and to educate and enlist humanity to protect and restore the quality of the natural and human environment. Sierra Club and its members are actively involved in species and habitat protection in Florida and throughout the country, as well as water quality, air quality and environmental justice issues. Sierra Club has been actively working to preserve and restore the Everglades ecosystem.

10. NRDC, NWF, and Sierra Club bring this action on their own institutional behalves, and also on behalf of their members, who regularly, and will continue to, hike, fish, birdwatch, and otherwise enjoy the natural beauty and abundance of wildlife in the Everglades ecosystem, including wildlife that use and depend on the wetlands that will be destroyed by the activities here authorized and being implemented. The ability of these organizations and their members to engage in educational, recreational and advocacy activities in this area is injured by the Corps' failure to comply with NEPA, WRDA 2000 and the APA, because, by violating these statutes, the agencies are both authorizing the loss of historic Everglades wetlands and the reduction of wildlife and habitat enjoyed by the organizations' members and failing to ensure the restoration of more natural hydrological patterns and habitat in the Everglades in areas enjoyed by the organizations' members.

11. Defendant Lieutenant General Robert L. Van Antwerp is the Chief of

Engineers for United States Army Corps of Engineers, has responsibility for modifications of the Central and Southern Florida (“C&SF”) Project such as those planned under CERP, and is responsible for ensuring that the Corps complies with the requirements of WRDA 2000 and NEPA. Lt. Gen. Van Antwerp is named as a defendant herein in his official capacity.

12. Defendant Pete Geren, as Acting Secretary of the Department of the Army, is the government official with ultimate responsibility for the management of the C&SF Project, including modifications such as those planned under CERP. Acting Secretary Geren is charged with administering and enforcing federal environmental protection laws as they relate to the operation of the C&SF Project, and with administering congressional mandates concerning its management and operation. Acting Secretary Geren is named as a defendant herein in his official capacity.

Statutory Scheme Relating to Plaintiff’s Claims

The Water Resources Development Act of 2000

13. In response to growing concern about the health of Florida’s Everglades, Congress in 1996 directed the Corps to develop “a Comprehensive Plan for the purpose of restoring, preserving, and protecting the South Florida ecosystem.” Water Resources Development Act of 1996, Pub. L. No. 104-303, § 528, 110 Stat. 3658 (Oct. 12, 1996). Pursuant to this directive, the Corps issued a Final Integrated Feasibility Report and Programmatic Environmental Impact Statement – also known as the Comprehensive Everglades Restoration Plan or CERP – on July 1, 1999. As part of the “recommended Comprehensive Plan,” the “Everglades Agricultural Area Storage Reservoirs – Phase I” (“EAASR”) project was recommended for initial Congressional authorization. *See*

Central and Southern Florida Comprehensive Review Study Final Integrated Feasibility Report and Programmatic Impact Statement– April 1999, available at http://www.evergladesplan.org/pub/restudy_eis.aspx (“CERP”), at 9-1, 10-41.

14. On June 27, 2000, the “Restoring the Everglades, an American Legacy Act” was introduced, for the purpose of approving “the CERP as a framework and authoriz[ing] the first set of projects and implementation procedures.” Report of the Senate Committee on Environment and Public Works on the Water Resources Development Act of 2000 (S. Rep. 106-362) at 36. Ultimately, the bill, in modified form, was enacted into law as part of the Water Resources Development Act of 2000 or WRDA 2000.

15. WRDA 2000 stated that, as modified by the law, CERP was approved as a framework:

to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. [CERP] shall be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in [CERP], and required pursuant to this section, for as long as the project is authorized.

WRDA 2000, § 601(b)(1)(A). WRDA 2000 acknowledges that adaptation of the CERP blueprint for projects may be beneficial and, to that end, provides for the modification of components in the CERP in certain circumstances – where such changes “will provide a substantial benefit to the restoration, preservation and protection of the South Florida ecosystem.” *Id.* § 601(c)(1)(B).

16. As the Corps had recommended, Congress also specifically authorized the EAASR project as one of CERP’s “initial projects.” *Id.* at § 601 (b)(2)(C). Congress

directed the Corps to carry out the EAASR project, as well as the remaining initial projects, in accordance with certain requirements. *Id.* at § 601(b)(2)(A)(i); *id.* at § 601(b)(2)(C). Specifically, Congress required the Corps to complete and approve a PIR – the comprehensive planning and engineering document for the project – “[b]efore implementation” of the project. *Id.* at § 601 (b)(2)(D)(i) (emphasis added); *id.* at 601(f)(1) (emphasis added). The approved PIR was required to then be submitted to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate. *Id.* at § 601(b)(2)(D)(ii).

