SPARK PLUGS OF POLICY IMPLEMENTATION: INTERGOVERNMENTAL RELATIONS AND PUBLIC PARTICIPATION IN FLORIDA'S ACCELER8 INITIATIVE TO SPEED EVERGLADES RESTORATION

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Modern environmental policy is beset by "wicked problems," sometimes described as "problems with no solutions, only temporary and imperfect resolutions" where there are only "narrowly defined technical definitions and solutions" and no "clear-cut criteria to judge their resolution."[1] The poster child for a "wicked problem" is ecosystem restoration, an attempt to rehabilitate a disturbed ecosystem to a function more similar to its previous undisturbed state.[2] A great experiment in ecosystem restoration is currently underway in Florida's Everglades.[3] Everglades restoration has run smack into a structure and culture of environmental law that envisions a "'front-end' system of decision-making that has little tolerance for flexibility and experimentation."[4] But flexibility

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1. Frank Fischer, *Citizen Participation and the Democratization of Policy Expertise: From Theoretical Inquiry to Practical Cases*, 26 POL'Y SCI. 165, 172–73 (1993); *see also* FRANK FISCHER, CITIZENS, EXPERTS, AND THE ENVIRONMENT 128–29 (2000) (describing the attributes of "wicked problems").

2. *See generally* Cathy Geist & Susan M. Galatowitsch, *Reciprocal Model for Meeting Ecological and Human Needs in Restoration Projects*, 13 CONSERVATION BIOLOGY 970, 970–71 ("Because restoration involves diverse scientific and social interests and is often laden with conflicting priorities, we view it as a 'wicked problem.'"); Ron Stewart, Syllabus: Environmental Planning and Administration: Decision-Making for Wicked Environmental Problems (2005), http://digbig.com/4grps (defining "wicked problem" and discussing the difficulties of solving "wicked problems" in the context of environmental decision making). This attempt is occurring under an exceptionally strong influence of developmental, agricultural, and other interests.

3 *See* Ron Dean Johnson, *Travel and Adventure: Everglades Restoration Begun*, COPLEY NEWS SERVICE, Sept. 26, 2001 (explaining that the Florida Everglades Restoration project, "the most ambitious ecosystem restoration ever undertaken in the United States," was begun in 1998, received additional federal funding in 2000, and will take at least twenty years to complete).

4. J.B. Ruhl, *The Disconnect Between Environmental Assessment and Adaptive Management*, TRENDS: A.B.A. SEC. ENV'T, ENERGY, & RESOURCES NEWSL., July/Aug. 2005, at 1; *see also* Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179, 1181–84 (2004) (mentioning how environmental policy is dominated by front-end

and experimentation is precisely what is needed for restoration to succeed. Despite this roadblock, we are beginning to see progress "on the ground" in the restoration effort. This is largely a result of innovative public servants, the "spark plugs" of policy implementation, who are committed to the effort.[5]

Two government agencies are partners in the restoration effort: the U.S. Army Corps of Engineers (the Corps) and the South Florida Water Management District (SFWMD).[6] In the Water Resources Development Act of 2000 (WRDA 2000), Congress endorsed the Comprehensive Everglades Restoration Plan (CERP), a multibillion-dollar plan spanning twenty years to restore the natural system while providing water for a growing South Florida and preserving flood control.[7] The fascinating story of how Florida was able to achieve a consensus over CERP in the 1990s has been the subject of a number of studies but is only briefly described here.[8] The ongoing story of CERP's implementation, however, is equally fascinating and is described in greater detail below. After CERP's enactment, the U.S. Army Corps of Engineers developed an elaborate participatory decision-making structure to be employed in the design and construction of individual CERP projects.[9]

In the fall of 2004, however, CERP's implementation took an unusual turn, when Governor Jeb Bush announced the state's Acceler8 program to speed Everglades restoration.[10] The federal and state partners selected several projects critical to Everglades restoration for accelerated construction in advance of federal appropriations for the projects.[11] By the

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rationalization).

5. *See infra* notes 118–22 and accompanying text.

6. THE JOURNEY TO RESTORE AMERICA'S EVERGLADES, FACT SHEET: THE COMPREHENSIVE EVERGLADES RESTORATION PLAN (CERP) 1 (2006), *available at* http://digbig.com/4grpx.

7. The Comprehensive Everglades Restoration Plan (CERP) is available from the U.S. Army Corps of Engineers. Its formal title is CENTRAL AND SOUTHERN FLORIDA PROJECT, COMPREHENSIVE REVIEW STUDY, FINAL INTEGRATED FEASIBILITY REPORT AND PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (1999), *available at* http://digbig.com/4rrcq.

8. *E.g.*, ROBERT M. JONES, FINDING THE COMMON GROUND: THE EVERGLADES MEDIATION: REFRAMING THE POLITICS OF CONSENSUS (2002), *available at* http://digbig.com/4rrcr (chronicling the history of Everglades restoration). *See infra* notes 15–32 and accompanying text (discussing the background of CERP).

9. *See infra* notes 33–65 and accompanying text (discussing the decision-making structure for CERP projects).

10. Press Release, Governor Bush Accelerates Restoration of America's Everglades (Oct. 14, 2004), *available at* http://digbig.com/4rrcs. The term "Acceler8" uses the number eight (8) because there were eight CERP projects (or portions thereof) that Florida proposed to accelerate. S. FLA. WATER MGMT. DIST., QUICK FACTS ON: ACCELER8—AN OVERVIEW 1 (2004), *available at* http://digbig.com/4rrct. The list of projects, however, was more like twelve individual projects from the point of view of contiguous geographic locations.

11. *See* Press Release, Governor Bush Accelerates Restoration of America's Everglades, *supra*

end of last year, it seems that CERP's decision-making process no longer drives actual restoration progress in the Everglades. Instead, Florida largely has assumed the lead with federal agencies providing oversight and regulation rather than actually doing the restoration work. Acceler8 reflects the larger movement in public administration from a hierarchical bureaucratic model to a network model for delivery of government services.[12] Public participation in government decision making is adapting to this newer model.

The following pages tell this story in more detail. Parts I and II describe the legal framework that was established early in this decade (2000–2004) to ensure public involvement within CERP. Part III describes in some detail the evolution of the Acceler8 initiative to speed Everglades restoration, which emerged in 2004. As the Army Corps of Engineers' public participation processes for CERP faltered and returned to a "notice and comment" framework, a new state-led process more consistent with adaptive management emerged. Next, Part IV reflects upon this case study from the perspective of trends in policy implementation identified from recent intergovernmental relations and policy-implementation research. The movement of Everglades restoration decision making from a hierarchical, bureaucratic, structural model to a more horizontal governance by network has changed the way that public participation in environmental decision making works. Part V discusses how the Acceler8 experience parallels similar developments in the 1980s and 90s under the Superfund hazardous waste-cleanup program. These parallels further elucidate the tension between the traditional means of public participation in decision making embedded in environmental law and the process of adaptive management needed for restoration.

I. CERP'S BACKGROUND

In 1994, Florida Governor Lawton Chiles approached former Speaker of the Florida House of Representatives Richard Pettigrew to chair a Governor's Commission on a Sustainable South Florida.[13] Pettigrew was somewhat bemused by the Commission's proposed title—he stumbled over

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note 10 ("As part of the $8 billion state-federal partnership to restore the River of Grass, Florida is stepping up the pace to complete critical environmental projects more than a decade ahead of schedule.").

12. *See infra* notes 120–27 and accompanying text (elaborating on the network-governance model).

13. Cyril T. Zaneski, *Natural Wonder*, GOV'T EXECUTIVE, Apr. 1, 2001, http://digbig.com/4ryag.

the term "sustainable."[14] Pettigrew began the Commission's work with an inquiry into key principles of sustainability, drawing upon discussions from the international, national, state, and local efforts that invoked the term.[15] Informed by these other efforts, the Commission concluded in its Initial Report:

> The issue at hand is how to bring about change that will affect Floridians today and tomorrow in a manner that ensures quality community development both economically and ecologically. Past attempts have failed in clearly delineating and charting a measurable quality future for South Florida. A vigorous economy and a healthy ecosystem must be the lever and the fulcrum, respectively, of our present and future activities.[16]

Pettigrew's Commission developed what became known as CERP, which the U.S. Congress approved in WRDA 2000.[17] WRDA 2000 envisions a complex of projects costing in excess of $7.8 billion, to be funded 50/50 by the federal government and the state, intended to reverse environmental damage caused by prior flood control and development and to return much of the Everglades to a more natural state.[18] The United Nations Environment Programme has described the ongoing Everglades restoration in South Florida as "the world's most ambitious and extensive wetlands restoration."[19] CERP's ambitious goal is to preserve, protect, and restore the South Florida ecosystem while meeting other water-related needs of the region such as water supply and flood control.[20]

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14. *Id.*

15. *See* GOVERNOR'S COMM'N FOR A SUSTAINABLE S. FLA., INITIAL REPORT ch. I.D (1995), *available at* http://digbig.com/4rwqw (follow "Sustainability" hyperlink) (discussing sustainability and the evolution of its definition). A good listing of sustainability projects has been compiled by Martin County, Florida. *See* Martin County Board of Commissioners, Sites Relating to Sustainable Communities, http://digbig.com/4rrcx (last visited Feb. 22, 2006) (listing indicators of sustainability and communities and organizations involved with sustainability).

