

DEPARTMENT OF DEFENSE**Department of the Army, Corps of Engineers****33 CFR Part 385****RIN 0710-AA49****Programmatic Regulations for the Comprehensive Everglades Restoration Plan****AGENCY:** Army Corps of Engineers, DOD.**ACTION:** Final rule.

SUMMARY: The Army promulgates this final rule to establish programmatic regulations for the Comprehensive Everglades Restoration Plan. Congress approved the Comprehensive Everglades Restoration Plan in section 601 of the Water Resources Development Act of 2000, which was enacted into law on December 11, 2000. The Act requires the Secretary of the Army to promulgate programmatic regulations to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan are achieved. We have developed this final rule in response to that statutory requirement. The rule establishes processes and procedures that will guide the Army Corps of Engineers in the implementation of the Comprehensive Everglades Restoration Plan.

Today's action completes a rulemaking that began on August 2, 2002 with the publication of proposed regulations. The final rule contains a number of revisions that respond to public comments on the proposed regulations.

DATES: This rule is effective December 12, 2003.

FOR FURTHER INFORMATION CONTACT: Stu Appelbaum, Corps of Engineers, Jacksonville District, at the above address by telephone (904) 232-1877, or by fax (904) 232-1434. You may also access the programmatic regulations Web page at: http://www.evergladesplan.org/pm/progr_regs.cfm/.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 601(h)(3) of the Water Resources Development Act of 2000, Public Law 106-541 (114 Stat. 2688) (hereinafter "WRDA 2000") requires the Secretary of the Army, after notice and opportunity for public comment, to promulgate regulations to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan (the Plan) are achieved. These final

regulations fulfill this requirement and establish the administrative structure for carrying out the Plan.

The programmatic regulations establish a process: for the development of Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals that will ensure that the goals and the objectives of the Comprehensive Everglades Restoration Plan (CERP) are achieved; to ensure that new information resulting from changes or unforeseen circumstances, new scientific or technical information or information that is developed through the principles of adaptive management contained in the Plan, and future authorized changes to the Plan will be integrated into the implementation of the Plan; and, to ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals to provide a means by which the restoration success of the Plan will be evaluated throughout the implementation process.

The programmatic regulations recognize that the Everglades are a critical national resource in which the public has an important interest. Restoration of the Everglades involves many complicated issues involving ecosystem restoration, other water-related needs of the region, novel scientific and technical information and technology, and adaptive management. The final regulations envision a comprehensive process to involve the public, and the agencies that represent them, in important decisions involved in implementing the project.

In general, the programmatic regulations envision that the goals and purposes of the Plan will be achieved through the development of project-specific and system-wide measures. Project specific measures include but are not limited to Project Implementation Reports, Project Cooperation Agreements, Pilot Project Technical Data Reports, and Operating Manuals. The more generally applicable system-wide measures include, but are not limited to, the development of guidance memoranda, the Master Implementation Sequencing Plan, interim goals for evaluating the restoration success of the Plan, and interim targets for evaluating progress towards achieving other water-related needs of the region, including water supply and flood protection. The interim goals for evaluating the restoration success of the Plan and interim targets for other water-related needs are of special significance. They establish incremental targets to evaluate progress toward the expected level of

performance of the Plan and are used to monitor overall progress toward meeting the goals and purposes of the Plan.

Taken together, the project specific and system-wide measures form the foundation of the Plan and are critical to the successful restoration of the South Florida ecosystem.

The South Florida ecosystem is a nationally and internationally unique and important natural resource. It is also a resource in peril, having been severely affected by human activities for over a hundred years. The Central and Southern Florida Project extends from south of Orlando to the Florida Keys and is composed of a regional network of canals, levees, water storage areas, and water control structures. First authorized by Congress in 1948, the project serves multiple objectives. The objectives of the project include flood control, regional water supply for agricultural and urban areas, prevention of salt water intrusion, water supply to Everglades National Park, preservation of fish and wildlife, recreation, and navigation. While fulfilling these objectives, the project has had unintended adverse effects on the unique natural environment that constitutes the Everglades and South Florida ecosystem. In 1996, the Army Corps of Engineers was directed to develop a comprehensive plan to restore, preserve, and protect South Florida's natural ecosystem while providing for the water-related needs of the region, including flood control, the enhancement of water supplies, and other objectives of the Central and South Florida Project. The resulting plan, which was submitted to Congress on July 1, 1999, is called the Comprehensive Everglades Restoration Plan.

The overarching goal of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, such as flood protection and water supply. As submitted to Congress, the Plan contained 68 major components that anticipated the creation of approximately 217,000 acres of reservoirs and wetland-based water treatment areas, wastewater reuse plants, seepage management, and the removal of levees and canals in natural areas. These components vastly increase storage and water supply for the natural system, as well as for urban and agricultural needs, while continuing to fulfill the original objectives of the existing Central and Southern Florida Project. The Comprehensive Everglades Restoration Plan will restore more natural flows of water, including sheet flow; improve water quality; and

establish more natural hydroperiods in the South Florida ecosystem. Improvements to fish and wildlife habitat, including those that benefit threatened and endangered species, are expected to occur as a result of the restoration of hydrologic conditions. This will promote the recovery of native flora and fauna, including threatened and endangered species.

In enacting section 601 of WRDA 2000, Congress approved the Comprehensive Everglades Restoration Plan as a framework for modifications to the Central and Southern Florida Project. Section 601 of WRDA 2000 contains a variety of provisions associated with implementation of the Comprehensive Everglades Restoration Plan, including an authorization for the construction of four pilot projects and ten initial projects of the Comprehensive Everglades Restoration Plan.

Section 601(h) of WRDA 2000 states, "the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection." This section directs that the Plan be implemented to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida Ecosystem. Implementation of the Plan also seeks to achieve and maintain the benefits to the natural system and human environment described in the Plan.

Section 601(h)(2) of WRDA 2000 requires the President and Governor to enter into a binding agreement ensuring that the water generated by the Plan will be made available to the natural system. The President and Governor signed this agreement on January 9, 2002. The agreement specifies that the State will ensure by regulation, or other appropriate means, that water made available by each project in the Plan will not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the Project Implementation Report for that project and consistent with the Plan. This agreement also specifies that the State will monitor and assess the continuing effectiveness of reservations as long as the project is authorized in order to achieve the goals and objectives of the Plan.

Section 601(h)(3) of WRDA 2000 requires that the Secretary of the Army,

after notice and opportunity for public comment, and with the concurrence of the Governor of Florida and the Secretary of the Interior, and in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and other Federal, State, and local agencies, issue programmatic regulations within two years of the date of enactment of WRDA 2000 to ensure that the goals and purposes of the Plan are achieved. This regulation is promulgated in furtherance of these statutory requirements.

Section 601(h)(4) of WRDA 2000 describes the project specific assurance requirements for Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals. Finally, section 601(h)(5) contains a savings clause that provides protection for existing legal sources of water that will be eliminated or transferred due to project implementation and provides for maintenance of the levels of service for flood protection that were in existence on the date of enactment of WRDA 2000 and in accordance with applicable law.

II. Process for Developing the Programmatic Regulations

The Department of the Army developed the programmatic regulations through an open and inclusive process that involved numerous meetings, briefings, and discussions with other Federal, State, and local agencies; the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida; agricultural, environmental, urban utilities, recreational, and urban interest groups; and the public. Briefings on the programmatic regulations were provided to the Governing Board of the South Florida Water Management District and its Water Resources Advisory Commission and the South Florida Ecosystem Restoration Task Force and its Working Group. In addition, programmatic regulations web pages were developed and posted on the Comprehensive Everglades Restoration Plan web site (www.evergladesplan.org). The web site was used to disseminate information about the programmatic regulations and to provide a place for individuals and organizations to submit comments electronically during the development of the programmatic regulations. This was designed to identify the major concerns of the agencies and various groups, prior to publishing the proposed regulations and soliciting formal public comment.

The Army held an opening round of meetings with agencies, interest groups,

and the public in May and June 2001. The purpose of these meetings was to discuss the process that would be used to develop the programmatic regulations and to solicit comments on the major issues and concerns that should be addressed in developing the regulations.

Following this initial round of meetings, the Army developed a draft outline of the programmatic regulations. We then held a second round of meetings in September and October 2001 with agencies, interest groups, and the public to solicit comments on the outline. We also consulted with the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida, and sought their comments on the draft outline.

After the second round of meetings, we developed an initial draft of the programmatic regulations. We distributed this initial draft to the public on December 28, 2001, and allowed informal public comment until February 15, 2002. We then held meetings with agencies, tribes, and interest groups, to discuss the initial draft. We also received written comments on the initial draft that were posted on the programmatic regulations web site. In addition, the Water Resources Advisory Commission formed a subcommittee on the programmatic regulations. The subcommittee met several times to discuss issues concerning the initial draft and potential ways of addressing these issues. The South Florida Ecosystem Restoration Task Force also met several times after the release of the initial draft to discuss the programmatic regulations.

The proposed rule was published in the **Federal Register** on August 2, 2002 and the public was allowed to submit comments on the regulations until October 1, 2002. During the comment period, we held a public meeting in Miami on September 10, 2002 and a public meeting in West Palm Beach on September 19, 2002. We also consulted with the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida and held a number of informal meetings with interested groups. The comments submitted on the proposed rule and the transcripts of the two public meetings were posted on the programmatic regulations web site after the close of the public comment period.

On February 6, 2003, the Council for Environmental Quality hosted a public meeting in Washington. The purpose of the public meeting, which was facilitated by the Council on Environmental Quality, was to provide an opportunity for interested parties to clarify comments filed on the proposed rule. Representatives of the Department

of the Army, the Department of the Interior, and the State, as well as representatives of other Federal agencies were in attendance to listen to these views. Additionally, the meeting afforded attendees an opportunity to engage directly with each other. This open dialogue was especially useful in developing a thorough understanding of the parties' views.

This final rule was developed after considering all of the information received at the meetings, as well as written comments that were received from agencies, interest groups, and the public.

III. Discussion of Final Rule

We received approximately 820 comments on the proposed regulations issued on August 2, 2002. Of these comments, approximately 800 were individual or form letters from the public. In general, these letters requested that the proposed regulations be revised to: give the Department of the Interior a greater voice in approving CERP documents and participating in RECOVER; to strengthen the independence of the independent scientific review panel to ensure that its reviews are objective, and to incorporate the interim goals in the final regulations. We also received approximately 25 letters from various types of organizations, members of Congress, Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida, and the Seminole Tribe of Florida. These letters included detailed comments on the recommendations and specific proposals for revisions in a number of areas.

All of the comments were generally supportive of the effort to issue final regulations. We have carefully considered all of these comments in developing today's final rule. The following paragraphs include a description of the significant issues raised by these comments and a discussion of how these issues were addressed in the final regulations. In reviewing these comments, we sought to reconcile different points of view and to find consensus solutions to common concerns. In a few instances this was not possible because the parties simply held diametrically opposing views. In these instances, our decisions on proposed revisions were guided by our judgment as to what would best fulfill Congressional intent with respect to the goals and purposes of CERP. The final rule remains similar to the proposed rule in organization and structure, but contains the substantive and editorial changes that were made to address the

issues raised by the comments. The Army is confident that these final programmatic regulations provide an excellent framework for the implementation of CERP as envisioned by Congress.

IV. Discussion of Comments

A. Amount of Detail in the Proposed Regulations

A number of commenters shared their views on the appropriate level of detail that should be contained in the regulations. Some commenters believed that the programmatic regulations should be very detailed and directive in terms of specific procedures and outcomes. Others believed that the programmatic regulations should be process-oriented and provide a general framework for implementing CERP. A few of these commenters also expressed concern that the Federal regulations not infringe on the sovereignty of the State of Florida or its right to allocate its water resources. Others sought to ensure that the regulations safeguard the Federal interest and investment in restoration, preservation, and protection of the South Florida ecosystem, including Federal properties within South Florida, such as national parks and wildlife refuges.

The final regulations attempt to recognize these diverse views. We made a number of changes to the proposed rule in order to clarify the procedures and processes specified in the regulations to ensure that the goals and purposes of the Plan are achieved. As in the proposed rule, the final regulations also call for the development of detailed guidance memoranda in the future to specifically address issues of system-wide import. In striking a balance between process and specificity, we strove to address those matters that could be specifically dealt with now while avoiding being so prescriptive that we would lose the flexibility to respond to new technical and scientific information revealed during implementation of the Plan.

B. Guidance Memoranda

A number of commenters raised concerns about the guidance memoranda described in the proposed regulations. These concerns varied but, in general, related to either the substantive matters addressed in the guidance memoranda or the process for finalizing the guidance memoranda. Some commenters felt that the concurrence provisions contained in the proposed regulations would delay finalizing the guidance memoranda. Others felt that the concurrence

provisions in the proposed regulations did not give the Secretary of the Interior or the Governor of Florida an appropriate role in approving the guidance memoranda because it appeared that the Secretary of the Army could finalize these documents after giving good faith consideration to comments from the Department of the Interior and the Governor, notwithstanding the fact that either or both officials had concerns about finalizing the regulations.

Some commenters believed that the scheduled completion dates for developing the guidance memoranda were unrealistic and should be changed. Others expressed the view that issues addressed in the guidance memoranda should be covered in the programmatic regulations. In addition, they were concerned that the guidance memoranda did not have the same legal status as the programmatic regulations and thus would not have the same legal import. These commenters stated that if the material intended for inclusion in the guidance memoranda was not included in the final rule then the guidance memoranda should be included in the programmatic regulations at the next revision. Several commenters also believed that the proposed regulations gave an inappropriate role to the South Florida Water Management District in the development of the guidance memoranda. One commenter requested that an additional guidance memorandum be developed to provide a procedure for determining if implementation of a project will cause the elimination or transfer of existing legal sources of water. The Seminole Tribe commented that "existing legal source" of water is a new concept not found in Florida statutes or regulations. The Tribe requested that the programmatic regulations set up a process for defining "existing legal source" of water and addressing how an "existing legal source" of water would be replaced to comply with the savings clause.

The comments reflected a difference of opinion with respect to whether certain issues should be addressed in the guidance memoranda or the programmatic regulations and whether the Department of the Interior and the Governor of Florida should have concurrence over the guidance memoranda, as they do with regard to the programmatic regulations. Some of the commenters believe that the issues that are proposed for discussion in the guidance memoranda should be included in the regulations because they cover processes and matters of system-

wide applicability. Alternatively, they believe that if guidance memoranda must be developed, they should later be incorporated into the regulations. These commenters believe that for these reasons the Secretary of the Interior and the State of Florida should have a concurrence right in the guidance memoranda regardless of whether the guidance memoranda are included in the regulations. Other commenters expressed the view that guidance memoranda should not be included in the regulations because they address technical or detailed matters instead of the system-wide procedural matters Congress intended would be addressed in the programmatic regulations. These commenters believed that it would be inappropriate to give the Secretary of the Interior and the Governor of Florida a concurrence right over these documents because the statute authorizing CERP provides for concurrence in the programmatic regulations only.

The final regulations contain revisions in response to these comments. In attempting to address the views of those who commented that the Secretary of the Interior and Governor of Florida should be given a greater role in the development of the guidance memoranda and that the South Florida Water Management District had an inappropriate role in developing the guidance memoranda, the final rule clarifies that the South Florida Water Management District and the Corps of Engineers work together in developing the guidance memoranda but the final approval is by the Secretary of the Army, after public notice and comment and with the concurrence of the Secretary of the Interior and the Governor of Florida. We believe that this change in the regulations assures that the South Florida Water Management District plays an important role in the development of the guidance memorandum, but preserves the ability of the Secretary of the Army to make a final decision on the guidance memorandum with the concurrence of the Secretary of the Interior and the Governor.

The approval process for the guidance memoranda parallels the statutory concurrence process for the programmatic regulations. We deleted the language in the proposed regulations that said the Army would give "good faith consideration" to the concurrence or non-concurrence statements of the Secretary of the Interior and the Governor before approving the guidance memoranda. Our intent is to issue guidance memoranda that have been concurred in by the Secretary of the

Interior and the Governor. We agree that the old language in the proposed regulations did not communicate adequately this intent. Instead, it suggested that the Army simply had to fulfill a ministerial coordination requirement by asking the Secretary of the Interior and the Governor whether they concurred or non-concurred in the guidance memorandum. This language did not convey the Army's intent to actively seek the concurrence of the Secretary of the Interior and the Governor prior to approving the guidance memoranda. The new language gives the Secretary of the Interior and the Governor the same concurrence opportunity they have on the programmatic regulations and assures that they have an appropriate role in the Department of the Army's adoption of these important documents. While concurrence or non-concurrence on the six guidance memoranda in § 385.5(b) is not required by law and will require additional time to fulfill, we believe it is appropriate to provide for this process because of the significance of these documents.

We believe that the public should have an opportunity to review and comment on the guidance memoranda because of their significance. Accordingly, the final regulations state that the public will be advised by notice in the **Federal Register** when the guidance memoranda are ready for review and comment. The final rule requires that the guidance memoranda should be developed within a year of the effective date of the programmatic regulations with the concurrence of the Secretary of the Interior and the Governor.

We have determined that the guidance memoranda should not be included in the programmatic regulations at this time for several reasons. First, they are still being developed, second, they will be very technical, and third, they will provide internal guidance to the agencies implementing CERP. This decision is consistent with the view of commenters who felt that including the guidance memoranda in the programmatic regulations was incompatible with structured, formal rule-making processes. These commenters felt that rulemaking processes would not accommodate recurring revisions to published technical documents, like the guidance memoranda, which will require periodic changes to accommodate new information. These commenters were concerned that if guidance memoranda were included in these regulations, every revision of them would require us to initiate a

rulemaking process. While we determined that the guidance memoranda should not be included in the programmatic regulations at this time, we preserve the opportunity to include the guidance memoranda in the programmatic regulations during the next review and revision of the programmatic regulations.

The final regulations no longer contemplate that a separate guidance memorandum will be developed for the system-wide evaluation of Project Implementation Report alternatives by RECOVER. We concluded that this subject should be addressed in the guidance memorandum for the formulation and evaluation of alternatives for Project Implementation Reports and that a separate guidance memorandum on this subject was unnecessary.

The final regulations also require the development of an additional guidance memorandum that will be used by agency personnel to identify if an elimination or transfer of "existing legal sources of water" will occur as a result of implementation of the Plan. This guidance memorandum will ensure the fulfillment of the savings clause requirements of section 601 (h)(5)(a) of WRDA 2000 that are designed to ensure that "existing legal sources of water" are preserved. There was general agreement among commenters that a definition is required for the phrase, "existing legal sources of water" but there was wide disagreement among the commenters about what the phrase actually means or who determines what an "existing legal source of water" is. The term is not defined in WRDA 2000 or elsewhere in Federal or Florida State law. Some commenters felt the term should include all water in the South Florida ecosystem that was not discharged to tide at the time WRDA 2000 was enacted. Other commenters emphasized that the term used in the statute, "existing legal sources" is a broad term which indicates that all water in the South Florida ecosystem should be covered by the requirements of the savings clause. Several commenters felt that the determination of what constitutes an "existing legal source of water" is not a decision for the Secretary of the Army to make. They argued that the Secretary of the Army should defer to the State of Florida on this issue because the determination of what constitutes an existing legal source of water involves a matter of state law. The new guidance memorandum contemplated in the regulations will establish procedures for identifying what constitutes "an existing legal source of water" and for determining

when an existing legal source of water has been eliminated or transferred.

C. Goals and Purposes of the Plan

The comments reflected different views on the goals and purposes of the Plan. A number of commenters felt the proposed regulations did not place enough emphasis on the restoration objectives of the Plan and recommended that the regulations be revised to clearly state that the restoration objectives of the Plan are a priority. Another commenter believed that the language in the proposed regulations concerning the goals and purposes of the Plan was vague. This commenter suggested that the language be replaced with the description of the goals and objectives of the Plan contained in the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." Finally, several commenters believed that the regulation should include all of the goals and purposes of the Plan, including providing for other water-related needs of the region.

To respond to these comments we have included a definition of the goals and purposes of the Plan in the final regulations that follows the language of WRDA 2000. This definition specifies that the overarching goal of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. We believe the open and collaborative process set forth in these regulations for the implementation of the Plan provides the greatest assurance that all the goals and the purposes of the Plan will be achieved. This regulation emulates the successful, open and collaborative process that produced the Comprehensive Everglades Restoration Plan and we are confident that these same processes will ensure that the goals and purposes of the Plan are fulfilled as intended by Congress.

Several commenters also expressed the view that the proposed regulations should not have tied performance of the Plan, and particularly the development of interim goals, to the model run identified as D-13R in the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." These commenters maintained that implementation modeling conducted after completion of the feasibility report demonstrated the potential for improving the Plan with regard to the restoration of the ecosystem.

We have removed the references to D-13R in the final regulations because we agree that it may be possible to produce

ecosystem restoration benefits beyond those contemplated in D-13R. We will further evaluate the performance of the Plan in accordance with the adaptive management provisions of the regulations to determine whether it is possible to realize any improvements in the performance of the Plan with regard to ecosystem restoration while providing for other water-related needs of the region. We will make adjustments to the Plan to the extent these improvements can be realized consistent with the overall goals and purposes of the Plan. As indicated, we have deleted the reference to D-13R in the hope that it may be possible to improve the Plan's performance with respect to ecosystem restoration consistent with the statutory and budgetary framework approved by Congress.

D. Defining Restoration

Several commenters expressed concern about the definition of restoration contained in the proposed regulations. Some commenters felt that restoration should be defined in terms of hydrologic and ecologic targets, not the level of performance contained in the April 1999 Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" as was contemplated in the proposed regulations. They believe that implementing the Plan in accordance with hydrologic and ecologic targets, and making adjustments as necessary through adaptive management, is a more effective way to ensure that system-wide restoration occurs. In particular, the Everglades Coalition commented that, " * * * the yellow book provides only a framework for restoration, and does not clearly describe the essential ecological characteristics of a sustainable restored Everglades. * * * It is necessary to keep the definition of restoration * * * based on ecological necessity and not anticipated performance. This structure is necessary for the adaptive management process to be successful in making meaningful improvements to the plan." Another commenter stated that the definition of restoration must clearly specify that restoration is "an absolute priority above all others."

Other commenters expressed the view that the definition of restoration must take into account certain relevant provisions of WRDA 2000. These commenters point out that the purpose of the Plan was not to provide for the restoration of the South Florida ecosystem without regard to other considerations. They note that restoration is not an open-ended abstract term; WRDA 2000 states that

the Plan must take into account "the other water-related needs of the region," and contains a prohibition against eliminating or transferring "existing legal sources of water" until new sources of water of comparable quantity and quality are available to replace the water that is lost as a result of implementation of the Plan. These commenters pointed out that the definition of restoration must recognize that Congress authorized the Plan as a framework for restoring the South Florida ecosystem and that the restoration that actually occurs is a result of the specific projects that Congress later authorizes in fulfillment of the Plan.