17. In addition, for each CERP project, such as the EAASR project, the Corps and the non-Federal sponsor also must execute a PCA in accordance with section 10 of CERP. *Id.* at § 601 (h)(4)(B)(i). PCAs are legal agreements that the Corps traditionally uses to embody commitments made by the agency and the non-Federal sponsor, in this case the SFWMD, in order to ensure, among other things, that CERP projects provide the benefits they are designed to provide. Section 10 of CERP states that a PCA must be completed for each CERP project before that project is initiated. CERP at 10-66.

18. WRDA 2000 also required that the Corps promulgate implementing regulations for CERP. Promulgated in 2003, these regulations reiterate the requirements that a PIR and PCA be completed for each CERP project before construction begins on that project. 33 C.F.R. §§ 385.26(a), 385.27(a). Moreover, the CERP implementing regulations require that the PIR include a draft of the project operating manual, another requirement of WRDA 2000. WRDA 2000 § 601(h)(4)(C); 33 C.F.R. §§ 385.26(a)(3)(xvi), 385.28(c).

19. Under WRDA 2000 and the implementing regulations, the PIR and the PCA, together with the project operating manual, are the vehicles for assuring CERP's primary purpose, *i.e.*, Everglades restoration, is achieved on a project by project basis. PIRs must be consistent with CERP, "identify the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system" and "comply with applicable water quality standards. . . ." WRDA 2000 § 601(h)(4)(A)(iii)(I), (IV), (IV); 33 C.F.R. §§ 385.26(a)(3)(i), (vii), 385.35. They must also determine "the amount of water to be reserved or allocated for the natural system" in order to ensure that each CERP project actually provides the identified appropriate "quantity, timing, and distribution of water" and complies with water quality standards. WRDA 2000 § 601(h)(4)(A)(iii)(V), 33 C.F.R. §§ 385.26(a)(3)(viii), 385.35. The actual reservation of water (as described in the PIR) to be dedicated and managed for the natural system must be completed prior to execution of the PCA, and the PCA must protect environmental water uses (fish and wildlife use) existing as of December 2000. WRDA 2000 § 601(h)(4)(B)(ii); 33 C.F.R. § 385.27(a), (d). As for project operating manuals, these are required to be consistent with the reservation or allocation of water for the natural system and ensure CERP goals and purposes are achieved. WRDA 2000 § 601(h)(4)(C); 33 C.F.R. § 385.28(a)(6)(vi), 385.28(a)(1) and (a)(6)(i).

20. In addition to protecting the "new" water CERP projects are to make available for the natural system, WRDA 2000 requires water managers to protect the existing – as of CERP's passage in December 2000 – beneficial water levels and flows that support fish and wildlife in the Everglades ecosystem. *See* WRDA 2000 § 601(h)(5). Once again, the PIR is to be the vehicle for determining compliance with this "Savings

Clause.” 33 C.F.R. § 385.36.

National Environmental Policy Act

21. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. Among the purposes of the statute are to “insure that environmental information is available to public officials and citizens before decisions are made and actions are taken,” and to “help public officials make decisions that are based on understanding of environmental consequences” *Id.* at § 1500.1(b)-(c).

22. To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). This statement – known as an Environmental Impact Statement (“EIS”) – must describe (1) the “environmental impact of the proposed action,” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented,” (3) alternatives to the proposed action, (4) “the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity,” and (5) any “irreversible or irretrievable commitment of resources which would be involved in the proposed action should it be implemented.” *Id.*

23. The Council on Environmental Quality (“CEQ”) regulations implementing NEPA, *see* 40 C.F.R. §§ 1500-1508, identify the alternatives analysis as “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. To that end, they require agencies to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” *Id.*; *see also, e.g.*, 42 U.S.C. § 4332(2)(C)(iii) (requiring a

“detailed statement” on alternatives to a proposed action) and 33 C.F.R. § 325, App.