16. GOVERNOR'S COMM'N FOR A SUSTAINABLE S. FLA., INITIAL REPORT, *supra* note 15, ch. I.D.

17. Water Resources Development Act of 2000 (WRDA 2000), Pub. L. 106-541, § 601, 114 Stat. 2572, 2680; GOVERNOR'S COMM'N FOR A SUSTAINABLE S. FLA., RESTUDY PLAN REPORT (1999), *available at* http://digbig.com/4rrcy (detailing the Commission's history).

18. § 601(b)(2)(B), 114 Stat. at 2681.

19. UNITED NATIONS ENV'T PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3, at 141 (2002), *available at* http://digbig.com/4rrda.

20. U.S. ARMY CORPS OF ENG'RS & S. FLA. WATER MGMT. DIST., PUBLIC OUTREACH PROGRAM MANAGEMENT PLAN, COMPREHENSIVE EVERGLADES RESTORATION PLAN 1 (2001), *available at* http://digbig.com/4rrdb.

Florida's Everglades is only one of the many ecosystem-restoration challenges confronting the United States. The Chesapeake Bay, the Great Lakes, coastal Louisiana, the Upper Mississippi River, Calfed Bay Delta, and other regions also have serious ecosystem-restoration challenges.[21] While Everglades managers ponder over the quality and distribution of water, managers of other systems ponder over severe water shortages or, in the case of Louisiana, the disappearance of land.[22] Proponents of these other restorations often express "Everglades envy" regarding CERP and its implementation.[23] They perceive congressional adoption of CERP to be a remarkable achievement that came about only after the creation of a unique consensus among diverse stakeholders (e.g., environmentalists; developers; agriculture; and a diverse array of federal, state, and local agencies).[24]

South Florida's consensus leading to congressional adoption in 2000 of CERP, known as The Yellow Book, came after almost two decades of wrangling—beginning with Florida Governor Bob Graham's "Save Our Everglades" program, substantial state and federal environmental initiatives, a lawsuit by the United States against the South Florida Water Management District, Governor Lawton Chiles's high-profile surrender in this suit shortly after his election, numerous challenges to this settlement before state and federal agencies and judges, creation by an interagency agreement of a South Florida Ecosystem Restoration Task Force and Working Group, a Statement of Principles among stakeholders staying several legal challenges, and a state Everglades Forever Act intended to

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21. *See* Northeast Midwest Institute, Large-Scale Ecosystem Restoration Initiatives, http://digbig.com/4rrdc (last visited Feb. 18, 2006) (depicting national restoration efforts by a map of the United States).

22. Northeast Midwest Institute, Protecting and Restoring the San Francisco Bay-Delta, http://digbig.com/4rrdd (last visited Feb. 18, 2006) (water shortage); Northeast Midwest Institute, Protecting and Restoring Coastal Louisiana, http://digbig.com/4rrde (last visited Feb. 18, 2006) (loss of coastal lands).

23. Advocates of restoration in these other U.S. regions expressed this envy during plenary sessions at the First National Conference on Ecosystem Restoration, Dec. 2004, in Orlando, Florida, National Conference on Ecosystem Restoration, Sustainable Ecosystem Restoration Through Integration of Science, Planning and Policy, http://digbig.com/4rrdf (last visited Mar. 13, 2007) and at a Breakfast Panel entitled, "Natural Ecosystem Restoration Nationwide," at the 20th Annual Conference of The Everglades Coalition, Jan. 15, 2005, in Naples, Florida. The Everglades Coalition, Past Conferences, http://digbig.com/4rrdg (last visited Mar. 1, 2007).

24. Zaneski, *supra* note 13. Whether a consensus could be reached turned on the unique circumstance that billions of gallons of water were being discharged each year to the ocean through the canals built by the Army Corps of Engineers and operated by the South Florida Water Management District. A reengineering of the system could be envisioned that would capture and store this "new water" for a variety of uses, i.e., agriculture, urban growth, and to help the remaining natural areas of the Everglades. *Id.* By "enlarging the pie," a "win-win" situation was possible that may not be plausible in many other situations. *Id.*

embody and indeed to force compromise.[25] Indeed, some remarkable ecosystem restoration was well underway prior to CERP such as the Everglades Construction Project creating stormwater treatment areas for runoff from the Everglades Agricultural Area and the Kissimmee River Restoration, some of which is now visibly complete.[26]

To many in the process, among the more significant reasons for the Everglades Restoration consensus was Governor Chiles's Sustainable South Florida Commission. The Commission consisted of forty-two members from business, agriculture, government, environmental, and other public interest groups with a mandate to "make recommendations for achieving a healthy Everglades ecosystem that can co-exist and be mutually supportive of a sustainable South Florida economy and quality communities."[27] The Commission's work took on issues far beyond the environmental problems of the Everglades and the water supply and flood control needs of South Florida. Its ultimate recommendations addressed economic, cultural, and social sustainability as well.[28] For example, it examined issues concerning the regional labor pool, education, and transportation infrastructure.[29] This inquiry was based on the Commission's recognition of the interdependent nature of, and the need for, balance among the resource requirements of "the natural environment, [the] built environment, social institutions, and the economy."[30] Based on the Commission's initial report in 1995, several initiatives important to human resources planning were started such as the Eastward Ho! project to encourage infill development, the Florida Sustainable Communities Demonstration Project, and the National Brownfields Showcase Community.[31]

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25. For a more detailed description of the history, see Alfred R. Light, *Ecosystem Management in the Everglades*, 14 NAT. RESOURCES & ENV'T 166, 167–70 (2000).

26. *See* South Florida Water Management District, Frequently Asked Questions on the Everglades Construction Project, http://digbig.com/4rrdh (last visited Feb. 13, 2006) (answering essential questions about the Everglades Construction Project); Kissimmee River Restoration Project, http://digbig.com/4rrdj (last visited Feb. 18, 2006) (defining the Kissimmee River Restoration Project).

27. NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, RESTORATION EFFORTS: EVERGLADES NATIONAL PARK, http://digbig.com/4rrdk (last visited Feb. 18, 2006) (citation omitted).

28. GOVERNOR'S COMM'N FOR A SUSTAINABLE S. FLA., PLANNING FOR 2050: A CONCEPTUAL PLAN TO ACHIEVE SUSTAINABLE COMMUNITIES IN SOUTH FLORIDA (1999), *available at* http://digbig.com/4rwqy.

29. *Id.* at 3–11.

30. *Id.* at 2.

31. *Id.* at 12. A list of these project websites follows: Florida Sustainable Communities Center, http://digbig.com/4rwra (last visited Feb. 18, 2006); Martin County, Fla., Sustainable Communities, http://digbig.com/4rxxa (last visited Feb. 18, 2006); Council for Sustainable Florida, http://digbig.com/4rxxb (last visited Feb. 18, 2006) ("The Council for Sustainable Florida is a program of the Collins Center for Public Policy. The Collins Center is a non-partisan, non-profit 501(c)(3) group."); U.S. Envtl. Prot. Agency, Brownfields Showcase Community Fact Sheet: Eastward Ho!, FL,

II. CERP "DE JURE"

The United States Army Corps of Engineers leads Everglades restoration at the federal level. Leading the State of Florida's effort is the South Florida Water Management District, the Corps's formal state agency partner in CERP cooperative agreements.[32] In the eyes of the Corps, the "public includes any individuals, organizations, or other groups outside the Corps and the South Florida Water Management District."[33] WRDA 2000 mandated significant public involvement and outreach in CERP's implementation. For example, it provides, "The Secretary [of the Army] shall ensure, to the maximum extent practicable, that public outreach and educational opportunities are provided, during implementation of the Plan, to the individuals of South Florida, including individuals with limited English proficiency, and in particular for socially and economically disadvantaged communities."[34] CERP anticipates public participation at the program level and for each of the more than sixty components designated in the plan, including the National Environmental Policy Act (NEPA) process, which requires public comment on environmental assessments and impact statements.[35] In its Programmatic Regulations under CERP, promulgated in 2003, the Corps obligated itself to involve "the public at an early stage and in such a way as to ensure a meaningful exchange of views so that the perspectives of those consulted [could] be taken into account and given good faith consideration."[36]

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http://digbig.com/4rxxc (last visited Feb. 18, 2006).

32. Design Agreement Between the Department of the Army and South Florida Water Management District for the Design of Elements of the Comprehensive Plan for the Everglades and South Florida Ecosystem Restoration Project (May 12, 2000), *available at* http://digbig.com/4rxxd.

33. Memorandum 029.00 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. District & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers, at 2 (Nov. 19, 2003), *available at* http://digbig.com/4rxxe.

34. WRDA 2000, Pub. L. No. 106-541, § 601(k)(2)(B), 114 Stat. 2572, 2692.

35. U.S. ARMY CORPS OF ENGINEERS & S. FLA. WATER MGMT. DIST., PUBLIC OUTREACH PROGRAM MANAGEMENT PLAN, COMPREHENSIVE EVERGLADES RESTORATION PLAN 5–6 (2001), *available at* http://digbig.com/4rrdb.

36. S. FLA ECOSYSTEM RESTORATION TASK FORCE, COMPREHENSIVE EVERGLADES RESTORATION PLAN CONSULTATION PROVISIONS (DRAFT) 2 (2005), *available at* http://digbig.com/4rxxf; *see also* 33 C.F.R. § 385.3 (2005) (including in the definition of outreach "to involve the public in the decision-making process for implementing the Plan" and defining consultation as "a process to ensure meaningful and timely input in the development of program and project activities, reports, manuals, plans, and other documents from Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida"). The Corps's outreach plan closely follows the principles laid out in the EPA's Model Plan for Public Participation. OFFICE OF ENFORCEMENT & COMPLIANCE ASSURANCE, U.S. ENVTL. PROT. AGENCY, THE MODEL PLAN FOR PUBLIC PARTICIPATION 9 (2000), *available at* http://digbig.com/4rxxg (elaborating on the public's role in the decision-making process). *See generally* OFFICE OF POL'Y, ECON. & INNOVATION, U.S. ENVTL.