Other commenters believed that the definition should recognize the important role that "getting the water right" plays in restoration. Getting the water right involves delivering water to the ecosystem in the right quantity and quality at the right time and place. Another commenter held a somewhat similar view, believing that the definition should emphasize the importance of hydroperiod and water quality in fulfilling the restoration objective since natural system conditions are a result of water quality and hydroperiod conditions.

Other commenters expressed the view that the definition of restoration in the proposed regulations was not scientifically credible. These commenters believed that to be credible from a scientific perspective, the definition of restoration must take into account other considerations that are relevant to the ecological condition of the South Florida ecosystem. For example, state and local restoration and water quality programs affect the South Florida ecosystem as well. Additionally, some commenters pointed out that there is no consensus among scientists about the specific ecological parameters that constitute successful "restoration." As an example, there is no agreement on what the goal should be for the population of specific species of plants, fish, or birds.

To some extent, the disagreement surrounding the definition of restoration reflects the underlying concern of affected parties that the definition of restoration will not take their interests into account. Certain parties are concerned that if the definition of restoration does not assign a proper role to science in fulfilling the objectives of the Plan, the implementation of the Plan will be driven by political compromises. These parties are concerned that as Federal and State governments move forward with implementation of the Plan, the restoration goals of the Plan

will be preempted by water supply and flood protection needs. In this regard, the Natural Resources Defense Council urged that the programmatic regulations must "preclude the achievement of water supply and flood protection goals at the expense of restoration goals." Other commenters are concerned that the other water-related goals of the region will be ignored in an effort to advance an elusive and constantly changing vision of restoration favored by scientists, instead of the Plan approved by Congress. All commenters emphasized the importance of developing an appropriate definition of restoration so that CERP projects are properly sequenced and appropriations wisely spent.

The final regulations contain a new definition of restoration that responds to these comments. The regulations define restoration as the recovery and protection of the South Florida ecosystem so that it once again achieves and sustains the essential hydrological and biological characteristics that defined this ecosystem in an undisturbed condition. This definition acknowledges that, as authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system but will be smaller and somewhat differently arranged than the historic ecosystem. Also, there may be different degrees of restoration in different areas of the ecosystem. The irreversible physical changes made to the South Florida ecosystem make a complete return to the historic ecosystem impossible. However, the restored ecosystem will have recovered those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem and made it unique among the world's wetlands systems.

The new definition of restoration recognizes that the restoration goal of the Plan is to achieve a healthy and functioning ecosystem that once again exhibits the essential characteristics of the undisturbed South Florida ecosystem. The definition acknowledges that, as authorized by Congress, the restored ecosystem will be different than the historic ecosystem. In so doing, the definition affords flexibility to allow for adaptive management and the accommodation of other water-related needs of the region, as the Plan is implemented through individual projects specifically authorized by Congress.

The definition of restoration recognizes implicitly that science will be the foundation of restoration, but it also assumes, as noted throughout the

programmatic regulations, that in all phases of implementation of the Plan both restoration and the other goals and purposes of the Plan should be achieved. The definition also recognizes that we must act within the legislative framework that has been approved by Congress in WRDA 2000 and later may be approved by Congress in future authorization acts.

E. Amount of Water Provided for Restoration

Some commenters expressed the view that the regulations must include a statement that new water generated by the Plan will be reserved for the natural system on an 80%–20% basis. These commenters note that the report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) states:

The Plan contains a general outline of the quantities of water to be produced by each project. According to the Army Corps, 80 percent of the water generated by the Plan is needed for the natural system in order to attain restoration goals, and 20 percent of the water generated for use in the human environment. * * * Subject to future authorizations by Congress, the committee fully expects that the water necessary for restoration, *currently estimated* at 80 percent of the water generated by the Plan, will be reserved or allocated for the benefit of the natural system (Emphasis added).

These commenters believed that the 80%–20% ratio should be set forth in the regulations as a generalized planning goal for reserving or allocating new water to the natural system. They are concerned that the 80%–20% ratio was not identified in the proposed regulations as a planning goal. On a different but related note, several commenters felt that a water budget should be developed for the South Florida ecosystem to ensure that the restoration goals of the Plan are achieved.

Other commenters observed that the 80%–20% ratio was merely the initial estimate of the new water that would be produced by the Plan and therefore, could be allocated or reserved for the benefit of the natural system. These commenters maintain that the goal of the Plan is to provide whatever water is needed for restoration of the natural system, irrespective of the 80%–20% ratio. These commenters point out that individual components of the Plan may produce amounts of water different from this initial estimate. In fact, some commenters pointed out that the 80%–20% ratio was part of a scenario called D–13R4, which was not included in the framework Plan (D–13R) authorized by Congress.

We understand the desire of the commenters to assure sufficient water will be allocated or reserved for the benefit of the natural system. To accomplish this result, we believe that it is necessary to preserve the ability to adapt to new information as the Plan is implemented. Therefore, the regulations do not contemplate the allocation of water on a rigid 80%–20% basis, either system-wide or project-by-project. Instead, the final regulations ensure that adequate water will be allocated or reserved for the benefit of the natural system without regard to this ratio by requiring that each Project Implementation Report evaluate and identify water to be reserved for the natural system and made available for other water-related needs of the region, and that the Plan itself be continually evaluated through adaptive management to assure that adequate water is allocated or reserved on a system-wide basis.

The final rule also provides that the Corps of Engineers and the South Florida Water Management District will determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment, and will periodically update that estimate, as appropriate, based upon changed or unforeseen circumstances, new scientific and technical information, new or updated modeling, and congressionally authorized projects or modifications to the Plan. In addition, the final regulations envision that a water budget for the Plan will be developed and disseminated annually to the public. These regulatory provisions will ensure that adequate water will be reserved or allocated to the natural system as intended by Congress.

F. Independent Scientific Review and External Peer Review

A number of commenters were concerned that the proposed regulations did not provide for the establishment of an independent scientific review panel. They noted that section 601(j) of WRDA 2000 requires that the Secretary of the Army, the Secretary of the Interior, and the Governor, in cooperation with the Task Force establish an independent scientific review panel convened by a body, such as the National Academy of Sciences, to review the Plan's progress toward achieving the natural system restoration goals of the Plan. These commenters feel that the panel must operate independently of the Corps of

Engineers, the State, and the Department of the Interior and believe that the programmatic regulations should address how the implementing agencies would work with the panel. One commenter also felt that the proposed regulations did not provide an appropriate role for the Task Force in the establishment of the independent scientific review panel.

The Department of the Army embraces the use of independent scientific review and external peer review. The successful implementation of CERP requires that appropriate decisions be made about significant scientific and technical issues. These extremely technical, often controversial, issues will be presented in various reports and documents generated by numerous sources, including the Corps of Engineers, the South Florida Water Management District, Everglades National Park, the Fish and Wildlife Service, the Florida Fish and Wildlife Conservation Commission, and various Federal, State, and local agencies. Independent scientific review and external peer review will ensure that the decisions made in implementing CERP are based on appropriate data and sound science that is clearly presented to decision makers.

There was some confusion evident in comments and public meetings regarding the panel that will be established to perform the section 601(j) functions and other independent scientific review, particularly the standing panel currently used by the South Florida Ecosystem Restoration Task Force (Task Force). In February 1999, the Task Force endorsed "the establishment of an ongoing outside scientific review panel * * * as an essential component to ensure an effective adaptive management process for South Florida Ecosystem restoration." In September 1999, in fulfillment of the Task Force's resolution, the Department of the Interior entered into a five-year cooperative agreement with the National Academy of Sciences (NAS) to establish the Committee on Restoration of the Greater Everglades Ecosystem (CROGEE). CROGEE provides scientific advice to the Task Force and its member agencies and that the Committee will review and make recommendations on the scientific and technical aspects and elements relating to the South Florida ecosystem.

The section 601(j) panel will be independent of CROGEE or any other panel. Its only mission will be to carry out section 601(j).

Acting on a proposal from the Department of the Army, the Secretary

of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, agreed to designate the National Academy of Sciences to convene the initial independent scientific panel that will perform the tasks required by Section 601(j) of the Water Resources Development Act of 2000. The final regulations contain new language that identifies the National Academy of Sciences as the entity that will convene the initial independent scientific review panel. These regulations also acknowledge that the South Florida Ecosystem Restoration Task Force has played a role in choosing the National Academy of Science as the initial organization to convene the panel, and the Task Force will play a role in the establishment of the panel. The final regulations state that we will enter into an agreement with the National Academy of Sciences to convene the independent scientific review panel. This agreement shall be for a period of five years with options for extensions in five-year increments. The final regulations include a statement recognizing that independent scientific review is crucial for ensuring that the best available science is used in the implementation of the Plan. The regulations recognize the continuing role of the Task Force to consult on decisions to exercise the option to extend the agreement. The regulations recognize the continuing role of the Task Force in designation of the organization to convene future panels and to consult on establishment of the panel upon expiration of the initial agreement.

The final regulations state that the Secretary of the Army, the Secretary of the Interior, and the Governor shall finalize any agreements and procedures necessary to provide for the operation and funding of the independent scientific review panel and establish this panel within six months of the effective date of the programmatic regulations.

The final regulations set forth the expectation that the National Academy of Sciences will use established practices for assuring the independence of members and that the review panel will include members reflecting a balance of the knowledge, training, and experience suitable to comprehensively review and assess the Plan's progress towards achieving restoration goals. WRDA 2000 provides very specific direction that the panel is "to review the Plan's progress toward achieving the natural system restoration goals of the Plan." This specific requirement will be

the focus of the agreement and the mission of the independent scientific review panel. The independent panel's tasks include those activities that are necessary to review the Plan's progress towards achieving the restoration goals of the Plan. In addition, in accordance with WRDA 2000, the panel will produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

To further insure the independence of the panel, the regulations provide that the panel will not be assigned, and may not accept, other tasks, nor may it provide advice on other matters to any entity, public or private. Its sole mission is to review the Plan's progress toward achieving the natural system restoration goals of the Plan and to produce the section 601(j) report.

The final regulations provide that the agreement with the section 601(j) panel will specifically recognize that the agencies may provide for other independent scientific panels and peer review to address specific scientific or technical questions. The regulations provide for an external peer review process to review documents, reports, procedures, or to address specific scientific or technical questions or issues. Draft Pilot Project Technical Reports and draft assessment reports are specifically designated to be externally peer reviewed.

G. Restoration Coordination and Verification (RECOVER)

Many comments focused on the role of RECOVER in implementing the Plan. Some of the commenters felt that the responsibilities of RECOVER were not clearly identified in the proposed regulations. They suggested that these responsibilities should be organized according to three major missions "assessment, evaluation, and planning. Another commenter felt the final regulations should clearly state that RECOVER is not an independent body but that it is instead an interagency group that prepares work products for consideration by others. Some commenters believe that the final regulation should emphasize that RECOVER is composed of agency personnel with scientific expertise. Several commenters believed that the Department of the Interior should have a co-leadership role over RECOVER along with the Corps of Engineers and the South Florida Water Management District.

RECOVER's origins trace back to the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement." RECOVER is an interdisciplinary, interagency scientific and technical team that was designed to perform system-wide analyses. In reviewing the comments on the proposed regulations, we felt that some misunderstanding might exist concerning the role of RECOVER. For example, some commenters suggested that RECOVER should be an independent body because independent science plays an important role in implementing the Plan. While RECOVER is a science-based group because many of its members possess scientific expertise, it is not an independent agency. It is an interagency group consisting of members from governmental entities. The role of RECOVER is to promote an integrated view within the implementing agencies on matters relevant to the implementation of the Plan in order to ensure that the goals and purposes of the Plan are achieved. Independent scientific research will be used to gain perspectives on these issues from outside parties and will be provided by entities other than RECOVER.

The final regulations recognize that RECOVER is an existing, presently functioning interagency team. The final regulations are consistent with the description of RECOVER in the Plan and envision that RECOVER will play an important role in ensuring that a system-wide perspective is applied and that the best available scientific and technical information is used during the development, implementation, and evaluation of the Plan. The final regulations address a number of issues. They recognize that the Corps of Engineers and the South Florida Water Management District will oversee the activities of RECOVER. The final regulations also identify the members of the RECOVER Leadership Group, which includes the program managers from the Corps of Engineers and the South Florida Water Management District, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, the U.S. Fish and Wildlife Service, the U.S. Geological Survey, Everglades National Park, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Agriculture and Consumer Services, the Florida Department of Environmental Protection, and the Florida Fish and Wildlife Conservation Commission. The diverse membership of the Leadership Group assures that the views of Federal

agencies, State agencies, and Tribes are appropriately represented. The final regulations outline a series of specific scientific and technical duties RECOVER will perform to assist the Corps of Engineers and the non-Federal sponsors in achieving the goals and purposes of the Plan, particularly restoration of the natural system. We have grouped these duties under the three major missions of RECOVER—assessment, evaluation, and planning/integration activities.

Again, the final regulations indicate that RECOVER is an interagency, interdisciplinary, scientific and technical team. The regulations state that the documents prepared by RECOVER are to be provided to the Corps of Engineers and the South Florida Water Management District for consideration as they carry out their responsibilities in implementing the Plan. The regulations specify that the Corps of Engineers and the SFWMD will consult with other Federal agencies, state agencies, local agencies and Tribes, as they consider the information that is provided by RECOVER.

Several commenters expressed the view that RECOVER is an advisory body that is subject to the Federal Advisory Committee Act (FACA). We concluded that FACA does not apply to RECOVER. FACA contains an exception for meetings "held exclusively between Federal officials and elected officers of State, local, and tribal governments," where those meetings "are solely for the purposes of exchanging views, information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration." Unfunded Mandates Act, Public Law 104-4, 109 Stat. 48, 65 (1995), 2 U.S.C. 1501, 1534 et seq. RECOVER's meetings and activities fall within this exception. Another commenter noted that FACA does not apply to the South Florida Ecosystem Restoration Task Force, pursuant to WRDA 1996 and proposed that RECOVER be made an advisory committee to the South Florida Ecosystem Restoration Task Force to avoid the application of FACA. Because we have determined FACA does not apply to RECOVER's meetings and activities, we do not believe this action is necessary.

H. Reservation or Allocation of Water for the Natural System

The provisions in the proposed regulations concerning the reservation or allocation of water for the natural system were of interest to a number of

parties. A brief discussion of the legislative foundation of these provisions proves helpful in understanding these comments.

The Plan authorized in WRDA 2000 is a framework plan designed to improve the distribution of water to the South Florida ecosystem. In accordance with section 601(f) of WRDA 2000, the Secretary of the Army, in coordination with the non-Federal sponsor, must prepare a Project Implementation Report before proceeding with an individual project that is included in the Plan. Section 601(h)(4)(A) of WRDA 2000 states that the Project Implementation Report must, among other items, identify the amount of water to be reserved or allocated for the natural system in order to provide for the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and comply with applicable water quality and permitting standards. Section 601(h)(4)(B)(2) of WRDA 2000 specifies that the reservation or allocation of water for the natural system will be implemented under State law and must be made before the Department of the Army can execute a Project Cooperation Agreement for a project.

Several commenters expressed concern about the process for verifying that a reservation or allocation of water for the natural system has been made under State law. One commenter believed that the regulations should clarify the process for determining reservations by establishing a restoration target of water to be reserved or established for each area of the ecosystem. Another commenter requested that the Corps of Engineers develop procedures for verifying that the reservation or allocation of water identified in the Project Implementation Report has been executed under State law. Two commenters believed that the requirement to amend the Project Cooperation Agreement (PCA) whenever the State revises the reservation limits the State's discretion to make appropriate reservations under State law. These commenters also believe that the requirement to revise the PCA is unnecessary as the State is required to make reservations that are consistent with the requirements of the President-Governor agreement of January 9, 2002, and that agreement is specifically enforceable in court. Both the State of Florida and the South Florida Water Management District expressed the view that in enacting WRDA 2000, Congress had not preempted State water law and that the programmatic regulations should not impede or interfere with Florida water law. Several commenters

were concerned that under the proposed regulations, changes to reservations or allocations of water could be made without the same congressional and public involvement that occurred for the initial reservation. Several Senators, while recognizing that reservations may need to be revised, expressed the view that because Congress approves projects based on a quantification of water, it also has a responsibility to ensure that when any change to a reservation of water occurs, that the Project Cooperation Agreement be changed to account for de minimus changes or changes consistent with the purposes of the Plan, or that the change be authorized by Congress.

Many commenters observed that the proposed regulations did not address the possibility that the actual performance of a project or project component might not meet the performance expected in the Project Implementation Report (PIR). As explained, WRDA 2000 requires that the Secretary not execute a Project Cooperation Agreement until a reservation or allocation of water for the natural system has been executed under State law. This raises the potential for problems under the provisions in WRDA 2000 that require sufficient reservations of water for the restoration of the natural system to be made under State law in accordance with the PIR for that project and provisions in the savings clause of WRDA 2000 that prohibit the elimination or transfer of existing legal sources of water. The problem arises if the actual performance of a project does not meet the projections of the water to be produced by the project or component laid out in the PIR. This led us to conclude that the final regulations must contain a discussion of what actions should be taken if a project or component does not perform as expected. This issue arises because the performance of a project or component will impact the reservation of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and whether a new source of water supply of comparable quantity and quality has been provided to replace an existing legal source, as required by the savings clause. The amount of water identified in the PIR is only a projection and the actual amount of water produced by a project will only be known when the project has been operated. The proposed regulations also were designed not to interfere in the State reservation process while providing, consistent with Congressional intent, that the reservation remain consistent with the

agreements reached between the State and Federal government in the Project Cooperation Agreement.

The proposed regulations recognized that reservations or allocations of water are a State responsibility. We attempted to ensure that the purpose of CERP reservations were met in the final regulations by requiring that the Project Cooperation Agreement include a finding that the required reservation has been made before execution of a Project Cooperation Agreement and by providing that the parties execute an amendment to the agreement if there is a change in the reservations. The final regulations also specify that "State law" includes reservations or allocations of water made by the South Florida Water Management District or the Florida Department of Environmental Protection under authority of Florida law. The intent was to preserve the State's control over its reservation and allocation process while also protecting the Federal interest in proceeding with the project only if adequate water had been reserved for the natural system.

In order to clarify our process and provide further assurances to concerned parties, the final regulations include provisions which state that prior to the execution of the Project Cooperation Agreement, the District Engineer will verify that the initial reservation has been made by the State, and that the District Engineer's verification will be referred to in the Project Cooperation Agreement and made available to the public. This provision is consistent with the right of third parties to enforce the reservation provisions of the President-Governor agreement of January 9, 2002. The final regulations retain the provision in the proposed regulations that reservations or allocations of water are a State responsibility and that any change to the reservation or allocation of water for the natural system made under State law will require an amendment to the Project Cooperation Agreement. The final regulations also retain the provision in the proposed regulations that the District Engineer will, in consultation with other agencies and the Tribes, make a determination, after considering any changed circumstances or new information since completion of the PIR, that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system and satisfies the requirements of the project-specific assurances of CERP.

The final regulations also provide that the Secretary of the Army will notify the appropriate committees of Congress if a change in reservation is made after

approval of the PIR. The Secretary's and the State's reasons for changing the reservation and information about any new or changed circumstances will also be provided to Congress. This provision will assist Congressional oversight of any project, and its oversight of the integrity of the reservation process.

We feel that these measures provide adequate assurances that the requirements of WRDA 2000 will be followed while not infringing upon the authority of the State of Florida. The open process also ensures both government and public oversight.

I. Interim Goals

Many comments focused on development of the interim goals. As background, section 601(h)(3)(c)(i)(III) of WRDA 2000 requires that the "Programmatic regulations * * * establish a process * * * to ensure the protection of the natural system consistent with the goals and purposes of the Plan, including the establishment of interim goals to provide a means by which the restoration success of the Plan may be evaluated throughout the implementation process." Interim goals provide a means of tracking restoration performance and for periodically evaluating the accuracy of predictions of system responses to the effects of the Plan. Progress towards meeting the interim goals is to be reported to Congress as part of the periodic reports required by WRDA 2000.

There was universal agreement among agencies, tribes, interest groups, and the public that interim goals will be useful for measuring the restoration success of the Plan; however, there was disagreement about whether the interim goals should be included in the final programmatic regulations. Some commenters believed that WRDA 2000 required that the interim goals be included in the programmatic regulations. In contrast, other commenters maintained that WRDA 2000 merely required that the regulations develop "a process" for establishing interim goals, and did not require that the goals themselves be in the regulations. Other commenters expressed views that did not relate to statutory considerations. Some of these commenters believed that it was important to include the interim goals in the programmatic regulations to give them appropriate visibility and to ensure that the interim goals are actually met. These commenters also believed that including the interim goals in the regulations would have the additional benefit of enabling the public to take part in the process of establishing the goals. Another group of

commenters realized that we could not include the interim goals in the regulations now but urged that they be made a part of the regulations at a later time. In this regard, five Senators wrote: "We understand that the interim goals will not be ready to include in the regulations before they are finalized, but we urge the Corps to include these goals when they are established rather than relegating them to guidance documents." Two Congressmen commented that the final rule should provide for "adoption of interim restoration goals once the programmatic regulations are completed."

Other comments maintained that interim goals should not be included in the programmatic regulations. Some pointed out that the Plan incorporates adaptive management, continuously assessing and adapting to new information and circumstances. They believe that incorporating fixed goals into regulations is inconsistent with adaptive management. Some commenters maintain that the rulemaking process is structured and cumbersome and that it is impractical to establish and amend interim goals through such a time-consuming process. These commenters believe that placing the interim goals in the programmatic regulations would delay the process of adopting and amending the goals, which is inconsistent with the concept of adaptive management. Other commenters were also concerned with delays but their concerns relate to identifying the interim goals in an Interim Goals Agreement independent of the regulations and making this agreement subject to the concurrence of the Secretary of the Interior and the Governor. These commenters maintain that the statute only grants the Secretary of the Interior and the Governor a concurrence right in the programmatic regulations and extending this right to the Interim Goals Agreement will simply cause delays.

In reviewing the comments, it was apparent that there was significant disagreement on exactly what the interim goals should be. One commenter observed that the interim goals should not include ecological goals as that could subvert the hydrological basis for the Plan. Most commenters who maintained that interim goals must be included in the regulations did not give examples or provide descriptions of the interim goals. Even those who thought that interim goals should be included in the final regulations recognized that additional time was required to perform more modeling related to the interim goals. These commenters understood the importance of modeling in

establishing interim goals that are an effective measure of the Plan's progress toward restoration. A number of commenters, including the Miccosukee Tribe of Indians of Florida, expressed a desire to review and comment on the interim goals before they are set forth in the Interim Goals Agreement.