B(9)(5)(c) (requiring changes in location to be considered). In addition, an agency “shall state how alternatives . . . will or will not achieve the requirements of section 101 and 102(1) of the Act” – which requires agencies to “use all practicable means” to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings” and to “preserve important historic, cultural, and natural aspects of natural heritage” – as well as how alternatives “will or will not achieve the requirements of . . . other environmental laws and policies.” 40 C.F.R. § 1502.2(d).

24. NEPA regulations set forth specific factors that agencies must consider “in adequate detail” in preparing NEPA documents. 40 C.F.R. § 1501.2(b). Pursuant to those regulations, an EIS must include, among other things, a “full and fair discussion” of (1) the significance of all “direct,” “indirect,” and “cumulative” effects of the action, 40 C.F.R. §§ 1502.1; 1502.16 (a-b); (2) any “[p]ossible conflicts between the proposed action and the objectives of Federal . . . policies and controls for the area concerned,” *id.* at § 1502.16(c); (3) “the environmental effects of alternatives,” *id.* at § 1502.16(d), (4) the “conservation potential” of various alternatives, *id.* at § 1502.16(e-f); (5) “historic and cultural resources, and the design of the built environment,” *id.* at § 1502.16(g); and (6) “means to mitigate adverse environmental impacts.” *Id.* at § 1502.16(h); *see also* 1508.25(c), 1502.15 (must evaluate all areas affected by alternatives). An EIS must also consider the “[u]nique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands [and] ecologically critical areas,” “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” “[t]he degree to which the action may establish a precedent for

future actions with significant effects,” “the degree to which the action is related to other actions with . . . cumulatively significant impacts,” and whether “the action threatens a violation of Federal . . . law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b).

25. The agency’s evaluation of these factors must be “concise, clear, and to the point,” and the agency’s conclusions “shall be supported by evidence.” *Id.* at § 1502.1. An agency must also “insure the . . . scientific integrity of the discussions and analyses in the environmental impact statement,” “identify any methodologies used,” and “make explicit reference . . . to the scientific or other sources relied upon for the [agency’s] conclusions.” *Id.* at § 1502.24

26. In addition, the CEQ regulations provide that, where either an EIS or SEIS is required, the agency “shall prepare a concise public record of decision” which “shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable,” and (c) “[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not.” *Id.* at § 1505.2.

27. NEPA forbids actions that would limit an agency’s choice among alternatives from moving ahead while a proposal for a major federal action is under NEPA consideration. 40 C.F.R. § 1506.1.

Facts Giving Rise to Plaintiffs' Claims

The Everglades Ecosystem and the Advent of CERP

28. Spanning the southern tip of the Florida peninsula and most of Florida Bay, the Everglades ecosystem is home to an extraordinary number of rare and sensitive species of animals and plants. The area contains both temperate and tropical plant communities, including sawgrass prairies, mangrove and cypress swamps, pinelands, and hardwood hammocks, as well as marine and estuarine environments. The area also supports a rich diversity of wildlife, including many species of large wading birds, such as the roseate spoonbill, wood stork, great blue heron and a variety of egrets. The Everglades has been designated a World Heritage Site and an International Biosphere Reserve.

29. However, over the last century, the Everglades ecosystem has suffered from the effects of human development. Since 1900, large tracts of Everglades wetlands have been converted to agricultural and residential uses. This abundance of “new” land supported and stimulated massive population growth. To support this expanding population, numerous canals were cut and new roads were built through native habitat. In 1948, the federal government undertook the “Central and South Florida Project” – a gargantuan and unprecedented program to replace the natural habitat and hydrology of the Everglades ecosystem with an elaborate system of roads, canals, levees, and water-control structures intended to provide flood protection and other benefits to urban and agricultural lands. Today, the Central and South Florida Project diverts millions of gallons of water each day on average to the Atlantic Ocean and the Gulf of Mexico. The alteration of regional wetland areas, estuaries, and bays – combined with increasing population pressures, changing land

uses, and accompanying water pollution – have largely destroyed the natural functioning of the Everglades ecosystem.

30. According to the National Park Service, over 50 percent of the original wetland areas in the Everglades ecosystem no longer exist. The numbers of wading birds, such as egrets, herons, and ibises, have been reduced by 90 percent. Entire populations of animals, including the Florida panther, are at risk of disappearing. Massive die-offs of seagrass beds in Florida Bay have been followed by the extensive losses of wading birds, fish, shrimp, sponges, and mangroves. As explained by Park Service biologists, “[t]hese grim indicators warn of a system under assault and in jeopardy of collapse.”