Some members of the public, however, are singled out for particular attention under CERP. The Corps and the SFWMD are required by a number of statutes such as NEPA, the Endangered Species Act, the Fish and Wildlife Coordination Act, the regulations implementing these laws, and CERP's Programmatic Regulations to consult with various federal and state agencies. In addition, the Corps is required to consult with the South Florida Ecosystem Restoration Task Force on various aspects of CERP.[37] The Task Force, an intergovernmental advisory body codified in the Water Resources and Development Act of 1996, must consult with the Corps on a wide variety of CERP activities such as program-wide guidance memoranda, project-implementation reports, pilot-project-design reports, interim goals and targets, and an evaluation of the plan itself.[38] The Secretary of the Army, the Secretary of the Interior, and the Governor are to establish an independent scientific review panel in consultation with the Task Force.[39] In addition, the Corps and the SFWMD are required to consult with the Seminole and Miccosukee Tribes on a government-to-government basis in accordance with the requirements of an Executive Order and the Programmatic Regulations.[40]

The Corps's guidance regarding projects being pursued under its agreement with the SFWMD for the implementation of CERP builds in formal public input at several stages of the process.[41] The principal

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PROT. AGENCY, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY (2003), *available at* http://digbig.com/4rxxh (detailing the EPA's final public-involvement plan).

37. 33 C.F.R. § 385.10(b)(2)(e). The Corps is required to consult with the Task Force as a body. *Id.*

38. *See* Water Resources Development Act of 1996, Pub. L. 104-303, § 528, 110 Stat. 3658, 3768, 3772; 33 C.F.R. §§ 385.5, .10, .12, .31, .32, .35, .38, .40(b).

39. 33 C.F.R. § 385.33. In 2004, the National Academy of Sciences' former science review panel for the Everglades effectively ended, and a new Comprehensive Independent Science Review of Everglades Restoration Plan (CISREP) was created. Official Website of CERP, Independent Scientific Review Panel, http://www.evergladesplan.org/pm/ind_review.cfm (last visited Feb. 12, 2006); Intergovernmental Agreement Among the U.S. department of the Army, the U.S. Department of the Interior, and the State of Florida for Establishment of an Independent Scientific Review Panel Pursuant to Section 601 of the Water Resources Development Act of 2000 (June 14, 2004), *available at* http://digbig.com/4satt. This change, pursuant to section 601(j) of the WRDA 2000, occurred at time in which Everglades managers expressed dissatisfaction with the apparent "agenda" of the prior Committee on Restoration of the Greater Everglades Ecosystem (CROGREE). *See infra* notes 124–27 and accompanying text. For a general history regarding independent review of Everglades science, see NATIONAL ACADEMY OF SCIENCE, CONCEPT PAPER, INDEPENDENT SCIENTIFIC REVIEW (2003) (Draft), *available at* http://digbig.com/4satw; Official Website of CERP, CERP: The Plan in Depth—Part 6: The Use of Sound Science, http://digbig.com/4rxxj (last visited Feb. 12, 2006).

40. *See* Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000) (stating that all agencies must consult with any implicated Native American government); 33 C.F.R. § 385.10(b)(1).

41. *See* Memorandum 015.00 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers, (Jan. 7, 2003), *available at* http://digbig.com/4rxxk (detailing specific project milestones that

document setting forth alternatives for a CERP project is usually called the Project Implementation Report (PIR).[42] For pilot projects, such as the projects intended to demonstrate the feasibility of Aquifer Storage and Recovery (ASR), the equivalent report is the Pilot Project Design Report (PPDR).[43] For certain other projects, an alternative or additional analytic document is the Feasibility Study (FS).[44] Drafts of each of these studies are to be published in the Federal Register with public comment solicited.[45] Later in the process, the Corps publishes and solicits public comment on the final report for each of the types of study (PIR, PPDR, FS).[46] Sometimes a supplemental PIR may be required, in which case the Corps follows the same notice and comment procedure that it follows for a PIR. This final report serves as the basis for the Corps's Decision Document.[47] Accompanying the draft, final draft, and final reports are NEPA draft and final documents, usually the Environmental Impact Statement (EIS).[48] The document finally selecting an alternative is called the Record of Decision (ROD).[49] Only after the ROD is signed can the Corps execute the Project Cooperative Agreement (PCA) for the project, initiate any necessary real estate acquisition (RE), and begin the process for obtaining approval of detailed design documents and plans and specifications (P&S) for the project. Construction of the project must await the P&S approvals and reception of any necessary National Pollution Discharge Elimination System (NPDES) permits under the Clean Water Act.[50]

In addition to publication of draft and final reports with provision for the opportunity for public comment, the Corps holds public workshops during comment periods. These workshops are supposed to be organized to encourage public participation by means of an interactive format, allowing

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will allow for public input).

42. *See generally* Memorandum 019.01 from John R. Maloy, Chief Executive Consultant, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers, (Nov. 6, 2002), *available at* http://digbig.com/4rxxm (making reference to a Project Implementation Report (PIR) in discussing the implementation of the Everglades project).

43. *See id.* (referring to the Pilot Project Design Report (PPDR) in discussing the plan).

44. Official Website of CERP, CERP Feasibility Studies, http://digbig.com/4satx (last visited Feb. 11, 2006).

45. Memorandum 015.00 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers 5–6 (Jan. 7, 2003) (Milestone No. L325, 145), *available at* http://digbig.com/4rxxk.

46. *Id.* at 7 (Milestone No. L385, 180).

47. *Id.* at 6 (Milestone No. 100).

48. *Id.* at 3, 6 (Milestones L385, 310, referring to the NEPA Report).

49. *Id.* at 7 (Milestone 320).

50. The U.S. EPA has delegated permitting responsibilities for this program to the State of Florida. Florida Department of Environmental Protection, The Facts About The NPDES Program, http://digbig.com/4rxxn (last visited Feb. 6, 2006).

questions and comments from the public.[51] Feedback is facilitated through the use of response forms for those who do not wish to speak orally. Transcripts of staff presentations and all comments are included in the record. For the first PIRs prepared under CERP, some public workshops were very well-attended (e.g., the workshop on Indian River Lagoon-South on Hutchinson Island) while attendance at others was sparse (e.g., the workshop on Aquifer Storage and Recovery in Okeechobee).[52]

In addition to these formal opportunities for public input, CERP's Programmatic Regulations guarantee public access to meetings of the Project Delivery Teams, which are interdisciplinary, interagency working meetings, whose goal is to create products such as PIRs or PPDRs.[53] Unlike the Public Workshops, these meetings are interactive only among members of the Project Delivery Team (PDT), which is comprised of federal, state, local, and tribal officials.[54] In its Programmatic Regulations, the Corps structured the PDT meetings this way to avoid legal issues under the Federal Advisory Committee Act or Florida's Sunshine Act.[55] After gaining some experience with intergovernmental collaboration on individual projects in these teams, however, the Corps in 2004 determined that the multiplicity of projects was stretching the capabilities of local environmental agencies. To address this, the Corps decided to convene monthly regional Project Delivery Team meetings for two CERP subregions, Central Florida and South Florida. These meetings were

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51. Memorandum 029.00 from John R. Maloy, Chief Executive Consultant, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers (Nov. 19, 2003), *available at* http://digbig.com/4rxxe.

52. In the St. Thomas University research project, members of the project team attended each of the public workshops for these PIRs or PPDRs. *See* Aquifer Storage & Recovery Regional Study and Pilot Project Documents, http://digbig.com/4rxxp (last visited Feb. 25, 2006) (providing links to project documents for CERP).

53. *Id.*

54. *See* Memorandum 018.01 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers (Mar. 25, 2003), *available at* http://digbig.com/4rxxq (stating that the Project Delivery Team (PDT) must be governmental agencies).

55. Federal Advisory Committee Act (FACA), Pub. L. No. 93-502, 88 Stat. 1561 (1974) (codified as amended at 5 U.S.C. § 552 (2000)); Florida Sunshine Act, FLA. STAT. ANN. § 286.011 (West 2003); *see* 68 Fed. Reg. 64,200, 64,207 (Nov. 12, 2003) (discussion of the FACA as inapplicable to meetings of RECOVER); Memorandum 011.02 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers (Apr. 28, 2003), *available at* http://digbig.com/4rxxr (describing how CERP team meetings must be consistent with the Federal Advisory Committee Act (FACA)); *see also* Memorandum 034.00 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers (Dec. 18, 2003), *available at* http://digbig.com/4saty (describing how CERP team meetings are to be conducted so that the meetings are consistent with the requirements of the Florida Sunshine Act).

designed to resolve controversies with agency representatives who could speak with authority regarding the agency's position.[56] From the public's point of view, these regional PDT meetings replaced the multiplicity of individual project PDT meetings that the Corps's Programmatic Regulations indicate are to be open to the public since after creation of the regional PDT meetings the individual PDT meetings were no longer open to the public.[57]

The regional PDT process did not work, however, as envisioned. By mid-2005 the Corps had either consolidated or cancelled monthly meetings and conducted the sessions by video conference between Jacksonville and a South Florida location (such as West Palm Beach) rather than by a face-to-face meeting of all participants.[58] By October 2005, the actual timing and structure of public meetings in CERP decision making bore little resemblance to the process described in the Corps's Programmatic Regulations of several years before. In that month, the Corps decided to conduct the Regional PDT updates in connection with the meetings of the South Florida Ecosystem Restoration Task Force's working group.[59] In essence, the public now was no longer invited to any of the Project Delivery