As a threshold matter, we think it is important to acknowledge the significance of the interim goals. The interim goals provide the yardstick that will measure the success of the restoration effort. It will not be possible to fairly measure the success or failure of the Plan without appropriate interim goals. The final regulations establish principles that will guide the development of the interim goals and the execution of the Interim Goals Agreement discussed in § 385.38(a). These principles will appropriately involve Tribes, governmental interests and the public in the process. The regulations do not contain the specific interim goals because more time is needed to model them to satisfaction; therefore, the final regulations retain the concept of establishing the interim goals in an Interim Goals Agreement. The regulations provide that the public will have the opportunity to review and comment on the Interim Goals Agreement before the agreement is finalized. The regulation also makes clear that interim goals are targets for use by the agencies and Congress in evaluating the success of the restoration effort. They are not standards or schedules enforceable in court. The final regulations provide for the development and use of interim goals that include water quality and ecological indicators in addition to indicators characteristic of anticipated hydrological performance. These indicators will be helpful in making meaningful judgments about the performance of the Plan.

In order to address the concern that interim goals be given appropriate visibility, and to clarify the relationship between the interim goals and the programmatic regulations, the final regulations also contain a new section, 385.1(c), that clarifies our interpretation of the statutory assurances provided for in section 601(h) of WRDA 2000 and how the processes, tools and enforcement mechanism established in this section of the Act constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved. The section clarifies that the programmatic regulations provide a process for developing tools, including Project Implementation Reports, Project Cooperation Agreements, Operating Manuals, interim goals, and other tools

established in the regulations, which are used to guide the planning implementation and evaluation of the project. Section 601(h) also provides an enforcement mechanism, the Agreement between the President and the Governor, under which the State is to ensure, by regulation or other appropriate means, that water made available by each project in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the project implementation report and consistent with the Plan. The President and the Governor signed this Agreement on January 9, 2002.

The new § 385.1(c) further directs the Secretary of the Army to ensure that the public understands the linkage between the process, tools, and enforcement mechanism and can monitor the effectiveness of this integrated framework in assuring that the goals and purposes of the Plan are achieved, as provided for in the programmatic regulations, by providing for public notice and comment in the development of the tools; providing notice of final action on tools; making available on the world-wide web or by other appropriate means final, and where appropriate draft, copies of all tools; and explaining through these regulations and by other appropriate means the process for developing the tools, the linkage between the process, tools and enforcement mechanism, and the means by which these elements constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved.

The Restoration Coordination and Verification (RECOVER) team will use the principles set forth in the proposed regulations to develop and recommend by no later than six months after the effective date of the programmatic regulations, a set of interim goals for implementation of the Plan. This date was set in recognition of the completion dates for the pre-CERP baseline and the Master Implementation Sequencing Plan. RECOVER has already begun work in order to meet the deadline.

The final regulations specify that the interim goals will identify improvements in quantity, timing, and distribution of water in five-year increments that begin in 2005, with the goals reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. As stated, the interim goals also will include indicators for water quality improvement and ecological responses,

such as increases in extent of wetlands, improvements in habitat quality, and improvements in native plant and animal abundance. While hydrologic interim goals will assess the Plan's success in restoring the hydrology of the region, we believe that the development and use of indicators for water quality improvement and ecological responses is necessary to assess the Plan's success in achieving the ultimate goal of restoration of a healthy ecosystem. The final regulations recognize that programs and activities that are independent of CERP may influence the achievement of improvements in water quality and desired ecological responses. The extent of the influence of these programs and activities should be assessed and described at the time goals are developed, and should be taken into account as the Plan is subsequently evaluated relative to its goals and purposes. In addition, the final regulations include specific water quality indicators for RECOVER to consider.

The final regulations envision that RECOVER will provide its recommendations to the Army Corps of Engineers, the South Florida Water Management District, and the Department of the Interior for consideration. A proposed Interim Goals Agreement shall be developed by the Secretary of the Army, the Secretary of the Interior and the Governor in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. Interim goals will be memorialized in an agreement to be signed by the Secretary of the Army, the Secretary of the Interior, and the Governor of the State of Florida no later than one year after the effective date of the programmatic regulations. The Secretary of the Army will provide a notice of availability of the proposed agreement to the public in the **Federal Register**, seek public comments, and execute the final agreement with the Secretary of the Interior and the Governor.

As discussed previously, the final regulations do not envision that interim goals will be included in the programmatic regulations themselves. The regulations provide that the Department of the Army will memorialize the Interim Goals Agreement in appropriate Corps of Engineers guidance. However, the regulations do establish requirements that are triggered if the interim goals are not achieved as anticipated. If the

interim goals have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District must determine why the goals have not been met or are unlikely to be met and either initiate adaptive management actions to achieve the interim goals as soon as practical, consistent with the purposes of the Plan and consistent with the interim targets, or recommend changes to the interim goals.

Finally, the final regulations establish a process for revising the interim goals in five-year increments or sooner, if appropriate, in light of new information.

J. Interim Targets for Other Water-Related Needs of the Region

The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Identifying incremental targets for the other water-related needs of the region will help evaluate the success of implementation of the Plan in achieving the non-restoration goals of the Plan. The proposed regulations included provisions establishing a process for evaluating progress on meeting the other water-related needs of the region.

These provisions drew comments from several parties. One commenter suggested that the process for developing targets for other water-related needs of the region should closely parallel the process for developing the restoration-related interim goals. Two commenters believed that the date specified in the proposed regulations for RECOVER to provide recommendations on the targets should be extended because the targets are influenced by information that will be developed in connection with the pre-CERP baseline and the Master Implementation Sequencing Plan. One commenter expressed the view that the targets for other water-related needs should not be established before the adoption of the restoration-related interim goals. Other commenters were concerned that the proposed regulations did not address the question of how issues would be resolved if conflicts arise between achieving the interim goals and the targets for other water-related needs.

The final regulations provide that by not later than six months after the effective date of the programmatic regulations, RECOVER will recommend interim targets for the other water-related needs of the region, that are consistent with the interim goals. The

Secretary of the Army and the Governor, in consultation with others, including the South Florida Ecosystem Restoration Task Force, will develop the interim targets. RECOVER already has begun work in order to meet the deadline. The final regulations specify that the Secretary of the Army and the Governor will establish the targets within one year of the effective date of the programmatic regulations, but not prior to the execution of the Interim Goals Agreement. Like interim goals directed at evaluating the restoration success of the Plan, interim targets for other water-related needs of the region will be incorporated into appropriate agency guidance.

The final regulations retain the idea of drawing a distinction between interim goals, which are directed at evaluating the restoration success of the Plan, and interim targets for achieving the other water-related needs of the region. In the regulations, we use the term "interim" in front of the term "targets" to show that the interim targets for other water-related needs, which evaluate progress towards providing for these purposes, are parallel to the interim goals, which measure restoration success.

Like the provisions for interim goals, the final regulations specify that the interim targets will identify improvements in quantity, timing and distribution of water in five-year increments that begin in 2005, with the targets reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim targets will include indicators for the frequency of water restrictions in various areas and the frequency of meeting salt-water intrusion protection criteria for different areas. Again, like the provisions for interim goals, the final regulations do establish requirements that are triggered if the interim targets are not achieved as anticipated. If the interim targets have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District must determine why the targets have not been met or are unlikely to be met and either initiate adaptive management actions to achieve the interim targets as soon as practical, consistent with the purposes of the Plan and consistent with the interim goals, or recommend changes to the interim targets.

Finally, the final regulations make clear that the interim targets are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not standards or schedules enforceable in court.

K. Role of the Department of the Interior

Several commenters recommended that the Department of the Interior be given a more prominent role in implementation of the Plan because it administers significant lands and natural resources involved in the Plan. These commenters felt that the concurrence provisions in the proposed regulations diminished the role of the Department of the Interior envisioned in WRDA 2000. They felt that the concurrence provisions in the proposed regulations did not give the Secretary of the Interior an appropriate role in approving the guidance memoranda because the Secretary of the Army could finalize these documents after giving good faith consideration to comments from the Secretary of the Interior, notwithstanding the fact that the Secretary of the Interior might have concerns about finalizing the regulations. In addition, these commenters believe that the Department of the Interior should have a concurrence role on other programmatic decisions such as Comprehensive Plan Modification Reports, the Master Implementation Sequencing Plan, and System Operating Manual. Other commenters noted that the concurrence process in WRDA 2000 only extends to the programmatic regulations and that section 601(h)(3)(C)(ii) expressly prohibits the requirement for concurrence on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects, and other documents relating to the development, implementation, and management of individual features of the Plan unless concurrence is provided for in other laws. These commenters did not favor giving the Department of the Interior a greater role in implementing the Plan.

The final regulations give the Department of the Interior a concurrence role, along with the Governor of the State of Florida, in the development of six specific guidance memoranda related to important program-wide aspects of implementing the Plan. These guidance memoranda address the: (1) General format and content of Project Implementation Reports; (2) processes for evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts; (3) general content of operating manuals; (4) general processes for the conduct of assessment activities of RECOVER; (5) process for identifying if an elimination or transfer of existing legal sources of water will occur as a result of implementation of the Plan; and (6)

process used in Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system. In accordance with section 601(h)(3)(c)(ii) of WRDA 2000, the regulations prohibit concurrence by the Secretary of the Interior and the Governor of Florida on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects, and other documents relating to individual features of the Plan.

We revised the concurrence provisions in the final regulations so that the approval process for the guidance memoranda parallels the statutory concurrence process for the programmatic regulations. We deleted the language in the proposed regulations that said the Army would give "good faith consideration" to the concurrence or non-concurrence statements of the Secretary of the Interior and the Governor before approving the guidance memoranda. This language did not communicate adequately our intent to obtain the concurrence of the Secretary of the Interior and the Governor. Instead, it suggested that the Army simply had to fulfill a ministerial coordination requirement by asking the Secretary of the Interior and the Governor whether they concurred or non-concurred in the guidance memorandum. We felt that this language did not convey the Army's intent to actively seek the concurrence of the Secretary of the Interior and the Governor prior to approving the guidance memoranda.

The final regulations also provide that the Department of the Interior will play a significant role in addressing other issues related to the Plan. Like the proposed regulations, the final rule gives the Secretary of the Interior, along with the Governor of the State of Florida, a concurring role in the Secretary of the Army's determination of the pre-CERP baseline. The final regulations also envision that interim goals will be established through a formal Interim Goals Agreement among the Secretary of the Army, the Secretary of the Interior, and the Governor. Further, the Department of the Interior plays an important role in the Leadership Group of RECOVER, along with several other Federal and State agencies and Tribes.

Finally, the regulations give the Department of the Interior an important consulting role throughout implementation of the program, including, among other things, participation on Project Delivery Teams; selection and revision of hydrologic

models; development of the Adaptive Management Program, Project Implementation Reports, Operating Manuals, and Comprehensive Plan Modification Reports; development, review and revision of changes to the Master Implementation Sequencing Plan; and the development of the means for monitoring progress towards other water-related needs of the region as provided for in the Plan.

Read together, we believe that these provisions give the Department of the Interior as well as the Governor of the State of Florida an important and appropriate role in implementing the Plan. This prominent role is consistent with Interior's natural resources stewardship and land management responsibilities.

L. Role of South Florida Ecosystem Restoration Task Force

Several commenters felt that the proposed regulations did not give the South Florida Ecosystem Restoration Task Force ("Task Force") an appropriate role in Plan implementation. The Task Force is an interagency group created by section 528(f) of the Water Resources Development Act of 1996 (110 Stat. 3770) (hereinafter "WRDA 1996") More specifically, the Miccosukee Tribe and the Seminole Tribe expressed the view that the Task Force could play a constructive role in facilitating an open discussion of issues related to implementation of the Plan among Federal, State, Tribal, and local interests. The Seminole Tribe also commented that information about alternatives developed for Project Implementation Reports should be shared with the Task Force before the completion of the draft Project Implementation Report.

The responsibilities of the Task Force are found in section 528 of WRDA 1996 and section 601 of WRDA 2000. In general, section 528 envisions that the Task Force will coordinate programs and research on ecosystem restoration, exchange information, provide assistance and facilitate resolution of conflicts involving the restoration of the South Florida ecosystem. Section 601 of WRDA 2000 gives the Task Force a consultation responsibility concerning the establishment of an independent scientific review panel to review the progress that is being made toward achieving the natural system restoration goals of the Plan.

The final regulations recognize that the Task Force can play a constructive role in Plan implementation. The regulations acknowledge the benefits that result from sharing issues with the

Task Force and set forth the intention of the agencies involved in implementing the Plan to regularly report to the Task Force as they do currently. We will continue to regularly report to the Task Force and its working group on Plan implementation matters and we expect that the Task Force will continue to provide valuable input regarding implementation of the Plan.

The South Florida Water Management District and the Jacksonville District already regularly report to the Task Force and its working group on CERP matters. We expect that informal coordination among the implementing agencies, the Task Force and its working group and its other advisory bodies will continue. For example, the Task Force may wish to have regular briefings on CERP implementation issues, on the Master Implementation Sequencing Plan, on Project Implementation Reports, or on Operating Manuals; or the Task Force may decide to have RECOVER provide the working group with information on work in progress. Further, we contemplate that the Task Force will determine, on a case-by-case basis, the manner and extent to which it is appropriate for it to be involved in CERP in order to carry out its existing statutory responsibilities.

The final regulations assure that the Task Force will be informed of certain matters of significance. They specifically state that the Task Force will be notified of and given an opportunity to review and provide comment on a variety of issues, including but not limited to, interim goals, Project Implementation Reports, Pilot Project Design Reports, Pilot Project Technical Data Reports, the pre-CERP baseline, assessment reports, guidance memoranda, Master Implementation Sequencing Plan, Comprehensive Plan Modification Reports, periodic CERP updates, and reports to Congress. Finally, the regulations require that the Task Force shall be provided with information on the alternatives developed and evaluated for the Project Implementation Reports before completion of the draft Project Implementation reports.

M. Consultation

There was general agreement among those commenting on the proposed regulations that it is important for the agencies implementing the Plan to consult with interested parties. The Corps of Engineers and non-Federal sponsors are responsible for implementation of the Plan. However, successfully implementing the Plan requires more than the involvement of

these parties, it also requires extensive involvement by Tribes, Federal, State and local agencies.

One commenter recommended that the Tribal consultation provisions in the proposed regulations be revised to specifically state that the consultation with Tribes should be conducted on a government-to-government basis. This commenter also felt that the Federal trust responsibility for Tribes should not be tied to one Executive Order alone.

Other commenters expressed concerns about the time that would be allowed for consultations. Several commenters expressed the view that the time allowed for consultation should reflect the complexity of the task or issue under review. Another commenter suggested that the Tribes, agencies, and public be informed of the closing dates for consultation.

The final regulations contemplate that the implementing agencies will consult fully and openly with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies as the Plan is implemented. These consultation provisions ensure that interested parties are appropriately involved in implementing, evaluating, and modifying the Plan when necessary. The final regulations specifically state that the consultation with the Tribes will be conducted on a government-to-government basis and in compliance with applicable laws, Executive Orders, and regulations.

The final regulations contemplate that the consultations on Plan related matters will facilitate a timely exchange of views among the parties. This will ensure that the consultation process is not used as a tool to delay or veto actions. The final regulations also envision that the Corps of Engineers and the non-Federal sponsor will set reasonable limits on the time for consultations and inform parties of those limits, after giving appropriate consideration to the significance of the proposed action, the degree to which relevant information is known or obtainable, the degree to which the action is controversial, the state of the art of analytical techniques, the number of persons affected, the consequences of delay, and other time limits imposed on the agency by law, regulations, or Executive Order.

N. Operating Manuals

The provisions in the proposed regulations on Operating Manuals were

of interest to a number of commenters. These manuals provide operational guidance that is intended to ensure that the goals and purposes of the Plan are achieved. Project operating manuals provide guidance on operational concerns relevant to individual projects. System Operating Manuals provide guidance on operational concerns related to projects in the aggregate to ensure that projects function in a coordinated, systematic way. Several commenters expressed concerns that the proposed regulations would allow unconstrained deviations from the approved Operating Manuals because of provisions in the regulations that allowed for adjustments during years when substantial deviations from expected rainfall and runoff occur, or when required for adaptive management reasons. These commenters also were concerned that the precise circumstances in which these temporary deviations would be allowed were not specified. Another commenter expressed the view that the final regulations should include a provision that would ensure any changes to Operating Manuals are consistent with the goals and purposes of the Plan. Finally, one commenter felt that the final regulations should include a provision stating that the drought contingency plans that are mentioned in the regulations discussing Operating Manuals should be consistent with the Seminole Tribe's water rights compact.

The final regulations retain the concept of developing Project Operating Manuals and System Operating Manuals. They contain new provisions that allow for public review and comment before they are finalized. The regulations also specify that the System Operating Manual will be developed by December 31, 2005. They contemplate that a Project Operating Manual will be developed for each project and that a draft Project Operating Manual will be included as an appendix in the Project Implementation Report. This will ensure that the operation of the project is linked to the expected benefits of the project recommended in the Project Implementation Report. The final regulations state that the final Project Operating Manual will be prepared as soon as possible after completion of the operational testing and monitoring phase of the project. Additionally, a provision has been added to the regulations that will require modifications to operating manuals to be consistent with the goals and purposes of the Plan. We have deleted the proposed provision of concern regarding yearly adjustments and have

described the circumstances for allowing temporary deviations due to emergencies and unplanned minor deviations. The final regulations also require that the drought contingency plans be consistent with the Seminole water rights compact.

O. Master Implementation Sequencing Plan

Several parties commented on the provisions in the proposed regulations concerning the Master Implementation Sequencing Plan. This Master Implementation Sequencing Plan, identified as the framework for restoration of the South Florida ecosystem, covers 68 components that will be implemented as approximately 45 separate projects. The proposed regulations establish a process for developing a Master Implementation Sequencing Plan and a process for specifying that projects will be sequenced and scheduled to maximize the achievement of the goals and purposes of the Plan, including the achievement of the interim goals and interim targets at the earliest possible time, to the extent practical given scientific, technical, funding, contracting, and other constraints. One commenter felt that the Master Implementation Sequencing Plan should reflect the formulation and evaluation provisions and the results of Plan efforts currently underway. Another commenter believed that the Master Implementation Sequencing Plan should take into account the savings clause of WRDA 2000.

The final regulations contemplate that the Master Implementation Sequencing Plan will be developed within one year of the effective date of the programmatic regulations, following consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Indians, the U. S. Department of the Interior, the U.S. Department of Commerce, U.S. Environmental Protection Agency, the Florida Department of Environmental Protection, and other Federal, State and local agencies, as well as in consultation with the South Florida Ecosystem Restoration Task Force. They provide for sequencing and scheduling projects to ensure that each project delivers benefits, including benefits to the natural system, that justify the project, in the context of the then existing Central and Southern Florida Project, as modified by any Plan components that already have been implemented. The final regulations envision that the Master Implementation Sequencing Plan will base the sequence and schedule of projects on the best scientific, technical, funding, contracting, and other

information available. They also state that the Master Implementation Sequencing Plan will be revised as necessary to integrate new information such as updated schedules from Project Management Plans, the results of pilot projects and other studies, updated funding information, revisions to the Plan, Congressional or other authorization and direction, or information from the adaptive management program, including achievement of the expected performance level of the Plan and the interim goals and targets.

P. Adaptive Management Program

Several commenters thought that it was important to modify the proposed regulation's provisions concerning adaptive management in order to reinforce the importance of this management concept in implementing the Plan. Adaptive management is a crucial element of the Everglades Restoration Plan. It involves refining the Plan during its implementation to respond to new information or technologies to ensure that the goals and purposes of the Plan are fulfilled. The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) contains a discussion of that committee's expectations with respect to adaptive management:

The committee does not expect rigid adherence to the Plan as it was submitted to Congress. This result would be inconsistent with the adaptive management principles in the Plan. Restoration of the Everglades is the goal, not adherence to the modeling on which the April 1999 Plan was based. Instead, the committee expects that the agencies responsible for project implementation report formulation and Plan implementation will seek continuous improvement of the Plan based upon new information, improved modeling, new technology and changed circumstances.

One commenter suggested that the definition of adaptive management be revised to clarify its meaning. Another commenter pointed out that the Corps of Engineers and the South Florida Water Management District currently are in the process of updating the Plan to ensure that it is based on the latest available information and modeling. This commenter recommended that a direction to complete this update be included in the final regulations since the Plan is based on information and projections that are approximately five years old.

The final regulations contain a new definition of adaptive management. The regulations define adaptive management to mean:

The continuous process of seeking a better understanding of the natural system and human environment in the South Florida ecosystem, and seeking continuous refinements in and improvements to the Plan to respond to new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan in order to ensure that the goals and purposes of the Plan are fulfilled.

The final regulations also provide for the establishment of an adaptive management program that will guide the implementation of the Plan. This program will be used to assess the responses of the South Florida ecosystem to the Plan and to determine whether these responses match expectations, including anticipated performance levels. If the interim goals or targets are not achieved as anticipated, the Corps of Engineers and the South Florida Water Management District must determine why not, followed by either adaptive management actions to achieve the goals or targets as soon as practicable, or revisions to the goals or targets as appropriate.

The final regulations envision that the Corps of Engineers and the South Florida Water Management District, based on technical information developed by RECOVER, will prepare periodic assessment reports as part of this adaptive management program. These reports will be externally peer reviewed and used by the implementing agencies in consultation with others to evaluate whether the goals and purposes of the Plan are being achieved and to determine whether improvements to the Plan are warranted. The reports should prove invaluable in gaining an understanding of the Plan's effectiveness and in ensuring that its goals and purposes are fulfilled. The regulations also provide that in considering how the Plan may be improved, the Corps of Engineers and non-Federal project sponsor specifically shall consider modifying the design or operational plan for a project of the Plan not yet implemented; modifying the sequence or schedule for implementation of the Plan; adding new components to the Plan or deleting components not yet implemented; removing or modifying a component of the Plan already in place; or a combination of any of these actions.

The final regulations also specify that periodic CERP updates shall be performed, beginning within six months of the effective date of the programmatic regulations and whenever necessary to ensure that the goals and purposes of

the Plan are achieved, but not any less often than every five years. The periodic CERP updates will be accomplished by the Corps of Engineers and the South Florida Water Management District, in consultation with Tribes, Federal, State, and local agencies, to conduct an evaluation of the Plan using new or updated modeling that includes the latest scientific, technical, and planning information. The periodic CERP updates will provide a basis for determining if management actions are necessary to seek improvements in the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan. The final regulations direct that as part of the periodic CERP update, the Corps of Engineers and the South Florida Water Management District will determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity needed for the natural system and human environment.