31. One of the critical efforts underway to prevent further degradation of the Everglades ecosystem, and to restore natural habitats and imperiled species, is CERP. The central engineering premise of CERP is the capture and storage of stormwater currently diverted to the Atlantic Ocean and the Gulf of Mexico. The overwhelming majority – about 80 percent – of this water is, according to Congress, to be used to restore water flows and bolster wildlife populations in south Florida. *See* S. Rep. 106-362 at 40-41. A much smaller portion of the recaptured water – the remaining 20 percent – may also go to slake the thirst of the region’s still-burgeoning urban populations and agribusinesses. *Id.*

32. Congress recognized the potential for competition between CERP’s primary Everglades restoration goal and the law’s other water supply goals. As a result, Congress put in place several requirements to ensure CERP’s restoration success. First, Congress sought to protect the environmental baseline – existing water available to fish and wildlife in the Everglades – at the time of CERP’s passage in late 2000. *See supra*. Equally important, Congress sought to protect the new water that CERP was to make available for Everglades

restoration from encroachment by ever-increasing human demands in south Florida. To that end, Congress required the identification and protection of water that would be made available for Everglades restoration during the planning process for each CERP project – before project construction began – as well as the development of a specific agreement between the federal government and the State of Florida to require the proactive management of water resources to protect the water CERP was to make available for Everglades restoration. *See supra*; *see also* S. Rep. 106-362 at 37, 55. Finally, Congress required the development of programmatic regulations, regulations that would reiterate and elaborate on these protections.

33. Congress’ concerns about the need to protect CERP’s Everglades restoration goal from increasing water use demands have proven prescient. Human demands have increased significantly more than originally anticipated at the same time that CERP has been beset by delays (about half of the 44 CERP projects that were to be completed by 2010 have fallen behind schedule), thus creating a “water supply” shortfall. It is now widely-recognized that if water made available by CERP is not expressly protected, then it is likely to be used to satisfy consumptive use demand.

The History of EAASR and EAA-A1 Reservoir Projects

34. According to Congress, the ten initially authorized CERP projects – including the EAASR Project – “were carefully chosen by the . . . Corps and the [SFWMD] because they were viewed as the projects that would provide the most immediate system-wide improvements in water quantity, quality and flow distribution.” S. Rep. 106-362 at 43.

35. The EAASR Project in particular, because of its location, size, and

purpose, was viewed as critical to the success of the restoration effort. The EAA reservoirs will be at the top of the primary remaining Everglades flowway, which ultimately terminates in the Gulf of Mexico and Florida Bay. Historically, overflow from Lake Okeechobee served to initiate sheetflow down this flowway. Indeed, the need to provide additional water storage in the EAA was identified early on in the Everglades restoration process, ultimately culminating in the purchase of several large tracts of agricultural lands in the historic Everglades known as the Talisman tract purchases. Congress made clear that, in order to provide needed water storage, EAASR Project planners should “maximize” the use of these more than 50,000 acres. S. Rep. 106-362 at 43.

36. Located at the top of the historic Everglades flowway, the EAASR Project will be able to take overflow from the Lake – now choking the Lake as well as adjoining rivers and estuaries – and use it to replenish the parched Everglades to the south. It may also serve as a repository for polluted agricultural run-off – meaning that none or much less of that polluted run-off would need to be pumped into the Lake and could instead be stored in the reservoirs for later agricultural use or, after treatment, to help restore Everglades wetlands to the south. The EAASR Project could also be designed in a manner to provide habitat benefits to the Everglades.

37. According to CERP, the EAASR Project as a whole was to be comprised of three reservoirs with a total storage capacity of approximately 360,000 acre-feet constructed on approximately 50,000 acres. Each of the reservoirs would be up to 6 feet deep. *See* CERP at 9-9. According to CERP, the project was to:

improve the timing of environmental deliveries to the Water Conservation Areas, including reducing damaging flood releases from the Everglades Agricultural

Area to the Water Conservation Areas, reducing Lake Okeechobee regulatory releases to the estuaries, meeting Everglades Agricultural Area irrigation and Everglades water demands, and increasing flood protection in the Everglades Agricultural Area.