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56. The Corps began the first set of regional PDT meetings in Ft. Lauderdale with a briefing by counsel on the FACA and the consequent limitations on public participation. On the first day (July 13, 2004), the meeting leader who immediately followed this briefing appeared to contradict counsel as to certain aspects of the procedure and purpose of the meeting. This problem did not exist in the second meeting (July 15, 2004), but a different issue emerged. During that meeting, the leader stated that the regional PDT meeting would now provide the opportunity for public comment to PDTs and that individual PDT meetings would no longer be noticed on the web nor would the public be invited to observe. *See* Memorandum from Everglades Plan Joint Venture to Attendees, Central Florida Regional Product Delivery Team (RPDT) Meeting, July 15, 2004, at 2–3, http://digbig.com/4rxxs ("Public opportunity will not[sic] longer occur at the Project Specific Team level; the RPDT is now the forum for public comments. The Project Specific team meeting will not be publicized."). PDT meetings are required to be noticed in advance and open to the public, with an opportunity for public comment, by legal requirement in CERP's programmatic regulations. 33 C.F.R. § 385.18(b)(5) (2005). *See generally* Official Website of CERP, Regional Product Delivery Teams (RPDT), http://digbig.com/4rxxt (last visited Feb. 18, 2006) (describing changes to public meetings for CERP). After the regional PDT system was created, the Corps stopped having individual PDT meetings. However, there are still project-related meetings between the Corps and the SFWMD to prepare documents and monitor contractors. In practice, sometimes the public is not excluded from such meetings, but public notice of the meetings is not provided consistently as a matter of course.

57. *See* Official Website of CERP, Regional Product Delivery Teams, http://digbig.com/4rxxw (last visited Mar. 21, 2006) (stating that the regional meeting will act as a replacement to individual meetings).

58. The evolution of the character of these meetings could be traced through a survey of the minutes of the meetings included on the CERP website. In October 2005, after deciding to remove public participation from regional PDT meetings, the site deleted access to minutes of these meetings from its website.

59. Agenda, South Florida Ecosystem Restoration Working Group Meeting, at 1 (Nov. 15–16, 2005), *available at* http://digbig.com/4rxxx.

Team meetings. The Programmatic Regulations' PDTs, which the Regional PDT structure had sought to streamline, were slated for incorporation into meetings of the South Florida Ecosystem Restoration Working Group (Working Group).[60]

The Corps's outreach policies acknowledge other types of meetings with select members of the public. Frequently, the Corps identifies organized groups that have a higher level of interest in certain aspects of Everglades restoration or particular projects. These groups are known as stakeholders.[61] The Corps anticipates that it may meet with relatively small groups of such stakeholders (preferably no more than twenty-five persons) where it can identify a specific task or other issues to be resolved.[62] Similarly, community or other groups may approach the Corps for discussions in a more personal and interactive setting. These are typically a localized group whose interest in CERP is "limited to a specific project or geographic area."[63] Communities may schedule events that are "informal venues" where the Corps can present "slide show[s], video presentation[s], or exhibits in an informal atmosphere."[64] No records or transcripts are kept of these informal public meetings, which are not formally incorporated into the Corps's decision-making processes.

CERP departs from prior water development projects of the Army Corps of Engineers in several respects. Perhaps most important, for most projects financing was set to divide expenses equally between the federal government and the nonfederal sponsor, the SFWMD.[65] This contrasts with the 90/10 or 80/20 splits that typified many other prior projects.[66] In addition, CERP assigns responsibilities for acquiring lands necessary for

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60. At the November 15, 2005 meeting of the Working Group, there was considerable discussion about the plan to merge PDT updates into meetings of the Working Group with many members of the Working Group expressing concern. Approved Minutes, South Florida Ecosystem Restoration Working Group Meeting, at 3–4 (Nov. 15, 2005), *available at* http://digbig.com/4rmhr. These included Ken Ammon, co-chair of the Working Group, who expressed concern about the absence of public notification regarding PDT meetings occurring outside the framework of the Working Group. *Id.* at 5.

61. Memorandum 029.00 from John R. Maloy, Chief Executive Consultant, Water Resources, S. Fla. Water Mgmt. Dist. & Dennis R. Duke, CERP Program Manager, U.S. Army Corps of Engineers, at 5 (Nov. 19, 2003), *available at* http://www.cerpzone.org/documents/cgm/cgm_029.00.pdf.

62. *Id.*

63. *Id.*

64. *Id.*

65. PERVAZE A. SHEIKH & NICOLE T. CARTER, EVERGLADES RESTORATION: THE FEDERAL ROLE IN FUNDING, at CRS-1 (2005), *available at* http://digbig.com/4rxxy.

66. *See* NICOLE T. CARTER & BETSY A. CODY, THE CIVIL WORKS PROGRAM OF THE ARMY CORPS OF ENGINEERS: A PRIMER, at CRS-4 to CRS-5 (Feb. 3, 2005), *available at* http://digbig.com/4rxya (reviewing past apportionments in joint projects).

projects to Florida rather than to the Corps.[67] Under normal Corps procedure, land may not be acquired to construct a project until a Project Cooperation Agreement (PCA) is executed between state and federal sponsors, and a PCA may not be executed until Congress has appropriated funds for the project. Based on the outline of projects projected for CERP in the Yellow Book, however, Florida began acquiring or continued to acquire, property for projects well in advance of the PIR and subsequent PCA.[68] Moreover, Florida already had several trust funds set up under state law under which it could acquire land for conservation or environmental purposes.[69] These trust funds are operated largely outside the annual state appropriations process.[70] By 2005, Florida had acquired over half the lands projected to be needed for CERP, even though no federal appropriation, and thus no PCA, had been executed for any CERP projects.[71]

In late 2004, the first set of PIRs coming out of CERP made their way to Congress for authorization and funding of construction.[72] The local consensus supporting the Indian River Lagoon-South project, estimated to cost in excess of a billion dollars, was remarkable. Local governments, environmental groups, commercial, industrial, and recreational interests, scientists, and academics met at a local community center in Martin County, Florida, to push for the project.[73] The Indian River Lagoon-South project looks forward to returning a more natural water flow to the area, a

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67. *See generally* WANDA CAFFIE-SIMPSON, 2004 EVERGLADES CONSOLIDATED REPORT ch. 8C (2004), *available at* http://digbig.com/4rxyb (describing the aggressive land acquisition of Everglades property).

68. *See* S. FLA. ECOSYSTEM RESTORATION TASK FORCE, SOUTH FLORIDA ECOSYSTEM RESTORATION LAND ACQUISITION STRATEGY 6–7 (2004), *available at* http://digbig.com/4rxyc (stating that the task force had been acquiring land since 1999); *see also* S. FLA. WATER MGMT. DIST., LAND MANAGEMENT ANNUAL REPORT 4–6 (2003), *available at* http://digbig.com/4rxyd (describing land acquisitions and partners used). A report of the Congressional Research Service indicated, "From FY2001 to FY2004, Florida has provided approximately $803 million for CERP activities, while the federal government has provided about $155 million." SHEIKH & CARTER, *supra* note 65, at CRS-5.

69. *E.g.*, FLA. STAT. ANN. § 373.59 (West 2005).

70. *See id.* (establishing the trust fund).

71. *See* S. FLA. ECOSYSTEM RESTORATION TASK FORCE, *supra* note 68, at 7 ("The estimated land acquisition needs for water projects has been refined and is now 483,505 acres with 271,853 acres acquired."); *see also* AUDUBON OF FLA., EVERGLADES RESTORATION: LAND AND MONEY (2002), *available at* http://digbig.com/4rxye (describing land acquisitions).

72. The Chief of Engineers submitted to the Secretary of the Army for transmittal to Congress the report on the Indian River Lagoon-South project on August 6, 2004. U.S. Army Corps of Engineers, Chief of Engineers Completes Report Recommending Indian River Lagoon South Project in Support of Comprehensive Everglades Restoration Plan (Aug. 6, 2004), http://digbig.com/4rxwx.

73. S. FLA. WATER MGMT. DIST. & U.S. ARMY CORPS OF ENGINEERS, FINAL IRL-SOUTH PROJECT IMPLEMENTATION REPORT AND EIS § 9, at 9-9 to 9-11 (2004), *available at* http://digbig.com/4rxyf. Also of interest is Martin County's website tracking the project. *See* Martin County, Florida, Comprehensive Everglades Restoration Plan/Indian River Lagoon Study, *available at* http://digbig.com/4rxyg (last visited Feb. 18, 2006) (tracking the status of the project).

living St. Lucie River, and elimination of freshwater discharges from Lake Okeechobee during Florida's wet season.[74] While airboat operators complained about access restrictions, environmental groups also cheered the PIR for restoration of the Southern Golden Gates Estate (Picayune Strand) project, which seeks to restore over 55,000 acres.[75]

Despite the remarkable Florida consensus about the desirability of the Indian River Lagoon-South project, the large size of the project and its focus on environmental-restoration objectives instead of water supply or flood control, apparently caused the Washington, D.C., headquarters to consider the project cautiously. The final PIR was published in the Federal Register in May 2004, and the Chief of Engineers Report on the project was completed in August of that year.[76] Despite tentative inclusion of the project in the proposed Water Resources Development Act of 2005, the Army did not submit the PIR for the project to Congress, a precondition to appropriation, until March 18, 2005.[77] Despite publication of Picayune Strand PIR in the Federal Register in November 2004, the Chief's Report was not submitted to Washington for signature until May 2005 and was not ready for transmittal to Congress until September 15, 2005.[78]

A somewhat more controversial set of projects soon followed Indian River Lagoon and Picayune Strand, the regional study and pilot projects needed to assess the viability of ASR technology to store, and later use, Everglades water now "discharged to tide."[79] In Florida, where municipalities have used deep well injection for disposal of sewage waters

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74. Official Website for CERP, Indian River Lagoon–South, *available at* http://digbig.com/4rxyh (last visited Feb. 18, 2006).