The consultation provisions of the proposed regulations have been expanded to provide that the Corps of Engineers and the South Florida Water Management District also shall consult with the South Florida Restoration Task Force in conducting the evaluation of the Plan. The final regulations no longer provide for review of the assessment report by the independent science review panel. The independent science review panel will prepare its own report to Congress with its independent assessment of ecological indicators. It was deemed appropriate to keep these reports separate in order to provide for a truly comprehensive review of Plan performance and to ensure the independence of the science review panel by insulating it from any other aspect of Plan implementation or assessment beyond its statutory mission.

Q. Comprehensive Plan Modification Reports

We anticipate that the Plan will need to be revised periodically as part of the adaptive management program to reflect new information and to improve performance. The final regulations provide that a Comprehensive Plan Modification Report shall be prepared whenever significant revisions to the Plan are necessary to ensure that the goals and purposes of the Plan are achieved. The Comprehensive Plan Modification Report will be prepared using a process that parallels the process for developing a Project

Implementation Report. The final regulations provide that the final approved Comprehensive Plan Modification Report shall be transmitted to Congress. The final regulations also provide that the Comprehensive Plan Modification Report will include updated water budget information for the Plan, including the total quantity of water that is expected to be generated by implementation of the Plan, the quantity needed for the natural system in order to attain restoration goals, and the quantity generated for use in the human environment. In general, Plan modifications should be consistent with achieving the interim goals and targets. In some cases, the process of developing a Comprehensive Plan Modification Report (which includes consultation with Federal, State, and local agencies and public notice and comment) could identify necessary changes to the interim goals or targets. In this case, the goals or targets would be revised accordingly, as provided for in the final regulations.

We did not receive any comments on the proposed regulations provisions concerning Comprehensive Plan Modification Reports. We did make several changes in the proposed regulations to conform to the general comments made on other sections and to provide more detailed information related to these reports. For example, the final regulations state that the Comprehensive Plan Modification Report will be initiated at the discretion of the Corps of Engineers and South Florida Water Management District, in consultation with Federal, State, and local agencies and the Tribes. The regulations also set forth a series of general requirements related to the preparation of these reports.

R. Pre-CERP Baseline

The provisions in the proposed regulations concerning the pre-CERP baseline were of interest to a number of parties. Developing the pre-CERP baseline is an important step in ensuring that the goals and purposes of the Plan are fulfilled in accordance with WRDA 2000. This baseline is a tool for estimating hydrological conditions in the South Florida ecosystem on the date of enactment of WRDA 2000. It will be used to aid in the determination if existing legal sources of water will be eliminated or transferred as a result of project implementation and for determining the water made available by the Plan.

A number of commenters expressed concerns about the concurrence provisions for the pre-CERP baseline. These commenters pointed out that

WRDA 2000 only granted concurrence rights to the Secretary of the Interior and the Governor on the programmatic regulations. They believe that extending this concurrence process to the pre-CERP baseline was unnecessary and would cause delays in developing the baseline. Two commenters believed that the pre-CERP baseline should include all existing legal sources of water and also should include the levels of service for flood protection. One commenter observed that the requirement in the proposed rule that the pre-CERP baseline was to be consistent with the guidance memorandum for identifying the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system might not be developed before the pre-CERP baseline is determined.

The final regulations provide guidance on developing the pre-CERP baseline. They envision that the pre-CERP baseline will include information on the quantity, timing, distribution, and quality of water in the South Florida ecosystem on the date of enactment of WRDA 2000. The regulations state that the pre-CERP baseline will be supported by appropriate documentation and will include a description of the assumptions on which it is based. Additional work performed by the Corps and the South Florida Water Management District with regard to the pre-CERP baseline indicates that the pre-CERP baseline does not need to be tied to the methodology for identification of water to be reserved for the natural system as these are two separate analyses. The final regulations require that the recommended project be compared to the pre-CERP baseline and other appropriate information to determine if an elimination or transfer of legal sources of water will be caused by implementation of the project. Therefore, the final regulations do not contain the provision from the proposed regulations that require the Corps of Engineers and South Florida Water Management District, when determining the pre-CERP baseline, to use a method consistent with the guidance memorandum that contains instructions for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system.

The final regulations provide that within six months of the effective date of the programmatic regulations, the Corps of Engineers and the South Florida Water Management District shall, in consultation with Tribes, Federal, State, and local agencies develop the pre-CERP baseline and

present it to the Secretary of the Army for consideration, memorialized in an appropriate document. The regulations state that the pre-CERP baseline shall be developed with the concurrence of the Secretary of the Interior and the Governor. The language gives the Secretary of the Interior and the Governor the same concurrence opportunity they had on the programmatic regulations. While this concurrence process is not required by law and will require additional time to fulfill, we believe it is appropriate to provide for this process because of the significance of the pre-CERP baseline.

Additionally, the final regulations specify that pre-CERP baseline water availability is one of the factors that will be assessed in each Project Implementation Report when determining the water that needs to be reserved for the natural system. In order to ensure that the levels of service for flood protection are not reduced, we have added a provision that requires each Project Implementation Report to include an analysis that considers the operational conditions included in the pre-CERP baseline.

S. Shortfall in Performance by a Project

Several commenters noted that the proposed regulations did not provide guidance on what actions should be taken when the amount of water generated by a project is less than the amount estimated when the Project Implementation Report was prepared. These commenters believe that such a shortfall in performance should be shared in an equitable manner among project purposes. One commenter proposed that, if a component does not produce the water expected, the shortfall should be shared equally. Another commenter proposed that if the actual operations of a component do not produce the amount of water expected for the natural system and other water-related needs of the region, "the shortfall be shared between all anticipated uses on a pro rata basis of what the project was expected to produce for each use." Other commenters want to ensure that the needs of the natural system and the savings clause requirements are provided first, before additional water for agricultural and urban needs is provided.

The proposed regulations did not address the shortfall question. Since the framework Plan includes 68 components that have different functions, we do not consider one general rule concerning shortfalls in performance to be appropriate. One unvarying rule for all projects might

also create problems under the savings clause. The final regulations provide that the Project Implementation Report (PIR) will include a plan for interim operations of the project in the event that the project fails to provide the quantity, timing, or distribution of water described in the PIR. The plan will take into account the specific purposes of the specific project component addressed in the PIR and the overall goals and purposes of the Plan. Under the final regulations, management actions must be taken as part of the adaptive management program to make permanent adjustments for shortfalls in performance on a system-wide basis.

T. Elimination or Transfer of Existing Legal Sources of Water

Several commenters noted that the proposed regulations did not contain a definition of the term "existing legal sources of water." Section 601(h)(5)(A) of WRDA 2000 contains a savings clause provision that is designed to ensure that an existing legal source of water is not eliminated or transferred until a replacement source of water of comparable quantity and quality as was available on the date of enactment of WRDA 2000 is available. The statute states that "the Secretary and the non-Federal sponsor shall not eliminate or transfer existing legal sources of water, including those for—(i) agricultural or urban water supply; (ii) allocation or entitlement to the Seminole Indian Tribe of Florida * * * (iii) the Miccosukee Tribe of Indians of Florida; (iv) water supply for Everglades National Park; (v) water supply for fish and wildlife."

The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) describes the intent of the prohibition against the elimination or transfer of legal sources of water as follows:

Elimination of existing sources of water supply is barred until new sources of comparable quantity and quality of water are available; existing authorized levels of flood protection are maintained; and the water compact among the Seminole Tribe of Florida, the State, and the South Florida Water Management District is specifically preserved.

Although WRDA 2000 uses the term "existing legal sources of water," it does not define the term; nor could we find a definition of this term elsewhere in Federal or State law. Several commenters believed that the term should include all sources of water. According to this view, a legal source of water that was available on the date of enactment of WRDA 2000 would

include water that was accessible and could have been used on that date, as well as water that actually was used or permitted to be used on that date. These commenters pointed out that the statute refers to existing legal "sources" not existing legal "uses." Other commenters believed that existing legal sources of water should be limited to water permitted for consumptive use. Still others believed that the term was further limited to consumptive uses that not only were permitted, but also were actually used, on the date of enactment. One commenter suggested that a guidance memorandum be developed that defines an existing legal source of water and provides guidance for determining if the implementation of a project will cause an elimination or transfer of an existing legal source of water.

The final regulations provide for the development of a guidance memorandum that will define "existing legal sources of water." This guidance memorandum also will describe the process for determining if existing legal sources of water are to be eliminated or transferred and for determining if a new source of water of comparable quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan.

The final regulations also state that the Project Implementation Report will include an analysis to determine if the project will cause an elimination or transfer of existing legal sources of water. The final regulations also state that the recommended project will be compared to the pre-CERP baseline and other appropriate information to determine if an elimination or transfer of legal sources of water will be caused by implementation of the project. If the project will cause an elimination or transfer of a source of water, then the Project Implementation report will include measures to ensure that such elimination or transfer will not take place until a new source of water of comparable quantity or quality is available to replace the water that would be lost as a result of implementation of the Plan.

In accordance with WRDA 2000, the regulations make clear that the Secretary of the Army and the non-Federal sponsor will not eliminate existing legal sources of water, including those for agricultural or urban water supply, an allocation or entitlement of the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, water supply for Everglades National Park, and water supply for fish and wildlife. Some commenters wanted the

regulation to include a definition for urban water supply. We have not included a definition of urban water supply because we believe that such a definition should be more appropriately developed with the definition of existing legal sources of water that will be defined in the required guidance memorandum.

U. Flood Protection

The WRDA 2000 provisions concerning the maintenance of flood protection were of interest to several commenters. Section 601(h)(5)(B) of WRDA 2000 contains a savings clause provision that is designed to ensure that levels of service for flood protection are not reduced by implementation of a project. This provision specifically states "implementation of the Plan shall not reduce levels of service for flood protection that are "(i) in existence on the date of enactment of this Act; and (ii) in accordance with applicable law."

The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) describes the intent of the flood protection savings clause as follows:

With respect to flood control, the committee intends that implementation of the Plan will not result in significant adverse impact to any person with an existing, legally recognized right to a level of protection against flooding. The committee does not intend that, consistent with benefits included in the Plan, this bill create any new rights to a level of protection against flooding that is not currently recognized under applicable Federal or State law.

Several commenters felt that the final regulations should contain additional guidance on how to interpret the provisions providing for the maintenance of flood protection. One commenter believed that the savings clause provisions for flood protection also should be extended to the natural system and should be interpreted to prevent the transfer of excessive water to the natural system. This commenter also felt that the final regulations should define the term "in accordance with applicable law." Some commenters questioned how the Plan would address opportunities for increased levels of flood protection or the provision of flood protection in locations where there currently is no flood protection. These commenters felt that the regulation should specify that during the implementation of the Plan, the Project Delivery Teams will consider opportunities for providing additional flood protection.

We have concluded that the existing levels of service for flood protection for a particular area should be determined

on a project-by-project basis. Accordingly, the final regulations specify that Project Implementation Reports will include an appropriate analysis and consider the operational conditions included in the pre-CERP baseline to demonstrate that the levels of service for flood protection that were in existence on the date of enactment of WRDA 2000 and is in accordance with applicable law will not be reduced by the project. The Project Implementation Report process provides numerous opportunities for the Project Delivery Team, the public, and the South Florida Ecosystem Restoration Task Force, to examine the levels of service of flood protection provided by previous projects and any law applicable to the specific area affected by the Project Implementation Report. Finally, the regulations acknowledge that the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Accordingly, the final regulations provide for the evaluation of additional flood protection, provided that such flood protection is consistent with the other goals and purposes of the Plan.

V. NEPA Compliance

The Council on Environmental Quality regulations that implement the National Environmental Policy Act (NEPA) (40 CFR 1505.1 and 1507.3), specify that agencies must issue regulations identifying typical classes of actions that normally require environmental impact statements, that normally do not require either an environmental impact statement or an environmental assessment (categorical exclusions), or that normally require environmental assessments but not necessarily environmental impact statements. The Corps of Engineers has adopted procedures fulfilling this requirement in 33 CFR 230. The final regulations consider the actions needed to implement the Plan on a system-wide basis and apply the principles of 33 CFR 230 to those actions to ensure that the provisions of NEPA are fulfilled. The regulations identify certain actions that generally require preparation of a NEPA document (either an Environmental Impact Statement or an environmental assessment) or that do not require the preparation of a NEPA document because they are subject to a categorical exclusion under NEPA.

The final regulations envision that ordinarily the NEPA documentation for a particular project will accompany the Project Implementation Report. For this

reason, other project-specific documents such as the Project Cooperation Agreement, Project Management Plan, and plans and specifications for the project are listed as categorically excluded from NEPA documentation requirements. It is important to note that identifying a document as being categorically excluded from NEPA does not mean that the environmental effects of the action covered by that document will not be analyzed as required under NEPA. The Corps of Engineers will fully analyze and consider these effects at an appropriate time as required by NEPA. This analysis will be accomplished at the time the Corps of Engineers develops its specific project proposal in the Project Implementation Report. This process accords with NEPA's provisions on timing (40 CFR 1502.5 and 1508.23) and its admonishment to avoid duplication (§ 1500.4) and improper segmentation of Federal actions (§ 1502.4).

Some commenters expressed the view that the guidance memorandum for determining the quantity, timing and distribution of water dedicated and managed for the natural system in a Project Implementation Report (PIR) should be analyzed in an Environmental Impact Statement (EIS). Since the guidance memorandum is procedural and does not affect the environment, recommend legislation, or determine a specific quantity, timing, or distribution of water for a specific component, it is not considered a "major Federal action" under NEPA. As noted, the specific project proposal, which is governed by the guidance memorandum, will be subject to a full NEPA analysis in the Project Implementation Report.

Similar comments were directed at the interim goals. Some commenters felt that the interim goals were not "major Federal actions" affecting the environment under NEPA. These commenters regarded the interim goals as evaluation and reporting tools. Other commenters maintained that the interim goals are planning goals and that as such should be subject to a full NEPA analysis. We have determined that the interim goals and interim targets do not require separate NEPA analysis. Interim goals are means by which the restoration success of the Plan may be evaluated; interim targets are means by which progress towards other water-related needs of the region may be evaluated. The Plan itself has undergone NEPA analysis. Future decisions about the environment that involve interim goals and interim targets will be analyzed in other NEPA documents. Projects implementing the Plan will be analyzed under NEPA in Project

Implementation Reports. This will include an analysis of how the project contributes to the goals and purposes of the Plan, including the interim goals and interim targets. The effect of sequencing on the achievement of interim goals and interim targets will be analyzed under NEPA through the Master Implementation Sequencing Plan. The effect of changes to CERP on the achievement of interim goals and interim targets will also be analyzed under NEPA through the Comprehensive Plan Modification Report. For this reason, we have listed interim goals and interim targets as categorically excluded from NEPA. This is consistent with the NEPA implementing regulations, which specify the NEPA analyses should be structured to avoid duplication and improper segmentation of Federal actions.

Some commenters felt that Project Cooperation Agreements, Project Management Plans and Program Management Plans should not be categorically excluded from NEPA. The Project Cooperation Agreement is a written agreement between the non-Federal sponsor and the Federal government setting forth the Federal and non-Federal responsibilities for implementing the project. The Project Cooperation Agreement does not select among project alternatives, it merely sets forth the parties' contractual understandings with regard to a project proposal that previously has been selected in the Project Implementation Report. For this reason, we continue to believe that it is appropriate to extend a categorical exclusion to Project Cooperation Agreements; however, the Corps of Engineers will not conclude a Project Cooperation Agreement for a project before the environmental consequences of that project have been considered fully in an appropriate NEPA document accompanying a Project Implementation Report. Project Management Plans and Program Management Plans are administrative documents setting schedules and assigning tasks between the local sponsor and the Federal government. Accordingly, those items continue to be listed as categorically excluded in the final rule.

W. Outreach

Several commenters suggested that the outreach provisions in the proposed regulations be revised. A number of commenters requested inclusion of their community-based group as a specific entity with which to consult. Several commenters believed that the proposal did not make clear the need for effective

outreach throughout the implementation process, not just during the planning phase. In addition, several commenters believed that specific measurement tools were needed to monitor the effectiveness of the outreach effort and the minority contracting provisions. One commenter suggested that the regulations ensure that information is provided to socially and economically disadvantaged individuals and communities about potential or anticipated contracting opportunities. One commenter suggested that the regulations specify that meetings with the public should be scheduled at times and locations that are convenient to the public.

In the final regulations, we have broadened the definition of public to include community-based organizations. The regulations clarify that the public outreach provisions apply throughout the entire process of implementing the plan. The regulations also add a provision that public meetings and workshops will be held at times and locations that facilitate participation by the public. The final regulations also contain a provision to provide additional information to socially and economically disadvantaged individuals and communities about potential contracting opportunities, noting that the means chosen must be consistent with the outreach provisions of CERP and with other applicable provisions of Federal law. The intent of this provision is to share information with the public in a way that is allowable and consistent with the Federal Acquisition Regulations, the Competition in Contracting Act, and other applicable provisions of law and regulations.

X. Formulation and Evaluation of Alternatives

The final regulations explain that the Project Implementation Report is a document that provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, environmental effects, and the additional information that is necessary for the Secretary of the Army to approve the project for implementation, or for Congress to authorize the project for implementation. Several commenters felt that changes should be made to the provisions in the proposed regulations concerning the formulation and evaluation of alternatives for Project Implementation Reports. Some commenters believe that alternatives should be formulated, evaluated, and justified on their ability to provide system-wide benefits. One commenter

felt that the language in the proposed regulations, which requires system formulation and evaluation to compare "total benefits and costs of the alternative under both the with-CERP and without-CERP condition," is vague. The same commenter stated that the proposed regulation's inclusion of the evaluation of a selected alternative as the last-added increment of the Plan was superfluous, because the proposed regulations already require proposed alternatives to be evaluated on the basis they contribute to the achievement of the goals and purposes of the Plan. One commenter believed that constraining plan formulation within the funding target for the project established by the April 1999 "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" was not appropriate and would inhibit full consideration of alternatives. Another commenter believed that the proposed regulations envisioned an overly narrow definition of cost effectiveness. Some comments cautioned that the formulation and evaluation of alternatives should not mimic traditional Corps of Engineers planning principles because in their view, traditional Corps of Engineers planning has focused on the quantification of benefits at customary civil works projects, rather than achieving the unique goal of restoring an entire ecosystem. There was general agreement that the formulation and evaluation of alternatives should not elevate the goal of fulfilling the other water-related needs of the region over the goal of fulfilling the ecological needs of the South Florida ecosystem simply because the benefits of fulfilling the other water-related needs are readily quantifiable and the benefits of fulfilling the ecological needs are not. This is consistent with section 601(h) of WRDA 2000 which states that the overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection; and with section 601(f)(2), which states that the Secretary of the Army may determine that an activity under CERP is justified by the environmental benefits to be derived by the South Florida ecosystem, with no further economic justification required, provided the activity is cost-effective.

The final regulations remove the provision that constrains plan formulation to stay within the funding target for the project established in the April 1999 "Final Integrated Feasibility Report and Programmatic

Environmental Impact Statement.” Instead, the final regulations require that the Project Implementation Report include a discussion of any significant changes in cost or scope of the project from that presented in the April 1999 Report. They also require that in preparing Project Implementation Reports, the Corps of Engineers and the non-Federal sponsor will formulate and evaluate alternative plans in order to optimize the project’s contributions toward achieving the goals and purposes of the Plan on a system-wide basis in the most cost-effective manner, while also ensuring that the selected option provides benefits that justify costs on a next-added increment basis. The final regulations call for the development of a guidance memorandum that will describe the processes to be used to formulate and evaluate alternative plans and their associated monetary and non-monetary benefits and costs and the basis for justifying and selecting an alternative to be recommended for implementation. To aid the formulation and evaluation process, the final regulations also include definitions for the terms “alternative plan,” “justified,” and “optimize.” The definition of “justified” makes clear, consistent with section 601(f)(2) of WRDA 2000 that restoration benefits need not be quantified or monetized to justify costs, provided that the activity is justified by the environmental benefits derived by the South Florida ecosystem and is cost-effective. The regulations make clear that the project described in the April 1999 “Final Integrated Feasibility Report and Programmatic Environmental Impact Statement,” will be one of the alternative plans that will be evaluated. They also specify that the selected alternative plan will be the plan that maximizes net benefits while still being justified as the next-added increment. Under the final regulations, alternative plans that are not justified on a next-added increment basis will not be selected. Finally, we have revised figure 2 in Appendix A to better describe the formulation and evaluation activities conducted during the development of the Project Implementation Report.

In publishing these final regulations, we emphasize that the discussion in the regulations on plan formulation and evaluation should not be construed to elevate water supply and flood control benefits, which historically have been easier to quantify and place a monetary value on, over environmental restoration benefits, which are more difficult to quantify.

Y. References to Senate Committee Report Language

One commenter was concerned about references to the Senate Environment and Public Works Committee Report (Senate Report No. 106–362) in the preamble of the proposed regulations. This commenter expressed the view that Senate Committee Report 106–362 carries no legislative weight since the bill discussed in Senate Committee Report 106–362 differs in several critical areas from the final version of the bill adopted by the full United States Senate. We agree that the final statute differed in several areas from the bill discussed in the report and must be read with this limitation in mind. We have referred to the Senate Report in the preamble to the final regulations only where it provides relevant and reliable information to aid the understanding of issues involved in implementing the Plan.

V. Project Implementation Reports Approved Pursuant to Transition Rule

Section 601(h)(3)(D) of WRDA 2000 establishes a transition rule for Project Implementation Reports approved before the date of promulgation of the programmatic regulations. This transition rule requires that the Project Implementation Reports be consistent with the Plan. The transition rule also requires that the preamble of the programmatic regulations contain a statement concerning the consistency with the programmatic regulations of Project Implementation Reports that were approved prior to the date of issuance of the final regulations. Accordingly, this preamble specifically states that no Project Implementation Reports have been approved before the date of issuance of the final programmatic regulations.

VI. Concurrence Process for This Regulation

The Secretary of the Interior and the Governor are required by section 601(h)(3)(B) of WRDA 2000 to provide the Secretary of the Army with a written statement of concurrence or non-concurrence on the final programmatic regulations. The Secretary of Interior and the Governor shall provide concurrence or non-concurrence within 180 days of being provided with a copy of the final regulations.

The Department of the Army has sought to communicate openly and fully with the Department of the Interior and the State of Florida during the course of developing these regulations. We believe that this communication has improved the content of the regulations

and led to a full understanding of the views of these parties. The concurrency statements of the Department of the Interior and the State of Florida are included as an appendix to this document.