Id. Phase I of the project – the portion initially authorized by WRDA 2000 – was to be completed by approximately 2010.

38. In early 2004, the State of Florida unveiled its “Acceler8” program. Florida’s Acceler8 program is the State’s plan to construct and implement eight projects or groups of projects, comprised of 11 CERP projects (seven reservoirs and four non-storage projects) and one non-CERP component. Under Acceler8, the SFWMD proposed to provide the up-front funding for selected CERP projects by issuing a type of revenue bond; the federal government would later reimburse the SFWMD for expenses in excess of its planned share of project costs. Although Acceler8, as suggested by its name, has been touted as a plan to accelerate the construction of CERP projects, the program in fact simply serves to keep the construction of eleven CERP projects on CERP’s original timeline – Acceler8 components remain on, or close to, the schedule set forth in the original CERP planning documents (with completion dates currently around 2010). When the Acceler8 program was initiated two years ago, the State had committed to complying with WRDA 2000’s Everglades restoration “assurances” requirements.

39. One of the CERP components included in Florida’s Acceler8 Program was a portion of the EAASR Project – this component became known as the EAA-A1 Reservoir Project. According to the Corps’ Final Environmental Impact Statement (“FEIS”) and Record of Decision (“ROD”), the EAA-A1 Reservoir Project is comprised of one of the two currently proposed cells of the EAASR Project as a whole. ROD at 17, 25; FEIS at 6-7. The FEIS stated that “[g]iven that the Acceler8 projects are intended to

be constructed by the State and are a subset of planned federal projects within [CERP, the SFWMD] has agreed with the federal government to design, construct, and operate the projects consistent with the requirements of [WRDA 2000], applicable federal and state law, and the Central and South Florida Project purposes as a whole.” FEIS at 6-7.

40. The Corps released for public review its first Draft PIR and EIS for the EAASR Project as a whole in September 2005; the first public notice for SFWMD’s portion of the project – the EAA-A1 Reservoir Project – was published in October 2005.

41. In early 2006, the PIR process for the EAASR Project apparently became delayed. Nevertheless, the SFWMD continued to move forward with its portion of the project, the EAA-A1 Reservoir Project. In May 2006, the FEIS was completed. Ultimately, on July 11, 2006, the Corps issued a permit to the SFWMD – Permit No. SAJ-2005-53 (IP-TKW) – under Section 404 of the Clean Water Act authorizing the reservoir construction project; the Corps’ ROD was issued the same day. These documents continued to explicitly reference and rely on analyses completed as part of the PIR process for the EAASR Project. *See, e.g.*, ROD at 17, 25; FEIS at 6-7.

42. Construction of the EAA-A1 Reservoir Project is now underway. The PIR for the EAASR Project as a whole – with its identification of water to be reserved for the natural system, assurances regarding the protection of existing water available to fish and wildlife and demonstrating consistency with CERP, and a draft operating manual – was never finalized. Nor was a separate PIR for the EAA-A1 project prepared. The Corps and SFWMD have also not entered into a PCA, and the SFWMD has not moved forward and reserved any water from the project for the natural system. Rather, the Corps, together with the SFWMD, have ignored the detailed requirements carefully

developed by Congress for CERP projects like the EAA reservoirs, requirements designed to force the agencies to document and protect the environmental benefits each project would deliver *before* project approval and construction.

The Current Iteration of the EAA-A1 Reservoir Project

43. Although the EAA-A1 Reservoir Project was originally designed to help achieve CERP's restoration goals, the project's FEIS and ROD make clear that construction of the reservoir itself, in the absence of clear operational rules governing how the water it stores will be used, will have significant adverse environmental effects. Construction of the proposed reservoir would permanently destroy more than 15,000 acres of agricultural wetlands, which could be restored at relatively low cost, and almost 200 acres of natural wetlands. ROD at 5. The area affected by the project contains natural wetland plant species and supports a wide variety of animal species, including at least 16 federally listed threatened and endangered species. FEIS at 3-16 – 3-26; ROD at 4. A threatened Eastern indigo snake (*Drymarchon corais couperi*) – an animal similar to the endangered Florida panther in that it is a large predator at the top of the food chain that requires large habitat areas for survival – has already been killed during project construction activities. Permanent destruction of this Everglades habitat (and the animals that depend upon it) is a significant adverse environmental impact – especially considering CERP's recognition of the need to expand the spatial extent of the Everglades, the Clean Water Act's requirements relating to preserving wetlands and the ongoing significant loss of wetlands in central and south Florida.