75. Southern Golden Gates Estates (Picayune Strand) Hydrologic Restoration Integrated Project Implementation Report (PIR) / Environmental Impact Statement (EIS) (May 2004) (Draft), *available at* http://digbig.com/4rxyj. In October 2004, Governor Bush and the SFWMD entered into an agreement to accelerate construction of some of these less controversial restoration projects (in cooperation with the Corps) in advance of receipt of federal appropriations in a program colloquially known as Acceler8 Everglades Now. Press Release, Fla. Dep't of Envtl. Prot., Florida Breaks Ground on First Acceler8 Project (Jan. 14, 2005), *available at* http://digbig.com/4rxyk (last visited Feb. 25, 2006). Under the program, designs proceed in advance of the completion of the decision-making documents needed for federal appropriations. *Id.*

76. Project 11470: Milestones and Status, http://digbig.com/4rmht (last visited Feb. 18, 2006).

77. *Id.*

78. DEP'T OF ARMY, COMPREHENSIVE EVERGLADES RESTORATION PLAN, PICAYUNE STRAND RESTORATION PROJECT, COLLIER COUNTY, FLORIDA, CHIEF OF ENGINEERS REPORT, CECW-SAD (1105-2-10A) (2005), *available at* http://digbig.com/4rmhs.

79. U.S. ARMY CORPS OF ENGINEERS & S. FLA. WATER MGMT. DIST., FINAL AQUIFER STORAGE AND RECOVERY PILOT PROJECT DESIGN REPORT/FINAL ENVIRONMENTAL IMPACT STATEMENT: LAKE OKEECHOBEE ASR PILOT PROJECT, HILLSBORO ASR PILOT PROJECT, CALOOSAHATCHEE (C-43) RIVER ASR PILOT PROJECT, at ES1 (2004) [hereinafter PPDR/FEIS], *available at* http://digbig.com/4rxym.

for decades,[80] there was considerable public confusion and skepticism about ASR.[81] Despite initial underestimation of costs for the pilot projects, the Corps proceeded with the regional study and pilot projects while it assessed alternatives should ASR prove infeasible on the scale contemplated in the Yellow Book.[82] Public meetings on the regional study and pilot projects were quite open, as the Corps and the SFWMD hydrogeologists and engineers engaged the few (at Okeechobee, LaBelle, and Jupiter) or the many (Boca Raton).[83] After the PPDRs were completed in early 2005, it took the better part of the year before the corresponding ROD was signed on October 21, 2005, so that they could be submitted to Congress in an appropriations request.[84] As of the end of 2005, no appropriations for any of these projects, including the less controversial Indian River Lagoon, had been made.

III. CERP DE FACTO: THE ACCELER8 INITIATIVE

In 2004, four years after CERP had been enacted, its public participation processes were, as described above, still largely in early stages of development. Most projects were still years away from PIR submission to Congress that by statute had to precede any specific project appropriation.[85] Moreover, projects at the head of the line had begun to encounter bureaucratic obstacles. Imperfections in the public participation process also had begun to emerge by 2004. Thus, by mid-2004, state officials reasonably feared that public support for Everglades restoration in Florida would wane because there would be too few real-world examples of

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80. Fla. Dep't of Envtl. Prot., Underground Injection Control, http://digbig.com/4rxyn (last visited Feb. 25, 2006) (describing Florida's Underground Injection Control program).

81. LaBelle Public Meeting, June 3, 2004 (personal observation of discussion at public meeting by Alfred R. Light, Principal Investigator). *See generally* PPDR/FEIS, *supra* note 79, app. E, *available at* http://digbig.com/4rxyp (describing the design of the ASR pilot project).

82. The Yellow Book (the CERP also known as the Restudy) approved by Congress in WRDA 2000 can be viewed on the web in its entirety. Official Website of CERP, Read the Plan (CERP), http://digbig.com/4rxyq (last visited Mar. 21, 2006).

83. However, few members of the public at such meetings have the time, inclination, or possibly the competence to read and understand the lengthy and technical documents upon which they are to comment. At the Okeechobee meeting on ASR, upon inquiry all members of the public present acknowledged that they had not read the PPDT or EIS documents that were the subject of the meeting. June 1, 2004 (personal observation by Alfred R. Light, principal investigator). The Department of the Army did not approve the PPDT on ASR until November 8, 2005. *See* BENJAMIN H. BUTLER, U.S. ARMY CORPS OF ENGINEERS, RECORD OF DECISION: CENTRAL AND SOUTHERN FLORIDA PROJECT LAKE OKEECHOBEE, HILLSBORO, AND CALOOSAHATCHEE (C-43) RIVER AQUIFER STORAGE AND RECOVERY (ASR) PILOT PROJECTS 6 (2005), *available at* http://digbig.com/4rxyr (showing Army Corps's decision signed on Oct. 21, 2005).

84. BUTLER, *supra* note 83, at 6.

85. WRDA 2000, Pub. L. 106-541, § 601(b)(2)(D), 114 Stat. 2572, 2680.

restoration to which government could point to demonstrate the benefits of the program. This was true despite the state's considerable expense in land acquisition. Although restoration of the Kissimmee River and stormwater treatment areas from the Everglades Construction Program provided models, the extended timetable of CERP itself presented a potential problem that the public would perceive billions to have been spent without visible progress made.[86]

This was the background that led to Florida's Acceler8 initiative. Senator Bob Graham, while in office, perennially called for a "permanent source of state and federal funding [for Everglades restoration]. . . . [that] without this, [they] risk[ed] leaving the 68 projects that make up Everglades restoration exposed to the fickle and sometimes unpredictable political winds."[87] The inspiration for Acceler8 was a realization that a potential, albeit limited, dedicated source of funding for CERP already existed at the state level, given the political will. The SFWMD has ad valorem taxing authority for its operations.[88] Moreover, the SFWMD may borrow funds guaranteed by future revenues to be collected from the ad valorem tax.[89] These certificates of participation permit the SFWMD to borrow funds to accelerate construction of Everglades restoration projects without raising taxes.[90]

Ernest Barnett, a life-long Democrat, has worked on Everglades restoration in both Republican and Democratic Administrations. In 2004, he worked directly for the Secretary of the Department of Environmental Protection (DEP), a fairly new appointee, Colleen Castille. In 2001, as the DEP's Ecosystems Project Director, "Ernie" Barnett won the 2001 National Wetlands Award, sponsored by the Environmental Law Institute, the Environmental Protection Agency (EPA), and other federal agencies for his role in the development of CERP.[91] Working with his counterparts at the SFWMD familiar with certificates of participation, Barnett and the new Secretary approached Governor Jeb Bush with a plan, which Bush approved in October 2004.[92] The State of Florida then negotiated an arrangement

86. Interview with Ernest Barnett, Dir. of Ecosystem Projects, Fla. Dep't of Envtl. Prot. (Feb. 8, 2005).

87. Betsy Clayton, *Florida's National Treasure at Risk*, NEWS-PRESS (Fort Meyers, Fla.), Sept. 3, 2003, *available at* http://www.saveoureverglades.org/news/articles/news_atrisk.html.

88. FLA. STAT. ANN. §§ 373.0697, .4592, .503 (West 2005).

89. FLA. STAT. ANN. § 373.584(2) (West 2005).

90. *See* Memorandum of Agreement Regarding Acceleration of the Comprehensive Everglades Restoration Plan, Oct. 14, 2004, at 1–2, *available at* http://digbig.com/4rxys [hereinafter Acceler8 Agreement] (detailing Gov. Jeb Bush's strict financial planning for the project).

91. Press Release, Fla. Dep't of Envtl. Prot., DEP Project Director to Receive National Wetlands Award (May 9, 2001), *available* http://digbig.com/4rxyt.

92. Acceler8 Agreement, *supra* note 90, at 3.

with the Secretary of the Army permitting the prospect that Florida could be reimbursed for its accelerated expenses of state projects coordinated with the Corps's PIR processes.

Dennis Duke is a career civil servant with the U.S. Army Corps of Engineers, a senior figure in the restoration effort as familiar as anyone with each of CERP's many projects and programs. His official title is Restoration Program Division Chief, Restoration Program Division, of the U.S. Army Corps of Engineers, Jacksonville District.[93] In 2004, Duke was tasked with shaping the Corps's supporting role for the state's expeditionary force by guaranteeing federal personnel to work on priority Acceler8 tasks outside of their regular CERP duties and the normal bureaucratic structures of the Corps. In "eggs" comprised of experienced CERP personnel assigned to Acceler8 task forces, the Corps committed to achieving the state's expedited time schedules.[94] Mimicking military command structures, CERP leaders within the Corps were assigned to Acceler8. Within the Corps, Duke was said to have the authority of a "Tommy Franks" in reallocating personnel and resources to meet the needs of Acceler8. Through careful selection of the projects to be accelerated, the State of Florida may be able to avoid the kind of controversies that probably would have arisen had the focus been more controversial aspects of CERP such as the ASR or the Modified Waters Delivery problem.[95]

Ken Ammon became the face of the Acceler8 program within the SFWMD. As of June 2005, his official title in SFWMD is Deputy Executive Director, Comprehensive Everglades Restoration Program.[96] A senior engineer within SFWMD since 1991 and an important figure in CERP since its genesis, his new titles within SFWMD in 2005 coincided with his appointment as co-chair of the South Florida Ecosystem Restoration Working Group. The working group is the staff-level counterpart of the Task Force established in 1996, comprised of representatives of the major federal, state, local, and tribal entities with large stakes in the outcome.[97]

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93. U.S. Army Corps of Engineers, Jacksonville District, http://digbig.com/4rxyw (last visited Feb. 18, 2006).

