

LINE-BY-LINE REBUTTAL TO EVE SAMPLES' EMAIL RE SAVINGS CLAUSE – MAY 4, 2020

From: Eve Samples <eve.samples@everglades.org>
Sent: Wednesday, April 29, 2020 4:06 PM

Subject: Reject request to include "Savings Clause" in WRDA 2020

Florida congressional delegation Representatives and staff,

On behalf of Friends of the Everglades, I'm writing to voice our concerns about an effort to manipulate this year's Water Resources & Development Act (WRDA) in a manner that would be detrimental to the Everglades, the northern estuaries and Florida Bay.

In an email sent Tuesday, April 28, Rep. Alcee Hastings' staff requested other representatives sign onto a letter to the House Transportation & Infrastructure Committee requesting that, as part of WRDA 2020, Congress retroactively apply the WRDA 2000 "Savings Clause" to the Lake Okeechobee System Operating Manual that was already authorized in WRDA 2018 without this condition.

- There is nothing "retroactive" about applying WRDA 2000 to development of the Lake Okeechobee System Operating Manual ("LOSOM"). WRDA 2000 established the Comprehensive Everglades Restoration Plan ("CERP") as the "framework for modifications and operational changes to the Central and Southern Florida Project that are needed 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." WRDA 2000, Section 601(b)(1)(A). LOSOM has always been subject to WRDA 2000, which includes the Savings Clause, because LOSOM is an "operational change" that is being formulated to "restore, preserve and protect the South Florida ecosystem while providing for other water-related needs of the region."
- WRDA 2018 does not authorize the development of LOSOM. The Corps has revised regulation schedules for Lake Okeechobee multiple times since the 1950s. The Corps initiated the development of LOSOM, which is the latest revision to the lake regulation schedule, before WRDA 2018 was passed. WRDA 2018 simply ordered the Corps to expedite the completion of LOSOM because the Corps was widely criticized for moving too slowly. Nothing in WRDA 2018 changes the scope of the Corps' substantive authority and in fact references WRDA 2000.
- WRDA 2000 is the only law that allows the Corps to consider the restoration objectives such as reduction of harmful discharges from Lake Okeechobee

to the estuaries, salinity envelopes, and algae levels as part of Lake Okeechobee operations. If WRDA 2000 does not apply to LOSOM, then the Corps has no authority to address these important restoration goals.

This is a terrible idea that would result in the prioritization of water supply for large industrial farms south of Lake Okeechobee over the health of residents living along toxic-algae plagued waterways. It also would jeopardize long-term Everglades restoration goals.

This is factually incorrect, on several levels:

- The proposed language for WRDA 2020 would simply require the Corps to implement the Comprehensive Everglades Restoration Plan as authorized by Congress in WRDA 2000. The Corps is ignoring the requirements of CERP, which is why the proposed clarification in WRDA 2020 is necessary.
- The Savings Clause does not just protect farmers. On its face, the Savings Clause protects –
 - “Urban water supply.” The City of West Palm Beach directly relies on Lake Okeechobee during droughts.
 - The Seminole and Miccosukee Indian Tribes, which both have reservations downstream of Lake Okeechobee.
 - “Everglades National Park.” Since the late 1940s, Lake Okeechobee has been identified as the backup source of water supply for the park.
 - “Water supply for fish and wildlife.” Among the downstream recipients of lake water are the Loxahatchee National Wildlife Refuge and the Everglades / Francis Taylor Wildlife Management Area.
- The Savings Clause does not require the Corps to “prioritize water supply.” It simply provides that water users must be held harmless when the Corps modifies the Central and Southern Florida Project. The CERP was designed to improve conditions for everyone, and the Corps can prioritize other interests so long as they do not make water supply worse for longstanding users who rely on Lake Okeechobee.
- There is no inherent tradeoff between addressing concerns about algae in the St. Lucie Estuary and protecting existing water supply. The Corps itself is on record that changing water levels in Lake Okeechobee does not affect the formation of algae in the downstream estuaries.