44. The ROD and FEIS for the EAA-A1 Reservoir Project dismiss this harm by pointing in large part to the benefits that *other* projects *may* provide to wetlands in the

area and to benefits that *may* result from *future operations* of the EAA-A1 Reservoir Project itself. The ROD, the FEIS, and the permit for the project in no way require the construction or operation of those other projects, however; nor do they show that the EAA-A1 Reservoir Project operating alone or in conjunction with other Acceler8 projects will realize sufficient benefits to offset the harm caused as a result of construction of a water supply reservoir in historic Everglades wetlands.

45. To the contrary, the project's authorizing documents offer confusing and inadequate information about project benefits. For example, despite their reliance on assumptions about *final operations* of both the EAA-A1 Reservoir Project and other Acceler8 projects to generate projections of environmental benefits sufficient to mitigate for the adverse effects of the EAA-A1 Reservoir Project, the FEIS and the ROD make clear that:

- no final operating plan exists for the EAA-A1 Reservoir Project, ROD at 58,
- operating plans for other Acceler8 projects are also uncertain, FEIS at 5-23 (acknowledging that some of the projected Acceler8 program benefits are too speculative to be relied on as mitigation (under Section 404 of the Clean Water Act)), and
- even the details of initial operations of the EAA-A1 Reservoir Project remain to be developed. *See, e.g.*, ROD at 58-59 (stating only that (1) initially “water will only be sent downstream . . . when the environment calls for it,” and (2) “it is likely that operations . . . will be phased . . . until such time as a final operations plan can be

implemented”).

46. Nowhere does the FEIS or the ROD make clear what the effects of *initial* EAA-A1 Reservoir Project operations will be – all modeling of project effects is based on assumptions regarding a hypothetical final operating plan (both for the EAA-A1 Reservoir Project operating alone and for the project operating in conjunction with other Acceler8 projects) that would send water south to the Central Everglades. ROD at 59; EAA-A1 Reservoir Project Permit at 12. In addition, the draft supplemental EIS for the EAA-A1 Reservoir Project dated February 2006 expressly raised questions about the extent of the environmental benefits of initial project operations. Draft EAA-A1 Reservoir Project Supplemental EIS at 2-25, 4-33 (discussing need to limit environmental benefits during initial operations). With neither a draft operating manual nor identification of water to be reserved for the natural system, it is impossible to know exactly where and when benefits will accrue to the natural system as a result of the project.

47. Indeed, the permit for the EAA-A1 Reservoir Project states that because of the uncertainty regarding project operations, it is authorizing only reservoir construction, not reservoir operations. *See* EAA-A1 Reservoir Project Permit at pages 11-12; ROD at 59. The permit requires the SFWMD to request approval of “an initial operations plan at least six months prior to the projected operations of the project.” *Id.* at 12. A final operating plan must also be reviewed and approved by the Corps prior to its implementation, although the permit does not specify a date by which final operations need to be reviewed or in place. *Id.* at 14. Whether and the extent to which the public will be involved in the Corps’ review of any proposed operational plans is not explained

in the permit.

48. Even assuming that the modeled hypothetical final operations plans do represent actual project operations at some uncertain point in the future, the FEIS and the ROD do not fully evaluate project effects, including by notably failing to quantify or otherwise adequately describe adverse effects in certain portions of the historic Everglades. FEIS at 4-31, 5-6, 5-22; *see also* ROD at 43 (noting that “the duration of high stages in Lake Okeechobee increases, although the frequency of high stages declines, and [Water Conservation Area (“WCA”)] 2B and 3B did not meet defined . . . depth targets . . . Some of the conditions in WCA 2B and WCA 3A actually worsen compared to the present.”). Nor do the FEIS and ROD explain – as they must – how they calculate the habitat benefits they project. Other Corps documents and modeling relating to this project call to question some of the FEIS’ claims regarding project benefits.