VII. Organization of the Final Regulations

We have organized the final regulations in five subparts. The first subpart, “General Provisions,” sets forth the purpose of the regulations, the applicability of the regulations, definitions pertaining to the regulations and other general information. The second subpart, “Program Goals and Responsibilities,” describes the goals and purposes of the Plan, implementation principles, implementation responsibilities, and consultation and coordination expectations. The remaining subparts were designed to be consistent with the content required by section 601(h)(3)(C). These subparts are: “Comprehensive Everglades Restoration Plan Implementation Processes,” “Incorporating New Information into the Plan,” and “Ensuring Protection of the Natural System and Water Availability Consistent with the Goals and Purposes of the Plan.”

VIII. Administrative Requirements

A. Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

The final regulations do not impose any information collection requirements for which Office of Management and Budget (OMB) approval under the Paperwork Reduction Act is required. Thus, this action is not subject to the Paperwork Reduction Act.

B. Executive Order 12866, as Amended

Under Executive Order 12866 (58 FR 51735, October 4, 1993), as amended, we must determine whether the regulatory action is “significant” and therefore subject to review by the Office of Management and Budget and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees,

or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, as amended, it has been determined that the final regulations are a "significant regulatory action" in light of the provisions of paragraph (4) above. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in the public record.

C. Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires the development of an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Although the final regulations define the relationships between the Federal and State partners, it is limited to implementation of the Comprehensive Everglades Restoration Plan. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, within the meaning of Executive Order 13132. Nevertheless, the Corps of Engineers has consulted closely with the State and local officials in developing the final regulations.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended (5 U.S.C. 601 *et seq.*) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of the proposed rule on small entities, a small entity is defined as: (1) A small business based on SBA

size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. We certify that this action will not have a significant economic impact on a substantial number of small entities. The final regulations only establish processes and governmental relationships that will be used for implementation of the Comprehensive Everglades Restoration Plan.

E. Unfunded Mandates Reform Act

We have determined in accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) The final regulations will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that they agree to act as a non-Federal sponsor for implementation of projects for the Comprehensive Everglades Restoration Plan. The final regulations do not establish new or different requirements for non-Federal sponsors for implementation of projects for the Comprehensive Everglades Restoration Plan. The Savings Clause ensures that small governments, including public water utilities, will not be impacted by the loss of an existing legal source of water, or existing levels of service for flood protection that were in effect on the date of enactment of WRDA 2000, and in accordance with applicable law.

(b) The final regulations will not produce a Federal mandate of \$100 million or greater in any year, and therefore, do not constitute a "significant regulatory action" under the Unfunded Mandates Reform Act. The final regulations define processes and relationships between the Federal and State partners in implementing the Comprehensive Everglades Restoration Plan. The regulations do not affect the cost sharing requirements for non-Federal sponsors in implementing the Plan and therefore, impose no new obligations on State or local governments.

F. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (the NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note), directs us to use voluntary consensus standards in our regulatory

activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards. These regulations do not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

G. Executive Order 13045

Executive Order 13045, as amended, entitled "Protection of Children From Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Was initiated after April 21, 1997, or for which a notice of proposed rulemaking was published after April 21, 1998; (2) is determined to be "economically significant" as defined under Executive Order 12866, and (3) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets all three criteria, we must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives that were considered. The final regulations are not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. The final regulations establish processes for the implementation of the Comprehensive Everglades Restoration Plan and define the relationships between the Federal and State partners for implementation. Furthermore, the regulations do not concern an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children.

H. Executive Order 13175

Under Executive Order 13175, we may not issue a regulation that has substantial, direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of powers and responsibilities between the Federal government and Indian tribes, and imposes substantial direct compliance costs on those communities, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct

compliance cost incurred by the Tribal governments, or we consult with those governments. If we comply by consulting, Executive Order 13175 requires us to provide the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of our prior consultation with representatives of affected Tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13175 requires us to develop an effective process permitting elected officials and other representatives of Indian Tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities." The final regulations are required by section 601(h)(3) of WRDA 2000. Additionally, the final regulations do not impose significant compliance costs on any Indian Tribes. The regulations establish processes for the implementation of the Comprehensive Everglades Restoration Plan and define the relationships between the implementing entities. Accordingly, the requirements of section 3(b) of Executive Order 13175 do not apply to these final regulations. However, the Corps of Engineers recognizes that two Indian Tribes, the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida, have a significant direct interest in the implementation of the CERP and the framework for its implementation that will be established by these programmatic regulations. We have thus consulted extensively with these Tribes in the development of the regulations, and have included requirements for continued consultation in all significant project implementation components, including program-wide guidance memoranda, Project Management Plans, Program Management Plans, Project Implementation Reports, Project Operating Manuals, the System Operating Manual, and the Master Implementation Sequencing Plan. These Tribes also are included in the Leadership Group of RECOVER and participate in the Project Delivery Teams and the South Florida Ecosystem Restoration Task Force, which has played and will continue to play a consultative role on many aspects of CERP implementation. Finally, § 385.10(b) includes a general requirement for consultation with the Tribes "throughout the implementation process."

I. Executive Order 12630

In accordance with Executive Order 12630 entitled "Governmental Actions and Interference with Constitutionally Protected Property Rights," the final regulations will not effect a taking of private property or otherwise have taking implications. Therefore, a takings implication assessment is not required. The final regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan and in and of itself does not address property needs.

J. Civil Justice Reform

In accordance with Executive Order 12988, we have determined that the final regulations do not unduly burden the judicial system and meet the requirements of sections 3(a) and 3(b)(2) of the Executive Order. The final regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan and define the relationships between the governmental entities that will implement the Plan.

K. Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) that applies to regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Because the final regulations are not expected to significantly affect energy supplies, distribution, or use, this action is not a significant energy action and no Statement of Energy Effects is required.

L. Executive Order 13272

On August 13, 2002, the President issued an Executive Order (E.O. 13272) that requires that agencies review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided for in the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*) We have determined that this action will not have a significant economic impact on a substantial number of small entities. The final regulations only establish processes and governmental relationships that will be used for implementation of the Comprehensive Everglades Restoration Plan.

M. Environmental Documentation

As required by the National Environmental Policy Act (NEPA), the Department of the Army prepares appropriate environmental

documentation for its activities affecting the quality of the human environment. We have determined that the final regulations do not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, environmental documentation under the National Environmental Policy Act (NEPA) is not required for the final regulations. One commenter expressed the view that an Environmental Impact Statement was necessary for the regulations. The Corps of Engineers has prepared appropriate environmental documentation, including a Programmatic Environmental Impact Statement, for the Comprehensive Everglades Restoration Plan. Today's final regulations do not implement any of the features of the Plan. Rather, the final regulations identify the processes to be followed in implementing features of the Plan. Moreover, the final regulations establish requirements for the preparation of appropriate environmental documentation as part of the implementation process. Accordingly, we continue to believe that an EIS is not warranted.

List of Subjects in 33 CFR Part 385

Environmental protection, Flood control, Intergovernmental relations, Natural resources, Water resources, Water supply.

Dated: October 30, 2003.

John Paul Woodley, Jr.,

*Assistant Secretary of the Army (Civil Works),
Department of the Army.*

■ Accordingly, as set forth in the preamble, the Army Corps of Engineers adds 33 CFR part 385 as follows:

■ Add part 385 to read as follows:

PART 385—PROGRAMMATIC REGULATIONS FOR THE COMPREHENSIVE EVERGLADES RESTORATION PLAN

Subpart A—General Provisions

Sec.

385.1 Purpose of the programmatic regulations.

385.2 Applicability of the programmatic regulations.

385.3 Definitions.

385.4 Limitation on applicability of programmatic regulations.

385.5 Guidance memoranda.

385.6 Review of programmatic regulations.

385.7 Concurrency statements.

Subpart B—Program Goals and Responsibilities

Sec.

385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.

385.9 Implementation principles.

385.10 Implementation responsibilities, consultation, and coordination.

Subpart C—CERP Implementation Processes

Sec.

- 385.11 Implementation process for projects.
- 385.12 Pilot projects.
- 385.13 Projects implemented under additional program authority.
- 385.14 Incorporation of NEPA and related considerations into the implementation process.
- 385.15 Consistency with requirements of the State of Florida.
- 385.16 Design agreements.
- 385.17 Project Delivery Team.
- 385.18 Public outreach.
- 385.19 Environmental and economic equity.
- 385.20 Restoration Coordination and Verification (RECOVER).
- 385.21 Quality control.
- 385.22 Independent scientific review and external peer review.
- 385.23 Dispute resolution.
- 385.24 Project Management Plans.
- 385.25 Program Management Plans.
- 385.26 Project Implementation Reports.
- 385.27 Project Cooperation Agreements.
- 385.28 Operating Manuals.
- 385.29 Other project documents.

Subpart D—Incorporating New Information into the Plan

Sec.

- 385.30 Master Implementation Sequencing Plan.
- 385.31 Adaptive management program.
- 385.32 Comprehensive Plan Modification Report.
- 385.33 Revisions to models and analytical tools.
- 385.34 Changes to the Plan.

Subpart E—Ensuring Protection of the Natural System and Water Availability Consistent with the Goals and Purposes of the Plan

Sec.

- 385.35 Achievement of the benefits of the Plan.
- 385.36 Elimination or transfer of existing legal sources of water.
- 385.37 Flood protection.
- 385.38 Interim goals.
- 385.39 Evaluating progress towards other water-related needs of the region provided for in the Plan.
- 385.40 Reports to Congress.

Appendix A—Illustrations to Part 385

Authority: Section 601, Pub. L. 106–541, 114 Stat. 2680; 10 U.S.C. 3013(g)(3); 33 U.S.C. 1 and 701; and 5 U.S.C. 301.

Subpart A—General Provisions

§ 385.1 Purpose of the programmatic regulations.

(a) The programmatic regulations of this part implement the provisions of section 601(h)(3) of the Water Resources Development Act of 2000, Public Law 106–541, 114 Stat. 2688 (hereinafter

“WRDA 2000”), which was enacted on December 11, 2000.

(b) The purpose of the programmatic regulations of this part is to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan (the Plan) are achieved and to establish the processes necessary for implementing the Plan. Some of these processes are project specific, including, but not limited to, development of Project Implementation Reports, Project Cooperation Agreements, plans and specifications, Pilot Project Technical Data Reports, and Operating Manuals. Other processes are of more general applicability, including, but not limited to, development of program-wide guidance memoranda, interim goals, interim targets, and the Master Implementation Sequencing Plan. Taken together, these processes will ensure that the restoration purposes and other goals of the Plan are achieved. The regulations of this part also describe the relationship among the various entities responsible for implementation of the Plan.

(c) Section 601(h) of WRDA 2000 establishes an integrated framework for assuring that the goals and purposes of the Plan are achieved. This framework includes tools for planning, implementation, and evaluation; a process for developing these tools in an open public process, with input from other Federal, State, and local agencies; and an enforcement mechanism to ensure that the requirements of the statute are carried out.

(1) Tools.

(i) The specific planning tool established by section 601(h) is the Project Implementation Report.

(ii) The specific implementation tools established by section 601(h) are Project Cooperation Agreements and Operating Manuals.

(iii) The specific evaluation tool established by section 601(h) is the interim goals for evaluating the restoration success of the Plan.

(iv) In addition to the specific planning, implementation, and evaluation tools established by section 601(h), the regulations of this part establish additional tools, including but not limited to, Project Management Plans, Program Management Plans, Comprehensive Plan Modification Reports, the Master Implementation Sequencing Plan, and interim targets for evaluating progress towards achieving the other water related needs of the region.

(2) *Processes.* The regulations of this part establish the processes for developing these tools. Consistent with section 601(h), these regulations have

been developed, after notice and opportunity for public content, with the concurrence of the Secretary of the Interior and the Governor, and in consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

(3) *Enforcement mechanism.* The specific enforcement mechanism established by Section 601(h) is the “Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement,” dated January 9, 2002, between the President and the Governor, under which the State shall ensure, by regulation or other appropriate means, that water made available by each project in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the project implementation report and consistent with the Plan.

(4) *Public information.* The Secretary of the Army shall ensure that the public understands the linkage between the processes, tools, and enforcement mechanism and can monitor the effectiveness of this integrated framework in assuring that the goals and purposes of the Plan are achieved, as provided for in the regulations of this part, by:

(i) Providing for public notice and comment in the development of planning, implementation, and evaluation tools;

(ii) Providing notice of final action on planning, evaluation, and implementation tools;

(iii) Making available to the public on a web site or by other appropriate means final, and where appropriate draft, copies of all planning, evaluation, and implementation tools; and

(iv) Explaining through the regulations of this part and by other appropriate means the process for developing the tools, the linkage between the process, tools, and enforcement mechanism, and the means by which these elements constitute an integrated framework for assuring that the goals and purposes of the Plan are achieved.

§ 385.2 Applicability of the programmatic regulations.

(a) This part applies to all activities conducted to implement the

Comprehensive Everglades Restoration Plan.

(b) As used in this part, the Secretary of the Army acts through the Assistant Secretary of the Army for Civil Works with respect to the Army's civil works program pursuant to 10 U.S.C. 3016.

(c) Nothing in this part shall be interpreted to amend, alter, diminish, or otherwise affect:

(1) The rights, powers and duties provided under the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000; or

(2) Any existing legal water rights of the United States, the State of Florida, the Miccosukee Tribe of Indians of Florida, or the Seminole Tribe of Florida, including rights under the compact among the Seminole Tribe of Florida, the State, and the South Florida Water Management District, defining the scope and use of water rights of the Seminole Tribe of Florida, as codified by section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e).

(d) This part is intended to aid the internal management of the implementing agencies and is not intended to create any right or benefit enforceable at law by a party against the implementing agencies or their officers. Nothing in this part shall create a right or expectation to benefits or enhancements, temporary or permanent, in third parties that are not specifically authorized by Congress in section 601 of WRDA 2000.

(e) Nothing in this part is intended to, or shall be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nor is this part intended to, nor shall it be interpreted to, prescribe any process of Florida law.

§ 385.3 Definitions.

For the purposes of this part, the following terms are defined:

Adaptive management means the continuous process of seeking a better understanding of the natural system and human environment in the South Florida ecosystem, and seeking continuous refinements in and improvements to the Plan to respond to new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan in order to ensure that the goals and purposes of the Plan are fulfilled.

Alternative plan means a plan that consists of a system of structural and/or nonstructural measures, strategies, or programs formulated to achieve, fully or partially, the goals and purposes of the Plan, as further defined in section 1.6.1 of the Water Resources Council's "Economic and Environmental Guidelines for Water and Related Land Resources Implementation Studies," dated March 10, 1983.

Assessment means the process whereby the actual performance of implemented projects is measured and interpreted based on analyses of information obtained from research, monitoring, modeling, or other relevant sources.

Central and Southern Florida (C&SF) Project means the project for Central and Southern Florida authorized under the heading "CENTRAL AND SOUTHERN FLORIDA" in section 203 of the Flood Control Act of 1948 (62 Stat. 1176) and any modification authorized by any other provision of law, including section 601 of WRDA 2000.

Component means features of the Plan that include, but are not limited to, storage reservoirs, aquifer storage and recovery facilities, stormwater treatment areas, water reuse facilities, canals, levees, pumps, water control structures, and seepage management facilities; the removal of canals, levees, pumps, and water control structures; and operational changes.

Comprehensive Everglades Restoration Plan (CERP) means the plan contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as modified by section 601 of WRDA 2000, and any subsequent modification authorized in law.

Comprehensive Plan Modification Report means the report prepared for approval by Congress of major changes to the Plan that are necessary to ensure that the goals and purposes of the Plan are achieved. The Comprehensive Plan Modification Report describes the formulation and evaluation of alternatives, recommended modifications to the Plan, and other economic, environmental, and engineering information, and includes the appropriate NEPA document.

Concurrence means the issuance of a written statement of concurrence or the failure to provide such a written statement within a time frame prescribed by law or this part.

Consultation means 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.

Coordination means the formal exchange of information and views, by letter, report, or other prescribed means, between the Corps of Engineers and the non-Federal sponsor and another agency or tribe, including but not limited to, the exchange of information and views regarding the development of Project Implementation Reports, Operating Manuals, and Comprehensive Plan Modification Reports. Coordination activities are required by and in accordance with purposes and procedures established by Federal policy (public law, executive order, agency regulation, memorandum of agreement, and other documents that memorialize policy of the Corps of Engineers).

Cost-effective means the least costly way of attaining a given level of output or performance, consistent with the goals and purposes of the Plan and applicable laws.

Design Agreement means the agreement between the Corps of Engineers and a non-Federal sponsor concerning cost sharing for activities related to planning, engineering, design, and other activities needed to implement the Plan.

Dispute means any disagreement between the agencies or tribes associated with implementation of the Plan that cannot be resolved by the members of a Project Delivery Team or RECOVER and that is elevated to decision makers at the respective agencies or tribes.

District Engineer means the District Engineer of the Corps of Engineers, Jacksonville District.

Division Engineer means the Division Engineer of the Corps of Engineers, South Atlantic Division.

Drought contingency plan means the plan required by § 222.5(i)(5) of this chapter and described in implementing Engineer Regulation ER 1110-2-1941 "Drought Contingency Plans," and means a plan contained within an Operating Manual that describes procedures for dealing with drought situations that affect management decisions for operating projects.

Environmental and economic equity means the fair treatment of all persons regardless of race, color, creed, national origin, or economic status, including environmental justice, and the provision of economic opportunities for small business concerns controlled by socially and economically disadvantaged individuals, including individuals with

limited English proficiency, in the implementation of the Plan.

Environmental justice means identifying and addressing, disproportionately high and adverse human health or environmental effects of a Federal agency's programs, policies, and activities on minority and low-income populations, in accordance with applicable laws, regulations, and Executive Orders.

Evaluation means the process whereby the performance of plans and designs relative to desired objectives is forecast through predictive modeling and other tools.

Expected performance level means the projected level of benefits to the natural system and human environment described in the Plan.

External peer review means a process to review and validate the scientific and technical processes and information developed for implementation of the Plan that is independent of the agencies involved in the implementation of the Plan.

Goals and purposes of the Plan means the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

Governor means the Governor of the State of Florida.

Guidance memorandum means the specific procedure, process, or other guidance specified in § 385.5(b) that is developed and approved by the Secretary of the Army with the concurrence of the Secretary of the Interior and the Governor.

Improved or new flood protection benefits means increased or new levels of service for flood protection that are identified in a Project Implementation Report and approved as a purpose of the project.

Independent scientific review means the process established pursuant to section 601(j) of WRDA 2000 to review the Plan's progress toward achieving the natural system restoration goals of the Plan.

Individual feature of the Plan means a component or group of components of the Plan related to and limited to one specific project of the Plan.

Interim goal is a means by which restoration success of the Plan may be evaluated throughout the implementation process. Interim goals provide a means of tracking restoration performance, as well as a basis for reporting on the progress made at specified intervals of time towards restoration of the South Florida ecosystem, and for periodically

evaluating the accuracy of predictions of system responses to the effects of the Plan.

Interim target is a means by which the success of the Plan in providing for other water-related needs of the region, including water supply and flood protection, may be evaluated throughout the implementation process. Interim targets provide a means of tracking Plan performance, as well as a basis for reporting on progress made at specified intervals of time towards providing for other water-related needs of the region, and for periodically evaluating the accuracy of predictions of system responses to the effects of the Plan.

Justified has the same meaning as in section 601(f)(2) of WRDA 2000 which states that the Secretary of the Army, in carrying out any activity to restore, preserve, or protect the South Florida ecosystem, may determine that an activity is justified by the environmental benefits derived by the South Florida ecosystem and no further economic justification for the activity is required, if the Secretary determines that the activity is cost-effective.

Levels of service for flood protection means the expected performance of the Central and Southern Project and other water management systems in the South Florida ecosystem, consistent with applicable law, for a specific area or region.

Master Implementation Sequencing Plan means the document that describes the sequencing and scheduling for the projects of the Plan.

Mediation means a non-binding dispute resolution process designed to assist the disputing parties to resolve a disagreement. In mediation, the parties mutually select a neutral and impartial third party to facilitate the negotiations.

Monitoring means the systematic process of collecting data designed to show the status, trends, and relationships of elements of the natural system and human environment at specific locations and times.

Natural system means all land and water managed by the Federal government or the State within the South Florida ecosystem including, but not limited to, water conservation areas; sovereign submerged land; Everglades National Park; Biscayne National Park; Big Cypress National Preserve; other Federal or State (including a political subdivision of a State) land that is designated and managed for conservation purposes; the contiguous near-shore coastal water of South Florida; and, any tribal land that is designated and managed for conservation purposes, as approved by the tribe.

Next-added increment means the evaluation of an alternative as the next project to be added to a system of projects already implemented. For the purposes of this part, this means analyzing an alternative as the next project to be added to a system of projects that includes only those projects that have been approved according to general provision of law or specific authorization of Congress and are likely to have been implemented by the time the project being evaluated is completed.

Non-Federal sponsor means a legally constituted public body that has full authority and capability to perform the terms of the Project Cooperation Agreement and the ability to pay damages, if necessary, in the event of failure to perform, pursuant to section 221 of the Flood Control Act of 1970, as amended (42 U.S.C. 1962d-5b).

Operating Manuals means the set of documents that describe how the projects of the Plan and the Central and Southern Florida Project are to be operated to ensure that the goals and purposes of the Plan are achieved. Operating Manuals include the System Operating Manual and Project Operating Manuals. Operating Manuals contain water control plans, regulation schedules, and operating criteria for project and/or system regulations as well as additional information necessary to operate projects to ensure that the goals and purposes of the Plan are achieved.

Optimize means to follow a reasonable and practical process for developing a plan that returns the greatest excess of benefits, both monetary and non-monetary, over costs.

Outreach means activities undertaken to inform the public about the Plan and activities associated with implementation of the Plan, and to involve the public in the decision-making process for implementing the Plan.

Performance measure means an element or component of the natural system or human environment that is expected to be influenced by the Plan that has been selected to be evaluated or monitored as representative of a class of responses to implementation of the Plan and compared with a level of output that is expected and desired during or following the implementation of the Plan.

Periodic CERP update means the evaluation of the Plan that is conducted periodically with new or updated modeling that includes the latest available scientific, technical, and planning information.

Pilot project means a project undertaken to address uncertainties associated with certain components of the Plan such as aquifer storage and recovery, in-ground reservoir technology, seepage management, and wastewater reuse. The purpose of pilot projects is to develop information necessary to better determine the technical feasibility of these components prior to development of a Project Implementation Report.

Pilot Project Design Report means the report that contains the technical information necessary to implement a pilot project.