The result would be to impose the constraints of a 20-year-old water-supply arrangement onto the Lake Okeechobee System Operating Manual (LOSOM) already being developed by the Army Corps of Engineers.

- There is nothing new about the Savings Clause. It has been a basic requirement for environmental projects in South Florida since WRDA 2000.

- The Savings Clause does not require the Corps to manage water in Lake Okeechobee in any particular way. It simply requires that the Corps ensure that the water regulation schedule not eliminate preexisting water supply. The Corps typically develops regulation schedules with a series of constraints, and the proposed language for WRDA 2000 would make clear that protection of water supply is one of those constraints.

That's despite the fact that the Army Corps of Engineers has repeatedly stated (most recently during its December LOSOM PDT meeting) that the Savings Clause does not apply to LOSOM because LOSOM is not a part of the Comprehensive Everglades Restoration Plan (slides attached).

- The Corps is mistaken that the Savings Clause does not apply, which is why clarification in WRDA 2020 is necessary. WRDA 2000 states that CERP (which includes the Savings Clause) is the framework for all operational changes implemented to address environmental concerns. CERP expressly includes changes to the Lake Okeechobee Regulation Schedule among its projects. And the Corps is proposing that LOSOM be adopted to achieve environmental goals identified in CERP and at least in part to integrate other CERP projects.
- The Corps' informal PowerPoint at a technical meeting does not justify ignoring the directives of Congress. The slides cite to a draft agency "guidance" memo that they wrote in 2007 but never finalized. Agency guidance memos do not have the force of law. Nowhere in WRDA 2000 or CERP is there any reference to "intervening non-CERP activities." The slides also point out that the Corps has not finished all CERP projects related to Lake Okeechobee, but the Corps has applied the Savings Clause to other projects which only partially implemented CERP plans (for example, the Central Everglades Planning Project).

Moreover, why would we go back to water management as it was in 2000 when we know so much more now about the health risks stemming from human exposure to cyanobacteria/blue-green algae?

- Applying the Savings Clause does not require any specific regulation schedule for Lake Okeechobee, much less "water management as it was in 2000." The Corps is free to continue to develop LOSOM to address all uses of the Lake, recreation, navigation, supply and the environment, and the effects of the schedule on all aspects of the environment.
- Concerns about algae do not override the basic principles of CERP. CERP itself discussed the issue of algae in St. Lucie Estuary, and the plan was

designed to address that issue while also addressing the other water-related needs of the region. In addition, the Corps itself is on record that water levels in Lake Okeechobee do not affect the formation of algae in the estuaries.

- The FOE’s statement underscores their desire to have a Lake schedule that is unbalanced – looking at only the only algae issue and the coastal communities, to the detriment of everyone else. Applying the Savings Clause would ensure a balanced Lake schedule that addresses all the Congressionally-mandated uses.

Retroactively applying the unrelated WRDA 2000 Savings Clause to LOSOM would require keeping Lake Okeechobee water levels too high during the dry months — which, history tells us, results in toxic discharges to the St. Lucie and Caloosahatchee estuaries during the rainy months — and would deprive the Everglades and Florida Bay of much-needed water when they need it most.

- As noted above, WRDA 2000 governs operational changes to the Central and Southern Florida Project, including revised regulation schedules for Lake Okeechobee. There is nothing “unrelated” or “retroactive” about applying the law that has been in place for decades.
- The FOE’s statements about how the lake would be managed lack credibility, because they do not have the technical expertise to design a lake regulation schedule. That is the Corps’ job, and the proposed language for WRDA 2020 would leave the technical judgments about lake levels to the Corps consistent with protecting water supply.

In the name of the Everglades and Florida’s treasured estuaries, we ask that you reject the request to sign onto Hastings’ letter to the Transportation & Infrastructure Committee.

Sincerely,

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