49. In a nod to the contingent nature of positive effects the Corps hypothesizes will result from operation of the EAA-A1 Reservoir Project in conjunction with other Acceler8 projects, the permit notes that if the effects of operations of Acceler8 projects as a group are determined *in 2020* to be insufficient to offset the adverse effects of construction of the EAA-A1 reservoir, the Corps “will re-evaluate the project’s adverse effects in light of all the circumstances prevailing at that time, to determine if an alternate and/or supplementary compensatory mitigation plan is needed.” EAA-A1 Reservoir Project Permit at 13.

The Analysis of Alternatives to the Current Iteration of the EAA-A1 Reservoir Project

50. The FEIS and ROD fail to discuss *at all* whether (and how) alternative operational regimes or water management plans might affect projected benefits for the

EAA-A1 Reservoir Project. They also dismiss without any detailed discussion the potential positive effects of constructing a different size or different design of reservoir, such as one that is larger (or deeper).

51. With regard to alternative operation plans, the FEIS never even bothers to explain why it neglects to analyze the environmental effects of alternative operational regimes – such as how and when water would be routed to satisfy agricultural needs as opposed to environmental ones, when Lake Okeechobee stages would be reduced, and how different reservoir designs might allow for operational regimes that would help protect water quality and thus deliver greater habitat benefits. *See generally* FEIS at § 6.2; ROD at 58-59. The decision not to evaluate alternative operational regimes is particularly unreasonable given that *all* of the environmental benefits that the FEIS projects from the project turn on EAA-A1 Reservoir Project operations (in conjunction with other Acceler8 project operations), and not project construction. *See* FEIS at A7-A9 (Section 404(B)(1) Guidelines Analysis).

52. To similar effect, the FEIS fails to examine in any detail reservoirs that would provide more than 190,000 acre-feet of water storage despite comments from Florida's Department of Environmental Protection and conservation organizations highlighting the potential benefits a larger reservoir might offer. *See* FEIS at E16-E17; *see also* FEIS at E53-E54 (larger reservoir might allow for end to backpumping from Everglades Agricultural Area into Lake Okeechobee; shallower reservoir with larger aerial extent might provide greater water quality benefits). Notably, a larger reservoir might allow water storage beyond that assumed in CERP, the need for which has become clear. Specifically, CERP was premised on the development of additional water storage

sufficient to provide both for most of then-predicted water use through 2050 and for significant restoration of the natural system. Projected water use in South Florida is, however, surpassing CERP predictions. Because of these increases, the amount of water CERP planned to make available for public supply will not satisfy now-projected demand. If water supplies in addition to those envisioned in CERP are not made available, and absent a decision to provide the natural system with a priority for benefits in CERP implementation, CERP may simply help to stop the natural system from suffering additional declines, or reduce the extent of additional declines, while providing and subsidizing the cost of water that enables additional growth in the region.

53. The FEIS cursorily indicates that it did not consider larger alternatives because the cost of larger alternatives would consume too much of Florida's Acceler8 budget, and Florida's program is purportedly designed to provide balanced benefits to the Everglades as a whole. FEIS at 2-6, ROD at 17. However, the FEIS fails to provide any documentation to support its claim that a larger reservoir (e.g., a deeper reservoir) would be cost-prohibitive (in fact, the Corps decided to deepen by a half foot the proposed EAA-A1 Reservoir from that described in the project's January 2006 Draft Supplemental Environmental Impact Statement and revealed no cost implications of this change). Nor does the FEIS address the overwhelming evidence that more water storage is needed in CERP than originally anticipated and how different alternative configurations of the EAA-A1 Reservoir Project might help achieve the project's and CERP's environmental goals. A legally adequate FEIS would examine various configurations of larger reservoirs and weigh the greater wetland loss that such a reservoir might entail against the increased water storage and environmental benefits to offsite wetlands it might provide.

The FEIS for the EAA-A1 Reservoir Project fails to include these analyses.

Plaintiffs' Claims for Relief

Count 1

Violations of WRDA 2000 and the APA

54. Plaintiffs hereby reallege and incorporate by reference the allegations in paragraphs 1 through 53 in their First Claim for Relief.