Pilot Project Technical Data Report means the report that documents the findings and conclusions from the implementation and testing phases of a pilot project.

Plan means the Comprehensive Everglades Restoration Plan contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as modified by section 601 of WRDA 2000, and any subsequent modification authorized in law.

Plans and specifications means the information required to bid and construct the recommended project described in the Project Implementation Report.

Pre-CERP baseline means the hydrologic conditions in the South Florida ecosystem on the date of enactment of WRDA 2000, as modeled by using a multi-year period of record based on assumptions such as land use, population, water demand, water quality, and assumed operations of the Central and Southern Florida Project.

Program-level activity means those tasks, activities, or products that support more than one project or that are system-wide in scope.

Program Management Plan means the document that describes the activities, tasks, and responsibilities that will be used to produce and deliver the products that comprise a program-level activity.

Project means a component or group of components of the Plan that are implemented together to provide functional benefits towards achieving the goals and purposes of the Plan.

Project Cooperation Agreement (PCA) means the legal agreement between the Department of the Army and a non-Federal sponsor that is executed prior to project construction. The Project Cooperation Agreement describes the financial, legal, and other responsibilities for construction, operation, maintenance, repair,

rehabilitation, and replacement of a project.

Project Delivery Team means the inter-agency, interdisciplinary team led by the Corps of Engineers and the non-Federal sponsor that develops the technical products necessary to implement a project.

Project Implementation Report (PIR) means the report prepared by the Corps of Engineers and the non-Federal sponsor pursuant to section 601(h)(4)(A) of WRDA 2000 and described in section 10.3 of the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

Project Management Plan means the document that describes the activities, tasks, and responsibilities that will be used to produce and deliver the products necessary to implement a project.

Project Operating Manual means the manual that describes the operating criteria for a project or group of projects of the Plan. The Project Operating Manual is considered a supplement to the System Operating Manual and presents more detailed information on the operation of a specific project or group of projects.

Public means any individuals, organizations, or non-Federal unit of government that might be affected by or interested in the implementation of the Plan. The public includes regional, State, and local government entities and officials, public and private organizations, including community-based organizations, Native American (Indian) tribes, and individuals.

Quality control plan means the plan prepared in accordance with applicable regulations and policies of the Corps of Engineers that describes the procedures that will be employed to insure compliance with all technical and policy requirements of the Corps of Engineers and the non-Federal sponsor.

Reservation of water for the natural system means the actions taken by the South Florida Water Management District or the Florida Department of Environmental Protection, pursuant to Florida law, to legally reserve water from allocation for consumptive use for the protection of fish and wildlife.

Restoration means the recovery and protection of the South Florida ecosystem so that it once again achieves and sustains those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem. As authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system; however it will not completely

replicate the undisturbed South Florida ecosystem.

Restoration Coordination and Verification (RECOVER) means the interagency and interdisciplinary scientific and technical team described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 and established by the Corps of Engineers and the South Florida Water Management District to: ensure that a system-wide perspective is maintained; ensure the highest quality scientific and technical information is applied throughout the implementation process; and to assess, evaluate, and integrate the projects of the Plan with the overall goal of ensuring that the goals and purposes of the Plan are achieved.

South Florida ecosystem means the area consisting of the land and water within the boundary of the South Florida Water Management District in effect on July 1, 1999, including but not limited to, the Everglades, the Florida Keys, and the contiguous near-shore coastal water of South Florida.

South Florida Ecosystem Restoration Task Force (Task Force) means the task force established pursuant to section 528(f) of WRDA 1996 (110 Stat. 3770).

South Florida Water Management District (SFWMD) means the public body constituted by the State of Florida pursuant to Chapter 373.069 of the Florida Statutes.

State means the State of Florida.

System Operating Manual means the Operating Manual that provides an integrated system-wide framework for operating all of the implemented projects of the Plan and the Central and Southern Florida Project.

System-wide means pertaining to the Central and Southern Florida Project or the South Florida ecosystem, as a whole.

Technical review means the process that confirms that the engineering, economic, environmental, and other aspects of project formulation and design are in accord with appropriate Federal, State, and Corps of Engineers established standards and criteria, regulations, laws, codes, principles, and professional procedures that are necessary to ensure a quality product. Technical review also confirms the constructability and effectiveness of the product and the use of clearly justified and valid assumptions and methodologies.

Technical Review Team means the team established by the Corps of Engineers and the non-Federal sponsor to ensure quality control of documents and products produced by the Project

Delivery Team through periodic technical reviews of the technical aspects of projects.

Water budget means an account of all water inflows, outflows, and changes in storage over a period of time.

Water dedicated and managed for the natural system means the water to be reserved or allocated for the natural system under State law as identified in a Project Implementation Report.

Water made available means the water expected to be generated pursuant to the implementation of a project of the Plan in accordance with the Project Implementation Report for that project.

Without CERP condition means the conditions predicted (forecast) in the South Florida ecosystem without implementation of any of the projects of the Plan.

WRDA 1996 means the Water Resources Development Act of 1996, Public Law 104–303, which was enacted on October 12, 1996.

WRDA 2000 means the Water Resources Development Act of 2000, Public Law 106–541, which was enacted on December 11, 2000.

§ 385.4 Limitation on applicability of programmatic regulations.

In accordance with section 601(h)(3)(c)(ii) of WRDA 2000, this part expressly prohibits “the requirement for concurrence by the Secretary of the Interior or the Governor on Project Implementation Reports, Project Cooperation Agreements, Operating Manuals for individual projects undertaken in the Plan, and any other documents relating to the development, implementation, and management of individual features of the Plan, unless such concurrence is provided for in other Federal or State laws.”

§ 385.5 Guidance memoranda.

(a) *General.* (1) Technical guidance for internal management of Corps of Engineers personnel during Plan implementation will be normally issued in the form of Engineer Regulations, Circulars, Manuals, or Pamphlets, or other appropriate form of guidance.

(2) Guidance on the following six program-wide subjects shall be promulgated in accordance with paragraphs (b) and (c) of this section:

(i) General format and content of Project Implementation Reports (§ 385.26(a));

(ii) Instructions for formulation and evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts (§ 385.26(b));

(iii) General content of operating manuals (§ 385.28(a));

(iv) General directions for the conduct of the assessment activities of RECOVER (§ 385.31(b));

(v) Instructions relevant to Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system (§ 385.35(b)); and

(vi) Instructions relevant to Project Implementation Reports for identifying if an elimination or transfer of existing legal sources of water will occur as a result of implementation of the Plan (§ 385.36(b)).

(b) *Special processes for development of six program-wide guidance memoranda.* The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop the six guidance memoranda described in paragraph (a) of this section for approval by the Secretary of the Army. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in the development of these guidance memoranda. The following procedures shall apply to the specific guidance memoranda described in paragraph (a) of this section:

(1) Guidance memoranda shall be consistent with this part, applicable law, and achieving the goals and purposes of the Plan.

(2) The Secretary of the Army shall afford the public an opportunity to comment on each guidance memorandum prior to approval through the issuance of a notice of availability in the **Federal Register**.

(3) Approved guidance memoranda shall be made available to the public.

(4) The guidance memoranda specifically referenced in this part shall be developed by December 13, 2004.

(5) The six guidance memoranda described in paragraph (a) of this section shall be developed with the concurrence of the Secretary of the Interior and the Governor. Within 180 days after being provided with the final guidance memorandum, or such shorter period that the Secretary of the Interior and the Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the proposed guidance memorandum. A

failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency requirements of this section. A copy of any concurrency or nonconcurrency statements shall be made a part of the administrative record and referenced in the final guidance memorandum. Any nonconcurrency statement shall specifically detail the reason or reasons for the non-concurrence. If the six guidance memoranda described in paragraph (a) of this section create a special procedure for any individual Project Implementation Report, a specific Project Cooperation Agreement, an Operating Manual for a specific project component, or any other document relating to the development, implementation, and management of one specific individual feature of the Plan, this section does not require concurrence or non-concurrence on that special procedure. In lieu of concurrence or non-concurrence on such a special procedure, the Secretary of the Army shall consult with the Secretary of the Interior and the Governor.

(6) The Secretary of the Army shall consider incorporating into the regulations of this part the guidance memoranda specifically referenced in this section during future reviews and revisions of the regulations of this part.

(c) *Revisions to six Program-wide guidance memoranda.* The Secretary of the Army may, whenever the Secretary believes it is necessary, and in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the South Florida Water Management District, the Florida Department of Environmental Protection, other Federal, State, and local agencies, and the public, revise guidance memoranda that have been completed. Such revisions shall be developed and approved consistent with the provisions of paragraph (b) of this section. Revisions to the six guidance memoranda described in paragraph (a) of this section shall be made following the same concurrence process as in paragraph (b)(5) of this section.

(d) *Other guidance.* Nothing in this part shall be considered or construed to preclude the ability of the Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors from issuing other guidance or policy to assist in implementing the Plan. Any such guidance or policy shall be consistent

with applicable law, policy, and regulations.

§ 385.6 Review of programmatic regulations.

(a) The Secretary of the Army shall review, and if necessary revise, the regulations of this part at least every five years. In addition, the Secretary of the Army may review and revise the regulations of this part whenever the Secretary believes that such review and revision is necessary to attain the goals and purposes of the Plan. The Secretary of the Army shall place appropriate notice in the **Federal Register** upon initiating review of the regulations of this part.

(b) Upon completing the review of the regulations of this part, the Secretary shall promulgate any revisions to the regulations after notice and opportunity for public comment in accordance with applicable law, with the concurrence of the Secretary of the Interior and the Governor, and in consultation with the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and other Federal, State, and local agencies.

(c) Within 180 days after being provided with the final revisions to the programmatic regulations of this part, or such shorter period that the Secretary of the Interior and Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the revisions. A failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency process of paragraph (b) of this section. A copy of any concurrency or nonconcurrency statements shall be made a part of the administrative record and referenced in the final revised programmatic regulations. Any non-concurrency statement shall specifically detail the reason or reasons for the non-concurrence.

§ 385.7 Concurrency statements.

The administrative record of the programmatic regulations in this part contains a copy of the concurrency statements by the Secretary of the Interior and the Governor to the Secretary of the Army. The concurrency statements can be obtained from the Army Corps of Engineers, Jacksonville District, 701 San Marco Blvd., Jacksonville, Florida 32207, or by accessing the programmatic regulations Web page at: <http://>

www.evergladesplan.org/pm/progr_regs_final_rule.cfm.

Subpart B—Program Goals and Responsibilities

§ 385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.

(a) The Comprehensive Everglades Restoration Plan (CERP) is a framework for modifications and operational changes to the Central and Southern Florida Project. The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection.

(b) The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, implement the Plan, as authorized by Congress, to ensure the protection of water quality in, the reduction of the loss of fresh water from, and the improvement of the environment of the South Florida ecosystem and to achieve and maintain the benefits to the natural system and human environment described in the Plan, and required pursuant to section 601 of WRDA 2000, for as long as the project is authorized.

(c) The goal of the Plan is to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region. The Plan is designed to accomplish this by providing the quantity, quality, timing, and distribution of water necessary to achieve and sustain those essential hydrological and biological characteristics that defined the undisturbed South Florida ecosystem. As authorized by Congress, the restored South Florida ecosystem will be significantly healthier than the current system; however it will not completely replicate the undisturbed South Florida ecosystem and some areas may more closely replicate the undisturbed ecosystem than others. Initial modeling showed that most of the water generated by the Plan would go to the natural system in order to attain restoration goals, and the remainder of the water would go for use in the human environment. The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors

shall ensure that Project Implementation Reports identify the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system that is necessary to meet the restoration goals of the Plan. In accordance with the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000, the South Florida Water Management District or the Florida Department of Environmental Protection shall make sufficient reservations of water for the natural system under State law in accordance with the Project Implementation Report for that project and consistent with the Plan before water made available by a project is permitted for a consumptive use or otherwise made unavailable.

(d) The Corps of Engineers and non-Federal sponsors shall implement the Plan in a manner to continuously improve the expected performance level of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the adaptive assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

§ 385.9 Implementation principles.

The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, conduct activities, including program-level activities, necessary to implement the Plan. Such activities shall be conducted as part of an integrated implementation program, in accordance with this part, and based on the following principles:

(a) Individual projects shall be formulated, evaluated, and justified based on their ability to contribute to the goals and purposes of the Plan and on their ability to provide benefits that justify costs on a next-added increment basis.

(b) Interim goals shall be established in accordance with § 385.38 to provide a means for evaluating restoration success of the Plan at specific time intervals during implementation. Interim targets to evaluate progress on

providing for other water-related needs of the region provided for in the Plan shall be established in accordance with § 385.39. Interim goals and interim targets shall be consistent with each other.

(c) Endorsement of the Plan as a restoration framework is not intended as a constraint on innovation during implementation through the adaptive management process. Continuous improvement of the Plan shall be sought to ensure that new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan are integrated into the implementation of the Plan. The adaptive management process provides a means for analyzing the performance of the Plan and assessing progress towards meeting the goals and purposes of the Plan as well as a basis for improving the performance of the Plan. Improving the performance of the Plan means enhancing the benefits of the Plan in terms of restoration of the natural system while providing for other water-related needs of the region, including water supply and flood protection.

§ 385.10 Implementation responsibilities, consultation, and coordination.

(a) *Implementing agencies.* Implementation of the Plan shall be the responsibility of the Corps of Engineers and the non-Federal sponsors.

(b) *Consultation.* (1) *Consultation with tribes.* (i) In addition to any other applicable provision for consultation with Native American Tribes, including but not limited to, laws, regulations, executive orders, and policies the Corps of Engineers and non-Federal sponsors shall consult with and seek advice from the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida throughout the implementation process to ensure meaningful and timely input by tribal officials regarding programs and activities covered by this part. Consultation with the tribes shall be conducted on a government-to-government basis.

(ii) In carrying out their responsibilities under section 601 of WRDA 2000 with respect to the restoration of the South Florida ecosystem, the Secretary of the Army and the Secretary of the Interior shall fulfill any obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other applicable legal obligations.

(2) *Consultation with agencies.* The Corps of Engineers and non-Federal sponsors shall consult with and seek advice from the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies throughout the implementation process to ensure meaningful and timely input by those agencies regarding programs and activities covered under this part. The time for, and extent of, consultation shall be appropriate for, and limited by, the activity involved.

(c) *Coordination.* The Corps of Engineers and the non-Federal sponsor shall coordinate implementation activities and the preparation of documents with other Federal, State, and local agencies and the tribes to fulfill the requirements of all applicable Federal and State laws, including but not limited to, the Fish and Wildlife Coordination Act, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the National Historic Preservation Act, the Coastal Zone Management Act, the Marine Mammal Protection Act, and the Endangered Species Act.

(d) *Timeliness obligations of consultation.* Consultation involves reciprocal obligations: on the part of the Corps of Engineers and the non-Federal sponsor to involve agencies, tribes, and the public at an early stage and in such a way to ensure meaningful consultation, and on the part of the parties consulted to respond in a timely and meaningful fashion so that the implementation of the Plan is not jeopardized and so that delays do not result in other adverse consequences to restoration of the natural system, to the other goals and purposes of the Plan, or to the public interest generally. Prescribed time limits set by regulation are too inflexible for the entire consultation process. It is expected that the Corps of Engineers and the non-Federal sponsor will set reasonable time limits for consultation on specific decisions consistent with the purposes of this part and that the parties will consult in a timely and meaningful way. The Corps of Engineers and the non-Federal sponsor recognize that the time limits established for each specific decision will be proportionate to the complexity of the decision and will take into account the resources of the entity with whom the consultation is occurring in order to allow consultation to occur in a meaningful way. This part does not intend for a delay in consultation to be used as a de facto veto power. This part authorizes the

Corps of Engineers and the non-Federal sponsor to set reasonable limits on the amount of time for consultation. In setting reasonable time limits, the agencies and tribes may consider relevant considerations such as sequencing of projects, planning, contracting and funding, and any factor listed for setting time limits for consulting under the National Environmental Policy Act (NEPA) (40 CFR 1501.8), including but not limited to, the nature and size of the proposed action, the degree to which relevant information is known or obtainable, the degree to which the action is controversial, the state of the art of analytical techniques, the number of persons affected, and the consequences of delay. In engaging in consultation, the Corps of Engineers and non-Federal sponsor shall inform the agencies, tribes, and public of the ending date for consultation. In addition, the agencies and tribes should adhere to all time limits imposed by law, regulations or executive order. In appropriate circumstances, the Corps of Engineers and the non-Federal sponsor may extend the time for consultation upon a showing that delays will not result in adverse consequences to the implementation of the Plan, to the restoration of the natural system, to the other goals and purposes of the Plan, or to the public interest and that relevant considerations justify a longer time. Failure of an agency, tribe or the public to engage in consultation with the Corps of Engineers and the non-Federal sponsor, or file comments in, a timely and meaningful way shall not be a sufficient reason for extending a consultation or comment period. Nothing in this part is intended to alter existing time limits established by statute or other regulations.

(e) *South Florida Ecosystem Restoration Task Force.* The Department of the Army recognizes the valuable role that the South Florida Ecosystem Restoration Task Force (Task Force), its working group, and its other advisory bodies play in the discussion and resolution of issues related to the South Florida ecosystem. The Corps of Engineers and the South Florida Water Management District regularly brief the Task Force on the Plan and regularly serve on the working group and other advisory bodies. The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall continue to provide information to, and consult with, the South Florida Ecosystem Restoration Task Force, the Florida-based working group, and advisory

bodies to the Task Force as appropriate throughout the implementation process for the Plan. In addition to consultation with the Task Force specified elsewhere in this part, the Corps of Engineers and the South Florida Water Management District shall consult with the South Florida Ecosystem Restoration Task Force, its working group, and its advisory bodies, on other matters related to the implementation of the Plan, as the Task Force from time to time may request. Pursuant to the provisions of WRDA 1996, the Task Force shall provide general input concerning the implementation of the Plan. The Task Force shall provide recommendations to the Secretary of the Army regarding the implementation of the Plan, as provided in this part. The Secretary of the Army shall notify the Task Force to ensure it is afforded an opportunity to review and provide recommendations on reports and products, including but not limited to, interim goals and interim targets, Project Implementation Reports, Pilot Project Design Reports, Pilot Project Technical Data Reports, the pre-CERP baseline, assessment reports, guidance memoranda, Master Implementation Sequencing Plan, Comprehensive Plan Modification Reports, periodic CERP updates, and reports to Congress prepared pursuant to § 385.40.

Subpart C—CERP Implementation Processes

§ 385.11 Implementation process for projects.

Generally, the Corps of Engineers and non-Federal sponsors shall develop and implement projects in accordance with the process that is shown in figure 1 in Appendix A of this part. Typical steps in this process involve:

(a) *Project Management Plan.* The Project Management Plan describes the activities, tasks, and responsibilities that will be used to produce and deliver the products necessary to implement the project.

(b) *Project Implementation Report.* The Project Implementation Report provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, and environmental effects to bridge the gap between the conceptual design included in the Plan and the detailed design necessary to proceed to construction. The Project Implementation Reports will also set forth additional information and analyses necessary for the Secretary of the Army or Congress to approve the project for implementation.

(c) *Plans and specifications.* During this phase, final design of the project is completed and plans and specifications are prepared. Plans and specifications contain the information necessary to bid and construct the project.

(d) *Real estate acquisition.* The lands, easements, and rights-of way, and relocations necessary for the project are acquired prior to construction.

(e) *Construction.* This phase is the actual construction of a project's components and includes an interim operation and monitoring period to ensure that the project operates as designed.

(f) *Operation.* After construction of the project has been completed, it is operated in accordance with the System Operating Manual and the Project Operating Manual.

(g) *Monitoring and assessment.* After the project has been constructed, monitoring is conducted as necessary to assess the effectiveness of the project and to provide information that will be used for the adaptive management program.

§ 385.12 Pilot projects.

(a) The Plan includes pilot projects to address uncertainties associated with certain components such as aquifer storage and recovery, in-ground reservoir technology, seepage management, and wastewater reuse. The purpose of the pilot projects is to develop information necessary to better determine the technical feasibility of these components prior to development of a Project Implementation Report.

(b) Prior to initiating activities on a pilot project, the Corps of Engineers and the non-Federal sponsor shall develop a Project Management Plan as described in § 385.24.

(c) Project Implementation Reports shall not be necessary for pilot projects. Prior to implementing a pilot project, the Corps of Engineers and the non-Federal sponsor shall prepare a Pilot Project Design Report.

(1) The Pilot Project Design Report shall contain the technical information necessary to construct the pilot project including engineering and design, cost estimates, real estate analyses, and appropriate NEPA documentation.

(2) The Pilot Project Design Report shall include a detailed operational testing and monitoring plan necessary to develop information to assist in better determining the technical feasibility of certain components prior to development of a Project Implementation Report.

(3) In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide the public with

opportunities to review and comment on the draft Pilot Project Design Report.

(4) The Corps of Engineers and the non-Federal sponsor shall approve the final Pilot Project Design Report in accordance with applicable law.

(d) Upon completion of operational testing and monitoring, the Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, prepare a Pilot Project Technical Data Report, documenting the findings and conclusions from the operational testing and monitoring of the pilot project. The purpose of the Pilot Project Technical Data Report is to help assess the viability of technology and to assist in the development of the full-scale project. The Corps of Engineers and the non-Federal sponsor shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the report.

(1) In accordance with § 385.22(b), the draft Pilot Project Technical Data Report shall be externally peer reviewed.

(2) In accordance with § 385.18, the public shall be provided with opportunities to review and comment on the draft Pilot Project Technical Data Report.

(3) The final Pilot Project Technical Data Report shall be made available to the public.

§ 385.13 Projects implemented under additional program authority.

(a) To expedite implementation of the Plan, the Corps of Engineers and non-Federal sponsors may implement projects under the authority of section 601(c) of WRDA 2000 that are described in the Plan and that will produce a substantial benefit to the restoration, preservation, and protection of the South Florida ecosystem.

(b) Each project implemented under the authority of section 601(c) of WRDA 2000 shall:

(1) In general, follow the process described in § 385.11;

(2) Not be implemented until a Project Implementation Report is prepared and approved in accordance with § 385.26; and

(3) Not exceed a total cost of \$25,000,000.

(c) The total aggregate cost of all projects implemented under the additional program authority shall not exceed \$206,000,000.

§ 385.14 Incorporation of NEPA and related considerations into the implementation process.

(a) *General.* (1) In implementing the Plan, the Corps of Engineers shall comply with the requirements of NEPA (42 U.S.C. 4371, *et seq.*) and applicable implementing regulations, including determining whether a specific action, when considered individually and cumulatively, will have a significant impact on the human environment.