94. *See* Minutes of Central Florida Regional Project Delivery Team Meeting, Oct. 27, 2004, at 2, http://digbig.com/4rxyx.

95. *See generally* South Florida Ecosystem Restoration Task Force, Combined Structural and Operating Plan (CSOP) Advisory Team, http://digbig.com/4sawa (last visited Feb. 6, 2006) (describing CSOP Advisory Team and CSOP as including the ASR/Modified Waters Delivery project).

96. Kenneth G. Ammon, Deputy Executive Director, Comprehensive Everglades Restoration Program, http://www.sfwmd.gov/gover/3_kammon.html (last visited Feb. 18, 2006).

97. S. Fla. Ecosystem Restoration Task Force, Working Group, http://digbig.com/4ryaa (last visited Mar. 8, 2006).

At the outset of the Acceler8 program, no elaborate public participation process similar to that devised under the Corps's Programmatic Regulations for CERP existed. The SFWMD decided to rely on the Water Resources Advisory Committee (WRAC), which reports to the SFWMD's Governing Board, to conduct public meetings and to handle public comments on preliminary technical documents on Acceler8 projects.[98] When Governor Bush terminated the Governor's Commission for a Sustainable South Florida shortly after taking office, the WRAC became the only state entity focused on Everglades issues with broad representation from most of the interested communities. The WRAC includes representatives from business, water supply utilities, environment/conservation, agriculture, public interest, local government, federal and state agencies, and tribal governments.[99] Nongovernmental entities have a seat at the table in the WRAC but not in the Task Force, Working Group, or the Corps's PDTs.

One major perceived advantage of Acceler8 had to do with the relative efficiencies of state and federal procurement processes. At a May 2005 conference sponsored by the American Water Resources Association, Col. Robert M. Carpenter, Commander and District Engineer, U.S. Army Corps of Engineers, Jacksonville District, contrasted the Corps as "Clydesdales" with the SFWMD as "thoroughbreds."[100] The larger, slower Corps presents the advantage of size and strength, but the svelte SFWMD can move more smoothly and quickly in its contracting processes. Unlike the Corps, the SFWMD could rely on private contractors to prepare project documents (e.g., the Basis of Design Report, or BODR, Acceler8's equivalent to the Corps's PIR). Contractors became a more visible public feature at the American Water Resources Association public conference on Everglades Restoration in May 2005, which focused on Acceler8, more than they had been at the First Annual Ecosystem Restoration Conference in Orlando the preceding December, which had focused on CERP's processes.[101]

Integration of the SFWMD's Acceler8 processes with the Corps's PIR process evolved throughout the first months of the Acceler8 program in 2004 and 2005 and continues as a major challenge today. Since neither the federal or state governments enacted legislation for the Acceler8 program, it was necessary to adapt the new mechanism within existing legal

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98. For an example of a WRAC Acceler8 presentation, see Tom Teets, PowerPoint presentation: Acceler8 Proposed Public Involvement Process for Basis of Design Reports (Jan. 6, 2005), *available at* http://www.sfwmd.gov/gover/wrac/ref_mat/acceler8_010605.ppt#1.

99. Water Resources Advisory Committee Members, http://digbig.com/4ryab (last visited Feb. 13, 2006).

100. Robert P. King, *Environmental Pros Gather at PGA on Everglades Revival*, PALM BEACH POST (Fla.), May 3, 2005, at 6B.

101. *Id.*

frameworks. Following precedents established when the Corps operated in a regulatory capacity over the SFWMD's pre-CERP construction of stormwater treatment areas, the Corps decided to focus its input into Acceler8 projects in connection with its approval of Clean Water Act section 404 "dredge and fill" permits.[102] Treating these permits as a federal action under NEPA, the Corps integrated the public participation processes ongoing in connection with the PIR process under CERP (and the accompanying NEPA analysis) with Acceler8. This ended up requiring expedition of the early stages of the PIR process under CERP for projects with Acceler8 components. Figure 1 depicts how the timelines and milestones for CERP projects with Acceler8 components are envisioned to relate. The two agencies are devoting considerable attention to this coordination.[103] Thus, in the May 10, 2005 meeting of the South Florida Ecosystem Restoration Task Force, the Corps presented PIR status reports on a number of CERP projects in an attempt to ventilate and deal with any policy or technical issues that might arise on Acceler8 projects.[104]

Both agencies continued to struggle with adaptation of notice and comment-public-participation procedures to a fast paced and rapidly changing process for the design of restoration projects. The SFWMD opted to schedule stakeholder meetings with those known to be interested in particular projects in advance of public meetings. By the time of the public meeting, the agency already had a series of issues developed to review with stakeholders with comment from the larger public. For its part, the Corps in its first PIRs opted for a more conventional series of supplemental reports and environmental impact statements to take into account issues arising from Acceler8's "carving out" of features of CERP projects for expedited construction. The Corps sometimes found it had to revisit premises or analyses in earlier drafts of similar documents generated before Acceler8.

The author's survey of events and public meetings scheduled at the end of 2005 revealed very little CERP decision-making activity such as public meetings in connection with the preparation of PIRs or PPDRs.[105] Instead,

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102. *See* 33 U.S.C. § 1344 (2000) (stating that permit will not be issued without notice and public hearing).

103. For some of the first Acceler8 projects, Ken Ammon reported during various meetings in 2005, after key decisions about the outline of an Acceler8 project were set, the increasing realization that Florida would have to abandon the prospect of federal reimbursement of the Acceler8 expenses in light of difficulties in integrating the PIR and Acceler8 decisions and plans.

104. *See* Dennis Duke Presentation to Task Force, May 10, 2005 (describing the presentation and the question addressed).

105. At the November 5 meeting of the South Florida Ecosystem Restoration Working Group, members of the Working Group estimated that the level of activity at the Corps in preparation of PIRs, PPDRs, and the like was less than half of the level that had existed a year earlier.

the key public involvement events that Fall (in between the various hurricanes, including Katrina, Rita, and Wilma, that struck the region) were almost entirely in connection with the Acceler8 projects that the SFWMD planned to undertake, and the key state decision-making documents in that program, e.g., the BODRs. The calendar for the WRAC within the SFWMD, in stark contrast to CERP's calendar, was extremely busy in late 2005.[106] The main exception was the decision by the Corps's Washington headquarters to approve the Jacksonville District's PPDR regarding Aquifer Storage and Recovery on October 21, 2005, almost nine months after the Report had been submitted.[107]

On the ground, it appears Acceler8 will be the main activity in Everglades Restoration for the next several years. The key mechanism for live public input into Everglades decision making is now through the WRAC, an arm of the SFWMD rather than the Corps, where public Project Delivery Team activity appears dormant. Instead of Corps-managed regional PDT meetings mandated in CERP's Programmatic Regulations to ventilate and potentially resolve policy disputes, the intergovernmental network returned to the South Florida Ecosystem Restoration Task Force and Working Group, if ever before there had been a departure of such a network. At the project level, therefore, the federal role in Everglades restoration seems to be shifting to regulation of the state's efforts though such mechanisms as the section 404 permit required for any dredging or filling of wetlands. The special administrative processes created for joint federal/state projects under CERP have become less relevant as federal appropriations have been delayed.[108]

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106. *See* S. Fla. Water Mgmt. Dist., Upcoming Meetings and Events, http://digbig.com/4ryac (last visited Feb. 11, 2006) (2005 events may be viewed by month by clicking "previous month" on initial calendar).

107. *See* BUTLER, *supra* note 83, at 6. Even in this area, however, it seems that the SFWMD decided to plow ahead with state funding of the Hillsboro ASR Pilot Project without waiting for a congressional appropriation. This project does not, however, appear to be a formal part of the Acceler8 initiative. *See* Pete Kwiakowski, PowerPoint presentation at the Lake Okeechobee Committee in Clewiston, Fla.: Aquifer Storage and Recovery in the Comprehensive Everglades Restoration Plan (CERP) (Sept. 28, 2005), *available at* http://digbig.com/4ryad ("Hillsboro ASR Pilot Project Using SFWMD ad valorem funds").

108. For details concerning some of the special problems with using federal environmental regulation to shape restoration projects, see Alfred R. Light, *Of Square Pegs, Round Holes, and Recalcitrants Lying in the Weeds: Superfund's Legal Lessons for Everglades Restoration*, 12 MO. ENVTL. L. & POL'Y REV. 91 (2005).

IV. TRENDS IN INTERGOVERNMENTAL RELATIONS POLICY IMPLEMENTATION RESEARCH

In his pessimistic little book of the 1960s, *The Symbolic Uses of Politics*, political scientist Murray Edelman wrote,

> What people get from government is what administrators do about their problems rather than the promises of statutes, constitutions, or oratory. Administrators have wide leeway in practice to respond to the interests of groups that can exert economic, political, moral, or organizational sanctions against them. In doing so, they are not "selling out"; they are simply taking the roles their organizational positions make them recognize as viable.[109]

To Edelman, elections and partisan politics bear little direct relationship to results on the ground compared to the actions of administrators. But the policy implementation process is seldom studied. Two scholars at Resources for the Future recently screened more than 1800 case studies of public participation in environmental decisions and carefully analyzed 239 of these cases.[110] They found a need for research on the "specific links between public participation and the political, legal, and social forces that drive implementation forward."[111] These scholars concluded that, "[r]esearchers need to broaden the scope of their analyses beyond the participation effort itself to the larger political landscape and historical context in which that participation occurs."[112] In other words, there is very little research about how public participation affects the implementation of environmental policy.