55. By making the decision to issue Permit No. SAJ-2005-53 (IP-TKW) and otherwise approving the implementation and construction of the EAA-A1 Reservoir Project without completion of a PIR, a PCA, and a draft operating manual, the Corps violated WRDA 2000 and its implementing regulations, abused its discretion, and acted arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

56. By making the decision to issue Permit No. SAJ-2005-53 (IP-TKW) and otherwise approving the implementation and construction of the EAA-A1 Reservoir Project even though the project as currently proposed is likely to eliminate or transfer water available to the natural system as of December 2000, the Corps violated WRDA 2000, the implementing regulations, abused its discretion, and acted arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

57. These violations of WRDA 2000, the applicable regulations, and the APA have caused and will continue to cause plaintiffs' injuries as described in paragraphs 7-10.

Count 2

Violations of the National Environmental Policy Act and the APA

58. Plaintiffs hereby reallege and incorporate by reference the allegations in

paragraphs 1 through 53 in their Second Claim for Relief.

59. By failing to prepare an environmental impact statement that adequately addresses the serious environmental issues raised by the EAA-A1 Reservoir Project, including by (1) failing to take a hard look at a full range of reasonable alternatives including alternative configurations of reservoirs that would provide more storage and alternative operation plans, (2) failing to adequately describe and evaluate the environmental effects of the proposed reservoir project, including the effects of proposed initial or interim project operations of both the EAA-A1 Reservoir Project and the group of Acceler8 projects as a whole, (3) failing to provide an adequate discussion of the proposed mitigation for the reservoir project's adverse environmental effects, and (4) otherwise disregarding the requirements of NEPA and the CEQ regulations, the Corps has violated NEPA and the CEQ's implementing regulations, abused its discretion, and acted arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

60. By making the decision to issue Permit No. SAJ-2005-53 (IP-TKW) authorizing the construction of the EAA-A1 Reservoir Project, the Corps limits its ability to choose among alternatives for the EAASR Project as a whole, a project currently under NEPA consideration, thus violating NEPA and the CEQ's implementing regulations, abusing its discretion, and acting arbitrarily and capriciously in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

61. These violations of NEPA, the applicable regulations, and APA have caused and will continue to cause plaintiffs' injuries as described in paragraphs 7-10.

Count 3
Violations of the APA

62. Plaintiffs hereby reallege and incorporate by reference the allegations in paragraphs 1 through 53 in their Third Claim for Relief.

63. By arbitrarily and capriciously and contrary to law preparing and issuing the FEIS, the ROD, and the permit in connection with the EAA-A1 Reservoir Project, the Corps has violated the Administrative Procedure Act, 5 U.S.C. § 706.

64. These violations of the APA have caused and will continue to cause plaintiffs' injuries as described in paragraphs 7-10.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request this Court to enter the following relief:

1. A declaratory judgment that the defendants and the Corps violated NEPA, WRDA 2000, and the APA by preparing and issuing an inadequate FEIS, ROD and permit, and permitting the EAA A-1 project to proceed;
2. An order setting aside the FEIS, ROD and permit, and remanding the matter to Corps to comply with applicable law;
3. An order awarding Plaintiffs their attorneys' fees and costs; and

4. An order granting such other and further relief, including injunctive relief,
as the Court deems just and proper.

Date: May 22, 2007.

Respectfully submitted,

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Counsel for Plaintiffs

By: _____


Paul J. Schwiep
Florida Bar No. 823244

07-80444

JS 44 (Rev. 11/05)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS

Natural Resources Defense Council, Inc., National Wildlife Federation, and Sierra Club

(b) County of Residence of First Listed Plaintiff (EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Lt. Gen. Robert L. Van Antwerp, etc.; and Pete Geren, etc.

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT LAND INVOLVED.

Attorneys (If Known)

MAGISTRATE JUDGE
JOHNSON

Paul J. Schwiep, Esq., Coffey Burlington (305-858-2900)
2699 South Bayshore Drive, Penthouse
Miami, Florida 33133

(d) Check County Where Action Arose: ☐ MIAMI-DADE ☐ MONROE ☐ BROWARD ☒ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|--|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated or Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign National | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
			SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed- (see VI below) ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S).

(See instructions second page):

a) Re-filed Case ☐ YES ☒ NOb) Related Cases ☐ YES ☒ NO

JUDGE

DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity):

National Env'tl. Policy Act; Administrative Procedure Act; Water Res. Dev. Act of 2000

LENGTH OF TRIAL via 1 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

SIGNATURE OF ATTORNEY OF RECORD

DATE

May 22, 2007

FOR OFFICE USE ONLY

AMOUNT

RECEIPT #

IFP