(2) As appropriate, other agencies shall be invited to be cooperating agencies in the preparation of NEPA documentation pursuant to § 230.16 of this chapter.

(3) The District Engineer is the NEPA official responsible for compliance with NEPA for actions conducted to implement the Plan. Unless otherwise provided for by this part, NEPA coordination for implementation of the plan shall follow the NEPA procedures established in part 230 of this chapter.

(b) *Actions normally requiring an Environmental Impact Statement (EIS).*

(1) In addition to the actions listed in § 230.6 of this chapter, actions normally requiring an EIS are:

(i) Comprehensive Plan Modification Reports;

(ii) System Operating Manual or significant changes to the System Operating Manual;

(iii) Project Implementation Reports, including the draft Project Operating Manual when included in the Project Implementation Report;

(iv) Pilot Project Design Reports, including the detailed operational testing and monitoring plan; and

(v) Project Operating Manuals for any project where a Project Implementation Report is not prepared, or significant changes to Project Operating Manuals.

(2) The District Engineer may consider the use of an environmental assessment (EA) on the types of actions described in this paragraph if early studies and coordination show that a particular action, considered individually and cumulatively, is not likely to have a significant impact on the quality of the human environment.

(c) *Actions normally requiring an EA, but not necessarily an EIS.* In addition to the actions listed in § 230.7 of this chapter, actions normally requiring an EA, but not necessarily an EIS, are modifications to Project Operating Manuals or the System Operating Manual, that do not provide for significant change in operation and/or maintenance.

(d) *Categorical exclusions.* In addition to the activities listed in § 230.9 of this chapter, the following actions do not require separate NEPA documentation,

either because, when considered individually and cumulatively, they do not have significant effects on the quality of the human environment or because any such effects will already have been considered in NEPA documentation prepared in accordance with paragraphs (b) and (c) of this section. However, the District Engineer should be alert for extraordinary circumstances that may dictate the need to prepare an EA or an EIS. Even though an EA or EIS is not indicated for a Federal action because of a "categorical exclusion," that fact does not exempt the action from compliance with any other applicable Federal, State, or Tribal law, including but not limited to, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Clean Water Act, Clean Air Act, the Coastal Zone Management Act, and the Marine Mammal Protection Act.

- (1) Project Cooperation Agreements;
- (2) Project Management Plans;
- (3) Program Management Plans;
- (4) Plans and specifications for

projects;

- (5) Pilot Project Technical Data Reports;

(6) Assessment reports prepared for the adaptive management program;

(7) Interim goals and interim targets;

(8) Development or revision of guidance memoranda or methods such as adaptive management, monitoring, plan formulation and evaluation, quantification of water needed for the natural system or protection of existing uses, methods of determining levels of flood protection, and similar guidance memoranda or methods; and

(9) Deviations from Operating Manuals for emergencies and unplanned minor deviations when, considered individually and cumulatively, they do not have significant effects on the quality of the human environment, as described in applicable Corps of Engineers regulations, including § 222.5(f)(4) and § 222.5(i)(5) of this chapter, and Engineer Regulation ER 1110-2-8156 "Preparation of Water Control Manuals."

§ 385.15 Consistency with requirements of the State of Florida.

The State of Florida has established procedures, requirements, and approvals that are needed before the State or the South Florida Water Management District can participate as the non-Federal sponsor for projects of the Plan. Project Implementation Reports shall include such information and analyses, consistent with this part, as are necessary to facilitate review and

approval of projects by the South Florida Water Management District and the State pursuant to the requirements of Florida law.

§ 385.16 Design agreements.

(a) The Corps of Engineers shall execute a design agreement with each non-Federal sponsor for the projects of the Plan prior to initiation of design activities with that non-Federal sponsor.

(b) Any procedures, guidance, or documents developed by the Corps of Engineers and the non-Federal sponsor pursuant to a design agreement shall be consistent with this part.

§ 385.17 Project Delivery Team.

(a) In accordance with the procedures of the Corps of Engineers business process described in Engineer Regulation ER 5-1-11 "US Army Corps of Engineers Business process," the Corps of Engineers and the non-Federal sponsor shall form a Project Delivery Team to develop the products necessary to implement each project.

(b) The Corps of Engineers shall assign, and the non-Federal sponsor may assign, a project manager to lead the Project Delivery Team.

(c) The Corps of Engineers and the South Florida Water Management District shall encourage the participation of other Federal, State, and local agencies and the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida on Project Delivery Teams, and use their expertise to ensure that information developed by the Project Delivery Team is shared with agencies, tribes, and the public at the earliest possible time in the implementation process. In forming the Project Delivery Team, the Corps of Engineers and the non-Federal sponsor shall request that the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies participate on the Project Delivery Team.

(1) In general, participation on the Project Delivery Team shall be the financial responsibility of the participating agency or tribe. However, the Corps of Engineers shall provide funding for the U.S. Fish and Wildlife Service and the National Marine Fisheries Service to prepare Fish and Wildlife Coordination Act Reports, as required by applicable law, regulation, or agency procedures.

(2) Participation by an agency or tribe on the Project Delivery Team shall not

be considered or construed to be a substitute for consultation, coordination, or other activities required by applicable law or this part.

(d) Documents and work products prepared or developed by the Project Delivery Team shall not be self-executing, but shall be provided as information for consideration by the Corps of Engineers and the non-Federal sponsor, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

§ 385.18 Public outreach.

(a) *Goals.* (1) The goal of public outreach is to open and maintain channels of communication with the public throughout the implementation process for the Plan in order to:

(i) Provide information about proposed activities;

(ii) Make the public's desires, needs, and concerns known to decision-makers before decisions are reached; and

(iii) Consider and respond to the public's views in reaching decisions.

(2) In carrying out implementation activities for the Plan, the Corps of Engineers and non-Federal sponsors shall undertake outreach activities to:

(i) Increase general public awareness for the Plan;

(ii) Involve interested groups and interested communities in the decision-making process and incorporate public values into decisions;

(iii) Better serve and involve minority communities and traditionally underserved communities, persons with limited English proficiency, and socially and economically disadvantaged individuals;

(iv) Improve the substantive quality of decisions as a result of public participation; and

(v) Reduce conflict among interested and affected parties by building agreement or consensus on solutions to emerging issues.

(b) *General requirements.* (1) The Corps of Engineers and non-Federal sponsors shall provide a transparent, publicly accessible process through which scientific and technical information is used in the development of policy decisions throughout the implementation process for the Plan.

(2) The Corps of Engineers and non-Federal sponsors shall develop and conduct outreach activities for project or program-level activities in order to provide information to the public and to

provide opportunities for involvement by the public.

(3) The Corps of Engineers and non-Federal sponsors shall monitor the effectiveness of outreach activities throughout the implementation process.

(4) Project Management Plans and Program Management Plans shall include information concerning any outreach activities to be undertaken during the implementation of the project or activity.

(5) Project Delivery Team meetings and RECOVER meetings shall be open to attendance by the public. The public shall be notified in advance of these meetings through e-mail, posting on a web site, or other appropriate means. The public shall be provided with an opportunity to comment at such meetings.

(6) Public meetings and workshops shall be held at such times and locations as to facilitate participation by the public.

(7) The Corps of Engineers and non-Federal sponsors shall provide opportunities for the public to review and comment on draft documents.

(c) *Outreach to socially and economically disadvantaged individuals and communities.*

(1) The Corps of Engineers and non-Federal sponsors shall develop and conduct public outreach activities to ensure that socially and economically disadvantaged individuals, including individuals with limited English proficiency, and communities are provided opportunities to review and comment during implementation of the Plan.

(2) The Corps of Engineers and non-Federal sponsors shall monitor the effectiveness of outreach activities conducted to ensure that socially and economically disadvantaged individuals and communities, including individuals with limited English proficiency, are provided opportunities to review and comment during implementation of the Plan.

(3) Project Management Plans and Program Management Plans shall include information, concerning any outreach activities to be undertaken during the implementation of the project or activity, to socially and economically disadvantaged individuals and communities, including individuals of limited English proficiency.

(4) The Corps of Engineers and non-Federal sponsors shall make project and program information available in languages other than English where a significant number of individuals in the area affected by the project or program activity are expected to have limited English proficiency.

(5) The Corps of Engineers and non-Federal sponsors shall provide translators or similar services at public meetings where a significant number of participants are expected to have limited English proficiency.

§ 385.19 Environmental and economic equity.

(a) Project Management Plans and Program Management Plans shall include information concerning any environmental and economic equity activities to be undertaken during the implementation of the project or activity.

(b) As required by applicable laws and policies, the Corps of Engineers and non-Federal sponsors shall consider and evaluate environmental justice issues and concerns in the implementation of projects.

(c) During the implementation of the Plan, through appropriate means, consistent with section 601(k) of WRDA 2000 and other provisions of Federal law, the Corps of Engineers and non-Federal sponsors shall provide information to socially and economically disadvantaged individuals and communities, including individuals with limited English proficiency, about potential or anticipated contracting opportunities that are expected to result from implementation of the Plan.

(d) The District Engineer shall ensure that small business concerns owned and controlled by socially and economically disadvantaged individuals are provided opportunities to participate under section 15(g) of the Small Business Act (15 U.S.C. 644(g)) throughout the implementation process. The District Engineer shall track the amount of contracts awarded to small business concerns owned and controlled by socially and economically disadvantaged individuals in order to ensure that they are provided such opportunities.

§ 385.20 Restoration Coordination and Verification (RECOVER).

(a) RECOVER (Restoration Coordination and Verification) is an interagency and interdisciplinary scientific and technical team described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999. RECOVER was established by the Corps of Engineers and the South Florida Water Management District to conduct assessment, evaluation, and planning and integration activities using the best available science that support implementation of the Plan with the overall goal of ensuring that the goals

and purposes of the Plan are achieved. RECOVER has been organized into a Leadership Group that provides management and coordination for the activities of RECOVER and teams that accomplish activities such as: developing system-wide performance measures; developing and implementing the monitoring and assessment program; evaluating alternatives developed by Project Delivery Teams to achieve the goals and purposes of the Plan; conducting system-wide water quality analyses; developing, refining, and applying system-wide models and tools; and evaluating modifications to the Plan. RECOVER is not a policy making body, but has technical and scientific responsibilities that support implementation of the Plan.

(b) Documents or work products prepared or developed by RECOVER shall not be self-executing, but shall be provided as information for consideration by the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies. Technical information developed by RECOVER shall be available to the public.

(c) The Corps of Engineers and the South Florida Water Management District shall encourage the participation of other Federal, State, and local agencies and the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida on RECOVER, to use their expertise, to ensure that information developed by RECOVER is shared at the earliest possible time with agencies, tribes, and the public, and to ensure that matters of concern are addressed as early as possible. The Corps of Engineers and the South Florida Water Management District recognize the special role of the National Oceanic and Atmospheric Administration of the Department of Commerce, the Florida Fish and Wildlife Conservation Commission, the Department of the Interior and the Florida Fish and Wildlife Conservation Commission as stewards of the natural system and for their technical and scientific activities in support of restoration. The Corps of Engineers and the South Florida Water Management District recognize the special role of the Environmental Protection Agency and the Florida Department of Environmental Protection in water quality issues. Accordingly, the Corps of

Engineers and the South Florida Water Management District have used and will continue to use the Department of the Interior, the Department of Commerce, the Florida Fish and Wildlife Conservation Commission, the Environmental Protection Agency, and the Florida Department of Environmental Protection as co-chairs along with the Corps of Engineers and the South Florida Water Management District on the appropriate technical teams that have been established to date as part of RECOVER.

(1) In general, participation on RECOVER shall be the financial responsibility of the participating agency or tribe.

(2) Participation by an agency or tribe on RECOVER shall not be considered or construed to be a substitute for consultation, coordination, or other activities required by applicable law, policy, or regulation.

(d) The Corps of Engineers and the South Florida Water Management District shall:

(1) Assign program managers from the Corps of Engineers and the South Florida Water Management District to be responsible for carrying out the activities of RECOVER; and

(2) Establish a RECOVER Leadership Group to assist the program managers in coordinating and managing the activities of RECOVER, including the establishment of sub-teams or other entities, and in reporting on the activities of RECOVER. In addition to the program managers, the RECOVER Leadership Group shall, consist of one member appointed by each of the following:

- (i) Environmental Protection Agency;
- (ii) National Oceanic and Atmospheric Administration;
- (iii) U.S. Fish and Wildlife Service;
- (iv) U.S. Geological Survey;
- (v) National Park Service;
- (vi) Miccosukee Tribe of Indians of Florida;
- (vii) Seminole Tribe of Florida;
- (viii) Florida Department of Agriculture and Consumer Services;
- (ix) Florida Department of Environmental Protection; and
- (x) Florida Fish and Wildlife Conservation Commission.

(3) As necessary to assist the program managers, the Corps of Engineers and the South Florida Water Management District may add additional members to the RECOVER Leadership Group.

(e) RECOVER shall perform assessment, evaluation, and planning and integration activities as described in this paragraph.

(1) *Assessment activities.* In accordance with § 385.31, RECOVER

shall conduct credible scientific assessments of hydrological, water quality, biological, ecological, water supply, and other responses to the Plan. The Corps of Engineers and the South Florida Water Management District will ensure that these assessments incorporate the best available science and that the results are provided for external peer review, as appropriate, and are made fully available for public review and comment. RECOVER shall conduct assessment activities, including, but not limited to:

(i) Developing proposed assessment performance measures for assessing progress towards the goals and purposes of the Plan;

(ii) Developing a proposed monitoring plan to support the adaptive management program;

(iii) Conducting monitoring and assessment activities as part of the adaptive management program to assess the actual performance of the Plan;

(iv) Developing recommendations for interim goals in accordance with § 385.38;

(v) Assessing progress towards achieving the interim goals established pursuant to § 385.38;

(vi) Developing recommendations for interim targets in accordance with § 385.39;

(vii) Assessing progress towards achieving the interim targets established pursuant to § 385.39; and

(viii) Cooperating with the independent scientific review panel and external peer review in accordance with § 385.22.

(2) *Evaluation activities.* In accordance with § 385.26(c) and § 385.32, RECOVER shall assist Project Delivery Teams in ensuring that project design and performance is fully linked to the goals and purposes of the Plan and incorporating, as appropriate, information developed for Project Implementation Reports into the Plan. RECOVER shall conduct evaluation activities, including, but not limited to:

(i) Developing proposed evaluation performance measures for evaluating alternative plans developed for the Project Implementation Report;

(ii) Conducting evaluations of alternative plans developed for Project Implementation Reports and Comprehensive Plan Modification Reports; and

(iii) Supporting development and refinement of predictive models and tools used in the evaluation of alternate plans developed by the Project Delivery Teams.

(3) *Planning and integration activities.* RECOVER shall conduct planning and integration activities, in accordance

with § 385.31, in support of the adaptive management program as a basis for identifying opportunities for improving the performance of the Plan and other appropriate planning and integration activities associated with implementation of the Plan. RECOVER shall conduct planning and integration activities, including, but not limited to:

(i) Developing and refining conceptual and predictive models and tools in support of the integration of new science into the adaptive management program;

(ii) Reviewing and synthesizing new information and science that could have an effect on the Plan;

(iii) Developing proposed refinements and improvements in the design or operation of the Plan during all phases of implementation;

(iv) Preparing technical information to be used in the development of the periodic reports to Congress prepared pursuant to § 385.40; and

(v) Analyzing proposed revisions to the Master Implementation Sequencing Plan.

(f) In carrying out the functions described in this section, RECOVER shall consider the effects of activities and projects that are not part of the Plan, but which could affect the ability of the Plan to achieve its goals and purposes.

(g) As appropriate, the Corps of Engineers and the South Florida Water Management District shall seek external peer review of RECOVER activities in accordance with § 385.22(b).

§ 385.21 Quality control.

(a) The Corps of Engineers and the non-Federal sponsor shall prepare a quality control plan, in accordance with applicable Corps of Engineers regulations, for each product that will be produced by a Project Delivery Team. The quality control plan shall be included in the Project Management Plan and shall describe the procedures to be used to ensure compliance with technical and policy requirements during implementation.

(b) During development of the Project Management Plan for each project, the Corps of Engineers and the non-Federal sponsor shall establish a Technical Review Team to conduct reviews to ensure that products are consistent with established criteria, guidance, procedures, and policy. The members of the Technical Review Team shall be independent of the Project Delivery Team and the project being reviewed, and should be knowledgeable of design criteria established for the Plan.

(c) Technical review is intended to be a continuous process throughout project

implementation. The Technical Review Team shall document its actions and recommendations and provide reports to the Project Delivery Team at designated points during the implementation process that shall be described in the quality control plan.

§ 385.22 Independent scientific review and external peer review.

(a) *The independent scientific review panel required by section 601(j).* (1) Section 601(j) of WRDA 2000 requires that the Secretary of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, establish an independent scientific review panel, convened by a body, such as the National Academy of Sciences, to review the Plan's progress toward achieving the natural system restoration goals of the Plan. Section 601(j) also directs that this panel produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

(2) To carry out section 601(j), the Department of the Army, the Department of the Interior, and the State shall establish an independent scientific review panel to conduct on-going review of the progress achieved by the implementation of the Plan in achieving the restoration goals of the Plan and shall provide the panel with the resources and cooperation necessary to ensure that the panel is able to function effectively.

(3) Not later than June 14, 2004, the Secretary of the Army, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, shall enter into a five-year agreement, with options for extensions in five-year increments, with the National Academy of Sciences to convene this panel.

(4) The Department of the Army, the Department of the Interior, and the State expect that the National Academy of Sciences will use established practices for assuring the independence of members and that the review panel will include members reflecting a balance of the knowledge, training, and experience suitable to comprehensively review and assess progress towards achieving natural system restoration goals of the Plan.

(5) To ensure the independence of the section 601(j) panel, its sole mission shall be to review the Plan's progress toward achieving the natural system restoration goals of the Plan and to

produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan. The Secretary of the Army, the Secretary of the Interior, the Governor, and the South Florida Ecosystem Restoration Task Force and its members, shall not attempt to influence the panel's review or assign this panel any other tasks, nor request any advice on any other matter, nor shall this panel accept any other tasks nor provide advice on any other matter, to any entity, whether Federal, State or local, whether public or private.

(6) Before final establishment of the panel, the Department of the Army, the Department of the Interior, and the State, in consultation with the South Florida Ecosystem Restoration Task Force, shall be afforded the opportunity to review the list of panel members convened by the National Academy of Sciences.

(7) The agreement shall recognize that the Department of the Army, the Department of the Interior, and the State retain the right and ability to establish other independent scientific review panels or external peer reviews when deemed necessary by those agencies for conducting specific scientific and technical reviews.

(8) The Department of the Army, the Department of the Interior, and the State of Florida shall share the panel's costs. The Department of the Army and the Department of the Interior shall enter into a separate Memorandum of Agreement that will specify how the Federal agencies will pay the Federal share of these costs. The State's fifty percent share shall be accounted for in the design agreement between the Corps of Engineers and the South Florida Water Management District.

(9) The panel shall produce a biennial report to Congress, the Secretary of the Army, the Secretary of the Interior, and the Governor, pursuant to section 601(j) of WRDA 2000, that includes an assessment of ecological indicators and other measures of progress in restoring the ecology of the natural system, based on the Plan.

(10) The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall cooperate with the independent scientific review panel, including responding to reasonable requests for information concerning the implementation of the Plan.

(11) The Secretary of the Army, the Secretary of the Interior, and the Governor shall consult with the South

Florida Ecosystem Restoration Task Force in their decision to exercise each five-year option to extend the agreement with the National Academy of Sciences. Upon expiration of the agreement, the Secretary of the Army, the Secretary of the Interior, and the Governor shall consult the South Florida Ecosystem Restoration Task Force in selection of another body to convene the independent scientific review panel required by section 601(j) of WRDA 2000.

(b) *External peer review.* (1) The Department of the Army, the Department of the Interior, the South Florida Water Management District, and other Federal, State, and local agencies, the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida may initiate an external peer review process to review documents, reports, procedures, or to address specific scientific or technical questions or issues relating to their jurisdiction.

(2) In accordance with § 385.12(d), draft Pilot Project Technical Reports shall be externally peer reviewed.

(3) In accordance with § 385.31(b), draft assessment reports prepared for the adaptive management program shall be externally peer reviewed.

§ 385.23 Dispute resolution.

(a) Disputes with the non-Federal sponsor concerning a Project Cooperation Agreement shall be resolved under the specific dispute resolution procedures of that Project Cooperation Agreement.

(b) Disputes with the non-Federal sponsor concerning design activities shall be resolved under the specific dispute resolution procedures of the design agreement.

(c) All other unresolved issues with the non-Federal sponsor and disputes with the State associated with the implementation of the Plan shall be resolved according to the terms of the Dispute Resolution Agreement executed on September 9, 2002 pursuant to section 601(i) of WRDA 2000.

(d) For disputes with parties not covered by the provisions of paragraphs (a), (b), or (c) of this section, the Corps of Engineers shall attempt to resolve the dispute in accordance with applicable statutory requirements and/or the following procedures:

(1) The parties will attempt to resolve disputes at the lowest organizational level before seeking to elevate a dispute.

(2) Any disputed matter shall first be elevated to the District Engineer and the equivalent official of the other agency, or their designees. The parties may decide to continue to elevate the dispute to higher levels within each agency.

(3) The parties to a dispute may agree to participate in mediation.

(4) When a dispute is resolved the parties shall memorialize the resolution in writing.

§ 385.24 Project Management Plans.

(a) *General requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Project Management Plan prior to initiating activities on a project.

(2) The Project Management Plan shall define the activities, and where appropriate, the subordinate tasks, as well as the assignment of responsibility for completing products and activities such as Project Implementation Reports, Pilot Project Design Reports, plans and specifications, real estate acquisition, construction contracts and construction, Comprehensive Plan Modification Reports, and other activities necessary to support implementation of the Plan.

(3) The Project Management Plan shall include a quality control plan, as described in § 385.21.

(4) As appropriate, the Project Management Plan shall include activities to be conducted to meet the requirements of the Fish and Wildlife Coordination Act, as described in § 385.26(e).

(5) The Project Management Plan shall provide schedule and funding information for the project.

(6) In accordance with § 385.18, Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the Project Management Plan.

(b) *Revisions to Project Management Plans.* The Corps of Engineers and the non-Federal sponsor may, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, revise the Project Management Plan whenever necessary, including after completion of the Project Implementation Report, or Plans and Specifications. In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on revisions to the Project Management Plan.

§ 385.25 Program Management Plans.

(a) *General requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Program Management Plan prior to initiating a program-level activity.

(2) The Program Management Plan shall define the activities, and where appropriate, the subordinate tasks, as well as the assignment of responsibility for completing products developed in support to program-level activities.