The changing role of citizen participation and the critical need for trust also has been a central theme of the field of risk communication. Much of the literature in this field began to address the problems with environmental decision making by euphemistically referring to two-way communication and urging more and earlier information exchange between the experts and the public.[113] Citizen participation was criticized as susceptible to capture similar to the way agencies have been captured by those regulated by the

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109. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 193 (1964).

110. THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 17 (Resources for the Future, 2002).

111. *Id.* at 77.

112. *Id.*

113. *See, e.g.*, Eileen Gay Jones, *Risky Assessments: Uncertainties in Science and the Human Dimensions of Environmental Decisionmaking*, 22 WM. & MARY ENVTL. L. REV. 1, 49–51 (1997).

agencies, with citizen participation filtering rather than opening public participation.[114] To improve citizen involvement in their decision making, environmental organizations at various times sought to develop deliberative, consensus-building institutions and processes and to affirmatively seek out public input.[115]

Political scientists who focus on federalism and intergovernmental relations have reached similar conclusions. Denise Scheberle's case studies of drinking water, asbestos, and radon, for example, emphasize that success in the implementation of environmental policy turns strongly on whether state and federal officials regard "each other with mutual trust, respect, and a shared sense of program goals."[116] Working relationships among federal and state administrators involved in implementing an environmental program are vital in explaining how intergovernmental programs work.[117] While extrinsic factors, such as political pressure, the nature of the environmental problem being addressed, and judicial interpretations of environmental statutes, can be important, intrinsic factors such as the role orientations of administrators, the relationship between the implementing agency and the regulated community, and mutual respect of state and federal administrators can also be critical.[118]

Some intergovernmental-relations research focuses upon the policy entrepreneurship of administrators. Administrators committed to the implementation of environmental programs confront serious obstacles. Without effective strategies, nothing is accomplished. Heroes in the "story of high-stakes politics" involved in policy implementation are the "'implementation energizers,' people who—often despite political and bureaucratic forces to the contrary—continue to fight for effective and efficient environmental programs."[119] Scheberle calls these energizers the "spark plugs of policy implementation."[120]

Public administration scholars, focused on how bureaucracy actually works, recently have begun to refer to the emerging process as governing by network.[121] In the real world, much of the work of government now is

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114. John S. Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decision Making*, 73 IND. L.J. 901, 920–21 (1998).

115. *Id.* at 952–57; *see* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 423–32 (2004) (discussing the concept of civic environmentalism, which seeks cooperation between agencies and the public).

116. DENISE SCHEBERLE, FEDERALISM AND ENVIRONMENTAL POLICY 1 (2d ed., rev. and updated 2004).

117. *Id.* at 2.

118. *Id.* at 205–09.

119. *Id.* at 2.

120. *Id.*

121. *E.g.*, STEPHEN GOLDSMITH AND WILLIAM D. EGGERS, GOVERNING BY NETWORK (2004).

actually accomplished not by individual government agencies but by "a web of partnerships, contracts, and alliances."[122] Governing by network arises in part from "increased citizen demand for more control over their own lives and more choices and varieties in their government services," a trend obviously a part of the citizen participation scholarship, and "the increasing tendency for multiple government agencies . . . to join together to provide integrative service," a trend obviously a part of the intergovernmental relations scholarship.[123] However, the emergence of third-party government, i.e., the use of private firms and nonprofit organizations to deliver services and fulfill policy goals, and the digital revolution, or e-government, which enables organizations to collaborate in real time with external partners, is also part of the evolution.[124]

Goldsmith and Eggers call the challenge of governmental responsibility in an era of networked government the "accountability problem."[125] Governance by network places a special premium on identifying interested individuals and groups, setting performance goals at the outset, seeking early input from potential or current network members and stakeholders, and pushing the goals down the network.[126] Again, a central key to success is trust among the participants, without which knowledge will not be shared and coordination is impossible.[127] Tying incentives to results rather than activities is critical, and a key tactic for managing the tension between flexibility and accountability is adaptive management, in which there is continuous feedback and evaluation during the program.

V. REFLECTIONS: SPARK PLUGS, POLICY NETWORKS, AND CERCLA PARALLELS

Several features of Everglades-restoration policy implementation are now apparent. Perhaps the most obvious has been the critical role of the implementation energizers, those referred to by Scheberle as the "spark plugs of policy implementation" in the context of an ongoing, intergovernmental-policy network.[128] Prior studies point to Richard Pettigrew and the Governor's Commission on a Sustainable South Florida

122. *Id.* at 6.

123. *Id.* at 10, 15–19; *see also* Lobel, *supra* note 115, at 423–32.

124. GOLDSMITH & EGGERS, *supra* note 121, at 10–14, 17–18.

125. *Id.* at 121.

126. *Id.* at 125–28.

127. *See id.* at 128 (stating that contract provisions alone are not enough to ensure network success).

128. SCHEBERLE, *supra* note 116, at 115–19.

as the reasons for the Florida Everglades-restoration consensus that led to CERP.[129] This was high-stakes politics, a politics of compromise akin to legislative consensus-building. The Commission reached out beyond the governmental players to include the key economic, environmental, and other actors in South Florida. Many of those we interviewed in 2003–2005 regarding Everglades restoration spoke wistfully of the Commission meetings where everyone participated.[130] In the view of many of these Florida activists, Governor Bush's termination of the Commission was a major policy blunder from which Everglades restoration continues to suffer.

Despite the continuing absence of such a Commission, policy implementation regarding Everglades restoration continues to be energized by public servants, committed to results, who have found innovative means to overcome serious political and bureaucratic obstacles.[131] Faced with the prospect of analysis/paralysis in CERP's administrative processes and a laborious, congressional-appropriations, decision-making process, restoration "spark plugs" such as Ernie Barnett convinced a conservative Republican governor to take Florida out ahead of federal commitments at considerable financial risk. Key members of the Everglades intergovernmental-policy network within the Corps, such as Dennis Duke, and within the SFWMD, such as Ken Ammon, energized the Acceler8 process to show progress on the ground despite the innumerable bureaucratic challenges of overlaying Corps decision making with a new, accelerated, state-funded process. Without their attention to effective strategies, little progress would have been likely, and their attempt to have the strategies take advantage of the emergence of third-party government makes it likely that this case will be of continuing interest to students of public administration.

Everglades restoration provides an excellent example of Goldsmith and Eggers's phenomenon of "Governing by Network." The reasons for breakdown of the Corps's PDT process and the development of Acceler8 are illuminated by their perspectives regarding effective public management. CERP's PDT process reflects what they call "[t]he traditional, hierarchical model of government . . . that operate[s] with

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129. *See supra* notes 13–20 and accompanying text.

130. *Id.*

131. That the energizers of policy implementation were career civil servants should come as no surprise to those familiar with Professor Lewis's recent study. David E. Lewis, Political Appointments, Bureau Chiefs and Federal Management Performance 12–13 (Sept. 2005), *available at* http://digbig.com/4ryae. Professor Lewis finds that career managers consistently obtain better management grades than political appointees. *Id.* at 26. Careerists are the most likely to have worked in the bureau they manage, they have the most public management experience, and they have the longest tenures in their current positions. *Id.*

command-and-control procedures, narrow work restrictions, and inward-looking cultures."[132] Acceler8, while bowing to some legal requirements that call for adherence to the hierarchical format, seems more congruent with the policy-by-network approach that these social scientists perceive.

Goldsmith and Eggers argue that "[t]he success or failure of a networked approach can often be traced to its original design."[133] In a number of respects, CERP resembles the EPA's hazardous waste-site cleanup program in its overall design. CERP's congressional designers failed to learn from the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) experience. Both CERCLA and CERP were envisioned to develop restoration projects from a centralized plan, the National Contingency Plan and the Comprehensive Everglades Restoration Plan respectively. Though Congress directed both programs to devise detailed regulations for implementing these plans and required frequent overview reports, agency efforts to bring together the "policymaking" and "project" features of the program stumbled.

Acceler8 addresses one of the obvious design flaws that also bedeviled CERCLA. Adherence to a mathematical, cost-sharing formula predictably inhibits efficiency in restoration decisions. Matching requirements for federal or state grants inhibit rather than encourage intergovernmental cooperation. Under CERCLA in the 1980s, the EPA found that state-matching requirements inhibited the agency's use of the remedial action program, causing the agency to focus its efforts on emergency and small, planned removal actions that could be financed entirely from federal funds without a state-matching requirement.[134] Later, when strapped for funds, the EPA developed a deferral policy under CERCLA in which states were permitted to take the lead on cleanup of facilities within their jurisdiction under state authorities where states were willing.[135] In CERP, the 50/50 requirement initially caused unnecessary delay in project construction and frustrated program managers' desire to show progress on the ground in Everglades restoration. In Acceler8, Florida offered a strategy similar to EPA's deferral policy, in which it volunteered to take the lead on aspects of CERP projects that both the Corps and SFWMD agreed could be

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132. GOLDSMITH & EGGERS, *supra* note 121, at 7.

133. *Id.* at 91.

134. The cost-sharing provisions of CERCLA, some might argue, were inserted to give states a veto over remedial-action decisions, not primarily to spread costs. In this view, the EPA's failure to confer with states and citizens, particularly prior to the 1986 amendments to the statute, accounted for the early delays in making progress on the ground.

135. *See generally* ALFRED R. LIGHT, CERCLA LAW AND PROCEDURE § 5.2.4.3, at 160–62 (1991) (explaining CERCLA-deferral-policy process).

accelerated in advance of federal funding of the overall project. As federal taxes for the Superfund expired in the late 1990s, the importance of the federal program in remedying hazardous waste sites similarly declined, as state brownfields initiatives and redevelopment programs became more important to cleanup on the ground. The same may be occurring now with respect to Everglades restoration, as federal deficits and other demands related to hurricane relief delay federal funding of the effort. States may proceed, with some limited federal oversight, so long as they are willing to finance their program.

Public-participation requirements provides another example of a design flaw. In the 1980's, CERCLA's unrealistic expectations regarding the capacity of those affected by hazardous waste sites to participate in remedy selection eventually led to the funding of Technical Assistance Grants (TAGs) and the creation of technical advisory committees (TACs) and other mechanisms for assisting citizens to develop the capacity to meaningfully assess scientific and technical documents.[136] Similarly, the Corps's effort to devise a uniform public-participation procedure for many PIRs complicated the process to adapt to the realities of community and stakeholder capacity to attend meetings and meaningfully review technical reports.[137]

In the case of CERP, the Corps created an unworkable approach to the solicitation and incorporation of public input into its restoration projects. While the Corps acknowledged its consultative and coordinating responsibilities through existing intergovernmental mechanisms (e.g., Task Force and Working Group), it did not integrate these mechanisms with its project-implementation process. Instead, the Corps resorted to a notice and comment format that treated all governmental and nongovernmental entities outside the two core partners (the Corps and SFWMD) as outside commenters rather than as active participants in decision making. A

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136. *See* U.S. Envtl Prot. Agency, Technical Assistance Grants (TAGs), http://digbig.com/4ryaf (last visited Feb. 18, 2006) (describing the TAG program and its policy goals).

137. A possible additional area of comparison between CERCLA and CERP, not discussed here, regards the relative peripheral role of national environmental organizations in the restoration effort. In CERCLA, environmental groups played a considerable role at the legislative policy level but lacked the resources or will to participate in the development of specific remedial actions. Our survey of RODs and the administrative records behind them for South Florida finds little reference to any of the national environmental organizations. Similarly, though national environmental organizations participated in CERP and subsequent legislative processes, the organizations lack either the capacity or the will to participate in specific CERP projects with the notable exception of the Florida Audubon Society. Even though nongovernmental organization (NGO) participation has shaped the direction of CERP, in the rare circumstance where such organizations have involved themselves and made their case to the agency, this has been the case (e.g., Audubon's call for a "buffer" between the Everglades natural system and urban development).

principal pitfall in network design is breaking up a program into smaller contracts "when the program requires close integration."[138] By breaking CERP into a large number of discrete projects, the Corps made public participation in decision making virtually impossible. From this poor design in its Programmatic Regulations, the Corps has not yet fully realized its goals of public input.

Notice and comment-public-participation procedures work poorly in addressing technical issues likely to emerge in restoration projects. Under CERCLA, the EPA often found itself dividing large remedial-action projects into sequenced operable units, since later stages of the project depended on the resolution of issues and operating performance of earlier stages. Instead of one ROD, the same site produced many RODs over a period of years. Similarly, in the first CERP projects to "move dirt" under Acceler8, the Corps and the SFWMD have found the need for a sequenced approach, e.g., test cells for reservoir projects, pilot projects for aquifer storage and recovery projects, and modeling improvements for operating problems. The belief that a large multimillion-dollar CERP project can grow out of one PIR is again proving infeasible.

Law Professor J.B. Ruhl has called this the "disconnect" between environmental assessment and adaptive management.[139] "The central premise of environmental decision-making is that through expert agency policy analysis, thrashing public notice and comment and hard look judicial review, we can predict what is going to happen in the future, make a decision about what to do and not have to look back."[140] The concept of adaptive management, expressly endorsed in CERP, requires the ability to make adjustments, but notice and comment requirements, such as those envisioned under NEPA, exposes the agency "to litigation risks over environmental assessment compliance."[141] The complex, jerry-rigged, public-participation processes of Acceler8 and the departure of the Corps from its own PDT public-participation requirements in connection with PIRs and PPDTs clearly present such litigation risks today. The crafters of Acceler8 deliberately chose to take those risks rather than defer restoration progress on the ground.

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138. GOLDSMITH & EGGERS, *supra* note 121, at 91.

139. *See* Ruhl, *supra* note 4, at 1 ("[I]t has become monumentally difficult for agencies to adjust their decision without gearing up the full-blown decision-making process.").

140. *Id.*

141. *Id.* at 14.

Moreover, the need for informal and early stakeholder involvement to develop trust between the agency and outside interests has become obvious. Frequently, under CERCLA, agency processes ended up being duplicated—by potentially responsible parties developing technical solutions for legal settlement purposes and by Army Corps of Engineers and other response managers, in remedial design after the EPA's remedial action selection had been completed. Under CERP, the Corps and the SFWMD devoted intense effort to eliminating redundancy by assigning the same task to the same individuals within the duplicative contexts (PIR, Acceler8, NEPA). By mid-2005, however, the potential that stakeholders such as local governments might undermine CERP decisions through land use or development decisions was becoming increasingly obvious. In 2006, the State of Florida took one of the first steps to prevent this, when Florida DEP Secretary Colleen Castille and SFWMD Executive Director Carol Ann Wehle told the Miami-Dade County Commission that Florida was denying the County's application for a consumptive use permit that contemplated additional water for municipal purposes from the Everglades.[142] The SFWMD's decision to use its WRAC, where these stakeholders at least have a seat at the table, to manage the intergovernmental consensus necessary to proceed on individual Acceler8 projects may be signaling this recognition.

One of the aspects of "Governing by Network" that the Corps had appeared to be getting right was the extensive use of the tools of "the digital revolution" to collaborate in real time and to inform the public in ways previously not possible.[143] By posting materials on the Everglades-restoration website, including read-ahead materials for key meetings, minutes of past meetings, and all documents needing external input, the Corps seemingly embraced this trend. The use of web casting of PDT meetings, with the assistance of the SFWMD, also exemplified the real-time collaboration advantages of this technology. Nonetheless, as the Corps retreated from its use of PDT meetings with public input, it also began to edit its website to remove certain materials associated with the prior collaboration among civil servants and the public. Members of the broadly defined public, which had been relying on the website, began to complain about the Corps's failure to keep webpages for a particular project updated in a timely manner to reflect developments.[144] Activists seeking to

142. *See* Editorial, *The End of South Florida's Free Ride on Everglades Water*, MIAMI HERALD, Jan. 29, 2006.

143. *See* GOLDSMITH & EGGERS, *supra* note 121, at 10, 17.

144. This particular complaint was made several times during the public comment period at the November 5, 2005, meeting of the South Florida Ecosystem Restoration Working Group, which

obtain information about such developments via the Internet now may be more likely to turn to websites for the Acceler8 program, part of the SFWMD's extensive website, or to the Task Force and Working Group, rather than to the Corps's site.[145]

Since Everglades restoration is proceeding by network decision making, it also presents the "accountability dilemma" that Goldsmith and Eggers diagnose, i.e., the difficulty in assigning responsibility when something goes wrong or credit when something goes right where a network rather than a single agency or entity is making the decision. One pitfall to which they point is cherry picking or "creaming," in which managers pick the "easiest cases" to implement in order to look better.[146] Florida did, after all, pick the CERP restoration projects, or portions thereof, that it chose to accelerate while more difficult and complex projects were left to the PIR process. There is some indication that the risks of litigation or administrative hurdles have increased since decision making shifted from the Corps's PIR process to Acceler8.[147] But it is still too early in the Acceler8 program to know whether this is the case.

VI. CONCLUSION

Unlike the hero of CERP's creation, Richard Pettigrew, a political appointee, the heroes of CERP implementation–Ernie Barnett, Dennis Duke, and Kenneth Ammon–are career public servants. Indeed, it is the length and depth of their experience with restoration that seems to have provided the particular wisdom, commitment, and persistence that accounts for the Acceler8 innovation. What is clear is that without their participation, the acceleration of Everglades restoration would not now be happening. The strategies they developed are causing the implementation of Everglades restoration to unfold on their own terms. Their Acceler8 initiative is designed to overcome or avoid serious obstacles to restoration such as congressional delays in appropriations and a ponderously slow federal process for making project decisions and procuring construction.

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continued to be webcast after the Corps's decision in October 2005 to abandon public inputs into PDTs. *See supra* notes 58–60 and accompanying text.

145. This has been true of the research project that underlies this Article. In editing a draft of this Article for my fellow panelists in November 2005, the author found that the Corps had removed some of the Internet links to materials previously researched, such as minutes of the regional PDT meetings. The links set forth in the footnotes to this Article may not continue to exist.

146. GOLDSMITH & EGGERS, *supra* note 121, at 134.

147. For example, at the November 5, 2005, meeting of the Working Group, Richard Harvey, representing the U.S. EPA politely threatened to veto the section 404 permit for the C-43 Reservoir Acceler8 project if the agency's concerns over water quality were not addressed within the next thirty days.

Whether public involvement in the state's Acceler8 program will mark improvement over the process under CERP that had begun to falter remains unclear, as the Acceler8 process continues to evolve.