(3) In accordance with § 385.18, Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the Program Management Plan.

(b) *Revisions to Program Management Plans.* The Corps of Engineers and the non-Federal sponsor may, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, revise the Program Management Plan whenever necessary to incorporate new or changed information that affects the scope, schedule, or budget of the activities described in the Program Management Plan. In accordance with § 385.18, the Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on revisions to the Program Management Plan.

§ 385.26 Project Implementation Reports.

(a) *General requirements.* (1) The Project Implementation Report is a document that provides information on plan formulation and evaluation, engineering and design, estimated benefits and costs, environmental effects, and the additional information and analysis necessary for the Secretary of the Army to approve the project for implementation, or for Congress to authorize the project for implementation. The Project Implementation Report bridges the gap between the conceptual level of detail contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 and the detailed design necessary to prepare plans and specifications required to proceed to

construction. Prior to requesting approval or authorization for the implementation of a project, the Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, complete a Project Implementation Report addressing the project's justification in accordance with section 601(f)(2) of WRDA 2000, and other factors required by section 601(h)(4)(A) of WRDA 2000. To eliminate duplication with State and local procedures, the Project Implementation Report shall also address the factors of relevant State laws, including sections 373.1501 and 373.470 of the Florida Statutes.

(2) Before completion of the draft Project Implementation Report, the Corps of Engineers and the non-Federal sponsor shall provide the South Florida Ecosystem Restoration Task Force with information about the alternative plans developed and evaluated for the Project Implementation Report.

(3) The Project Implementation Report shall:

(i) Be consistent with the Plan and applicable law, policy, and regulation, including the Principles and Guidelines of the Water Resources Council, as modified by section 601(f)(2)(A) of WRDA 2000;

(ii) Be based on the best available science;

(iii) Comply with all applicable Federal, State, and Tribal laws;

(iv) Contain sufficient information for proceeding to final design of the project, such as: additional plan formulation and evaluation, environmental and/or economic benefits, engineering and design, costs, environmental impacts, real estate requirements, and the preparation of the appropriate National Environmental Policy Act documentation;

(v) Contain the information necessary to determine that the activity is justified by the environmental benefits derived by the South Florida ecosystem in accordance with section 601(f)(2)(A) and/or that the benefits of the project are commensurate with costs, and that the project is cost-effective;

(vi) Comply, in accordance with section 601(b)(2)(A)(ii) of WRDA 2000, with applicable water quality standards and applicable water quality permitting requirements;

(vii) Identify, in accordance with § 385.35, the appropriate quantity,

timing, and distribution of water dedicated and managed for the natural system;

(viii) Identify, in accordance with § 385.35, the amount of water to be reserved or allocated for the natural system under State law necessary to implement the provisions in paragraphs (a)(3)(vi) and (vii) of this section;

(ix) Identify the quantity, timing, and distribution of water made available for other water-related needs of the region;

(x) Determine, in accordance with § 385.36, if existing legal sources of water are to be eliminated or transferred;

(xi) Determine, in accordance with § 385.37(b) that implementation of the selected alternative will not reduce levels of service for flood protection that:

(A) Were in existence on the date of enactment of section 601 of WRDA 2000; and

(B) Are in accordance with applicable law; and consider, as appropriate, in accordance with § 385.37(c), opportunities to provide additional flood protection;

(xii) Include an assessment of the monetary and non-monetary benefits and costs, optimization and justification, cost-effectiveness, and engineering feasibility of the project;

(xiii) Include a discussion of any significant changes in cost or scope of the project from that presented in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999;

(xiv) Include an analysis, prepared by RECOVER as described in paragraph (c) of this section, of the project's contributions towards achieving the goals and purposes of the Plan, including, as appropriate, suggestions for improving the performance of the alternative plans;

(xv) Describe how the project contributes to the achievement of interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39;

(xvi) Include, in accordance with § 385.28(c), a draft Project Operating Manual as an appendix; and

(xvii) Include, as appropriate, information necessary for the non-Federal sponsor to address the requirements of Chapter 373 of the Florida Statutes, and other applicable planning and reporting requirements of Florida law.

(4) The Corps of Engineers and the non-Federal sponsor shall develop the Project Implementation Report generally in accordance with the process shown in figure 2 in Appendix A of this part.

(5) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the major tasks that are generally needed to prepare a Project Implementation Report and the format and content of a Project Implementation Report.

(b) *Formulation and evaluation.* In preparing a Project Implementation Report, the Corps of Engineers and the non-Federal sponsor shall formulate and evaluate alternative plans to optimize the project's contributions towards achieving the goals and purposes of the Plan, and to develop justified and cost-effective ways to achieve the benefits of the Plan.

(1) *General.* The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the processes to be used to formulate and evaluate alternative plans and their associated monetary and non-monetary benefits and costs, determine cost-effectiveness and optimize the project's contribution towards achieving the goals and purposes of the Plan, and the basis for justifying and selecting an alternative to be recommended for implementation. The guidance memorandum shall also provide a process for evaluating projects that are outside the boundary of regional computer models or projects whose effects cannot be captured in regional computer models. Project Implementation Reports approved by the Secretary of the Army before December 12, 2003 or before the development of the guidance memorandum may use whatever method that, in the Secretary of the Army's discretion, is deemed appropriate and is consistent with applicable law, policy, and regulations.

(2) *Project formulation and evaluation.* The guidance memorandum shall describe the process for formulating and evaluating alternative plans for their ability to optimize contributions for achieving the goals and purposes of the Plan. The guidance memorandum shall describe the process for including each alternative plan with all of the other components of the Plan and evaluating the total monetary and non-monetary benefits and costs of the resulting comprehensive plan when compared to the without CERP

condition. In formulating alternative plans to be evaluated, the project as described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 shall be included as one of the alternative plans that is evaluated. For the selected plan, the guidance memorandum shall also describe the process for evaluating that plan as the next-added increment of the Plan.

(3) *Identification of selected alternative plan.* The guidance memorandum shall also include a process for identification of a selected alternative plan, based on the analyses conducted in paragraph (b)(2) of this section. The alternative plan to be selected should be the plan that maximizes net benefits, both monetary and non-monetary, on a system-wide basis, provided that this plan is justified on a next-added increment basis. Alternative plans that are not justified on a next-added increment basis shall not be selected. The guidance memorandum shall describe an iterative process for evaluating and/or combining alternative options until an alternative is identified that maximizes net benefits while still providing benefits that justify costs on a next-added increment basis.

(c) *RECOVER performance evaluation of alternative plans.* (1) Prior to the identification of a selected alternative plan, RECOVER shall evaluate the performance of alternative plans towards achieving the goals and purposes of the Plan.

(2) RECOVER shall prepare information for the Project Delivery Team describing the results of the evaluations of alternative plans developed for the Project Implementation Report towards achieving the goals and purposes of the Plan, including, as appropriate, suggestions for improving the performance of the alternative plans.

(d) *NEPA documentation for Project Implementation Reports.* (1) The Corps of Engineers and the non-Federal sponsor shall prepare the appropriate NEPA document to accompany the Project Implementation Report. The NEPA document shall contain an analysis of the effects of the alternatives formulated for the Project Implementation Report. The NEPA document for the Project Implementation Report shall use the Programmatic Environmental Impact Statement included in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, as appropriate, for the purpose of tiering as described in § 230.14(c) of this chapter.

(2) The District Engineer shall prepare the Record of Decision for Project Implementation Reports. Review and signature of the Record of Decision shall follow the same procedures as for review and approval of feasibility reports in § 230.14 of this chapter and other applicable Corps of Engineers regulations.

(e) *Fish and Wildlife Coordination Act Requirements.* (1) The Corps of Engineers and the non-Federal sponsor shall coordinate with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Florida Fish and Wildlife Conservation Commission, and other appropriate agencies in the preparation of a Project Implementation Report, as required by applicable law.

(2) The Project Management Plan shall include a discussion of activities to be conducted for compliance with the Fish and Wildlife Coordination Act and other applicable laws.

(3) Consistent with applicable law, policy, and regulations, coordination shall include preparation of the following documents as shown in figure 2 in Appendix A of this part:

(i) Planning Aid Letter that describes issues and opportunities related to the conservation and enhancement of fish and wildlife resources; and

(ii) Draft and final Fish and Wildlife Coordination Act Reports that provide the formal views and recommendations of the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, and the Florida Fish and Wildlife Conservation Commission on alternative plans.

(f) *Project Implementation Report review and approval process.* (1) The Corps of Engineers and the non-Federal sponsor shall provide opportunities for the public to review and comment on the draft Project Implementation Report and NEPA document, in accordance with § 385.18 and applicable law and Corps of Engineers policy.

(2) The Project Implementation Report shall contain an appropriate letter of intent from the non-Federal sponsor indicating concurrence with the recommendations of the Project Implementation Report.

(3) Upon the completion of the Project Implementation Report and NEPA document, the District Engineer shall submit the report and NEPA document to the Division Engineer.

(4) Upon receipt and approval of the Project Implementation Report the Division Engineer shall issue a public notice announcing completion of the Project Implementation Report based upon:

(i) The Division Engineer's endorsement of the findings and

recommendations of the District Engineer; and

(ii) The Division Engineer's assessment that the project has been developed and the report prepared in accordance with current law and policy. The notice shall indicate that the report has been submitted to Corps of Engineers Headquarters for review.

(5) Headquarters, U.S. Army Corps of Engineers shall conduct a review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, U.S. Army Corps of Engineers shall administer the 30-day state and agency review of the Project Implementation Report, and as appropriate, file the Environmental Impact Statement with the Environmental Protection Agency.

(6) After completion of the review and other requirements of law and policy, the Chief of Engineers shall submit the Project Implementation Report and the Chief of Engineers' recommendations on the project to the Assistant Secretary of the Army for Civil Works.

(7) The Assistant Secretary of the Army for Civil Works shall review all Project Implementation Reports, and shall, prior to either approving them or submitting the Assistant Secretary's recommendations to Congress, coordinate the project and proposed recommendations with the Office of Management and Budget.

(i) For projects authorized by section 601(c) of WRDA 2000, the Assistant Secretary of the Army for Civil Works shall review and approve the Project Implementation Report prior to implementation of the project.

(ii) For projects authorized by section 601(b)(2)(C) of WRDA 2000, the Assistant Secretary of the Army for Civil Works shall review the Project Implementation Report prior to submitting the Assistant Secretary's recommendations to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate for approval.

(iii) For all other projects, the Assistant Secretary of the Army for Civil Works shall review the Project Implementation Report prior to submitting the Assistant Secretary's recommendations regarding authorization to Congress.

§ 385.27 Project Cooperation Agreements.

(a) *General.* Prior to initiating construction or implementation of a project, the Corps of Engineers shall execute a Project Cooperation Agreement with the non-Federal sponsor in accordance with applicable law.

(b) *Verification of water reservations.* The Project Cooperation Agreement shall include a finding that the South Florida Water Management District or the Florida Department of Environmental Protection has executed under State law the reservation or allocation of water for the natural system as identified in the Project Implementation Report. Prior to execution of the Project Cooperation Agreement, the District Engineer shall verify in writing that the South Florida Water Management District or the Florida Department of Environmental Protection has executed under State law the reservation or allocation of water for the natural system as identified in the Project Implementation Report. The District Engineer's verification shall provide the basis for the finding in the Project Cooperation Agreement and be made available to the public.

(c) *Changes to water reservations.* Reservations or allocations of water are a State responsibility. Any change to the reservation or allocation of water for the natural system made under State law shall require an amendment to the Project Cooperation Agreement.

(1) The District Engineer shall, in consultation with the South Florida Water Management District, the Florida Department of Environmental Protection, the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and other Federal, State, and local agencies, verify in writing that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system after considering any changed circumstances or new information since completion of the Project Implementation Report. In accordance with applicable State law, the non-Federal sponsor shall provide opportunities for the public to review and comment on any proposed changes in the water reservation made by the State.

(2) The Secretary of the Army shall notify the appropriate committees of Congress whenever a change to the reservation or allocation of water for the natural system executed under State law as described in the Project Implementation Report has been made. Such notification shall include the Secretary's and the State's reasons for determining that the revised reservation or allocation continues to provide for an appropriate quantity, timing, and distribution of water dedicated and managed for the natural system after

considering any changed circumstances or new information since completion of the Project Implementation Report. The Secretary of the Army's notification to the appropriate committees of Congress shall be made available to the public.

(d) *Savings clause provisions.* The Project Cooperation Agreement shall ensure that the Corps of Engineers and the non-Federal sponsor not:

(1) Eliminate or transfer existing legal sources of water until a new source of comparable quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan; and

(2) Reduce levels of service for flood protection that are:

(i) In existence on the date of enactment of WRDA 2000; and

(ii) In accordance with applicable law.

§ 385.28 Operating Manuals.

(a) *General provisions.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop Operating Manuals to ensure that the goals and purposes of the Plan are achieved.

(2) Operating Manuals shall consist of a System Operating Manual and Project Operating Manuals. In general, the System Operating Manual provides a system-wide operating plan for the operation of the projects of the Plan and other C&SF Project features and the Project Operating Manuals provide the details necessary for integrating the operation of the individual projects with the system operation described in the System Operating Manual.

(3) In accordance with § 385.18, the public shall have the opportunity to review and comment on draft Operating Manuals.

(4) The Division Engineer and the non-Federal sponsor shall approve completed Operating Manuals.

(5) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the content of Operating Manuals and the tasks necessary to develop Operating Manuals.

(6) Operating Manuals shall:

(i) Be consistent with the goals and purposes of the Plan;

(ii) Comply with NEPA, in accordance with § 385.14.

(iii) Describe regulation schedules, water control, and operating criteria for a project, group of projects, or the entire system;

(iv) Make provisions for the natural fluctuation of water made available in any given year and fluctuations necessary for the natural system as described in the Plan;

(v) Be consistent with applicable water quality standards and applicable water quality permitting requirements;

(vi) Be consistent with the reservation or allocation of water for the natural system and the savings clause provisions described in the Project Implementation Report and the Project Cooperation Agreement and the provisions of § 385.35(b), § 385.36, and § 385.37 and reflect the operational criteria used in the identification of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system;

(vii) Include a drought contingency plan as required by § 222.5(i)(5) of this chapter and Engineer Regulation ER 1110-2-1941 "Drought Contingency Plans" that is consistent with the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District and Florida Administrative Code Section 40E-21 (Water Shortage Plan) and Florida Administrative Code Section 40E-22 (Regional Water Shortage Plan); and

(viii) Include provisions authorizing temporary short-term deviations from the Operating Manual for emergencies and unplanned circumstances, as described in applicable Corps of Engineers regulations, including § 222.5(f)(4) and § 222.5(i)(5) of this chapter, and Engineer Regulation ER 1110-2-8156 "Preparation of Water Control Manuals." However, deviations shall be minimized by including planning for flooding events caused by rainfall and hurricane events, as well as by including a drought contingency plan.

(A) *Emergency deviations.* Examples of some emergencies that can be expected to occur at a project are: drowning and other accidents, failure of the operation facilities, chemical spills, treatment plant failures and other temporary pollution problems. Water control actions necessary to abate the problem are taken immediately unless such action would create equal or worse conditions.

(B) *Unplanned circumstances.* There are unplanned circumstances that create

a temporary need for minor deviations from the Operating Manual, although they are not considered emergencies. Deviations are sometimes necessary to carry out maintenance and inspection of facilities. Requests for deviations for unplanned circumstances generally involve time periods ranging from a few hours to a few days. Approval of these changes shall be obtained from the Division Engineer.

(7) Except as provided in this part, operating manuals generally shall follow the procedures for water control plans in § 222.5 of this chapter and applicable Corps of Engineers regulations for preparation of water control manuals and regulation schedules, including Engineer Regulation ER 1110-2-8156.

(b) *System Operating Manual.* (1) Not later than December 31, 2005, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a System Operating Manual that provides a system-wide operating plan for the operation of implemented projects of the Plan and other Central and Southern Florida Project features to ensure that the goals and purposes of the Plan are achieved.

(2) The System Operating Manual shall initially be based on the existing completed Central and Southern Florida Project features and shall be developed by the Corps of Engineers as provided in § 222.5(g) of this chapter and by the South Florida Water Management District as its laws and regulations require. Existing water control plans, regulation schedules, and Master Water Control Plans for the Central and Southern Florida Project shall remain in effect until approval of the System Operating Manual.

(3) The System Operating Manual shall be revised whenever the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, believe it is necessary to ensure that the goals and purposes of the Plan are achieved.

(4) Except as provided in this part, the System Operating Manual shall follow

the procedures for preparation of water control manuals, regulation schedules and Master Water Control Manuals in § 222.5 of this chapter and applicable Corps of Engineers regulations.

(5) The Corps of Engineers and the South Florida Water Management District shall provide notice and opportunity for public comment for any significant modification to the System Operating Manual.

(c) *Project Operating Manuals.* (1) The Corps of Engineers and the non-Federal sponsor shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Project Operating Manual for each project of the Plan that is implemented.

(2) Project Operating Manuals shall be considered supplements to the System Operating Manual, and present aspects of the projects not common to the system as a whole.

(3) Each Project Implementation Report shall, as appropriate, include a draft Project Operating Manual as an appendix to the Project Implementation Report.

(4) As appropriate, the draft Project Operating Manual shall be revised for the project construction phase and the operational monitoring and testing phase after completion of project construction.

(5) The final Project Operating Manual shall be completed as soon as practicable after completion of the operational testing and monitoring phase of the project. The completed project shall continue to be operated in accordance with the approved draft Project Operating Manual until the final Project Operating Manual is approved.

(6) The Corps of Engineers and the non-Federal sponsor shall provide notice and opportunity for public comment for any significant modification to the Project Operating Manual.

§ 385.29 Other project documents.

(a) As appropriate, the Corps of Engineers and the non-Federal sponsor may prepare design documents to provide additional design information needed for projects. Such documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

(b) The Corps of Engineers and the non-Federal sponsor shall prepare plans and specifications necessary for construction of projects. Such

documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

(c) The Corps of Engineers and the non-Federal sponsor may prepare other documents as appropriate during the real estate acquisition and construction phases for projects. Such documents shall be approved in accordance with applicable policies of the Corps of Engineers and the non-Federal sponsor.

Subpart D—Incorporating New Information Into the Plan

§ 385.30 Master Implementation Sequencing Plan.

(a) Not later than December 13, 2004 the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop a Master Implementation Sequencing Plan that includes the sequencing and scheduling for implementation of all of the projects of the Plan, including pilot projects and operational elements, based on the best scientific, technical, funding, contracting, and other information available. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the Master Implementation Sequencing Plan.

(1) Projects shall be sequenced and scheduled to maximize the achievement of the goals and purposes of the Plan at the earliest possible time and in the most cost-effective way, consistent with the requirement that each project be justified on a next-added increment basis, including the achievement of the interim goals established pursuant to § 385.38 and the interim targets established pursuant § 385.39, consistent with § 385.36 and § 385.37(b), and to the extent practical given funding, engineering, and other constraints. The sequencing and scheduling of projects shall be based on considering factors, including, but not limited to:

(i) Technical dependencies and constraints;

(ii) Benefits to be provided by the project;

(iii) Availability of lands required for the project; and

(iv) Avoiding elimination or transfers of existing legal sources of water until

an alternate source of comparable quantity and quality is available, in accordance with § 385.36.

(2) The Master Implementation Sequencing Plan shall include appropriate discussion of the logic, constraints, and other parameters used in developing the sequencing and scheduling of projects.

(3) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the Master Implementation Sequencing Plan.

(b) Whenever necessary to ensure that the goals and purposes of the Plan are achieved, but at least every five years, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, review the Master Implementation Sequencing Plan.

(1) The Master Implementation Sequencing Plan may be revised as appropriate, consistent with the goals and purposes of the Plan, and consistent with § 385.36 and § 385.37(b), to incorporate new information including, but not limited to:

(i) Updated schedules from Project Management Plans;

(ii) Information obtained from pilot projects;

(iii) Updated funding information;

(iv) Approved revisions to the Plan;

(v) Congressional or other authorization or direction;

(vi) Information resulting from the adaptive management program, including new information on costs and benefits; or

(vii) Information regarding progress towards achieving the interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39.

(2) Proposed revisions to the Master Implementation Sequencing Plan shall be analyzed by RECOVER for effects on achieving the goals and purposes of the Plan and the interim goals and targets.

(3) The revised Master Implementation Sequencing Plan shall include information about the reasons for the changes to the sequencing and scheduling of individual projects.

(4) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on revisions to the

Master Implementation Sequencing Plan.

§ 385.31 Adaptive management program.

(a) *General.* The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, establish an adaptive management program to assess responses of the South Florida ecosystem to implementation of the Plan; to determine whether or not these responses match expectations, including the achievement of the expected performance level of the Plan, the interim goals established pursuant to § 385.38, and the interim targets established pursuant to § 385.39; to determine if the Plan, system or project operations, or the sequence and schedule of projects should be modified to achieve the goals and purposes of the Plan, or to increase net benefits, or to improve cost effectiveness; and to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan. Endorsement of the Plan as a restoration framework is not intended as an artificial constraint on innovation in its implementation.

(b) *Assessment activities.* (1) RECOVER shall develop an assessment program to assess responses of the system to implementation of the Plan. The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the processes to be used to conduct these assessments.

(2) RECOVER shall develop a monitoring program that is designed to measure status and trends towards achieving the goals and purposes of the Plan throughout the South Florida ecosystem.

(3) RECOVER shall conduct monitoring activities and use the information collected and analyzed through the monitoring program as a

basis for conducting assessment tasks, which may include, but are not limited to, the following:

(i) Determining if measured responses are desirable and are achieving the interim goals and the interim targets or the expected performance level of the Plan;

(ii) Evaluating if corrective actions to improve performance or improve cost-effectiveness should be considered; and

(iii) Preparing reports on the monitoring program.

(4) Whenever it is deemed necessary, but at least every five years, RECOVER shall prepare a technical report that presents an assessment of whether the goals and purposes of the Plan are being achieved, including whether the interim goals and interim targets are being achieved or are likely to be achieved. The technical report shall be provided to the Corps of Engineers and the South Florida Water Management District for use in preparing the assessment report. The technical report prepared by RECOVER shall also be made available to the public.

(i) The Corps of Engineers and the South Florida Water Management District shall consult with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies in the development of the assessment report. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in developing the assessment report.

(ii) In accordance with § 385.22(b), the draft assessment report shall be externally peer reviewed.

(iii) In accordance with § 385.18, Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the draft assessment report.

(iv) The Corps of Engineers and the South Florida Water Management District shall transmit the final assessment report to the Secretary of the Army, the Secretary of the Interior, and the Governor.

(v) The Secretary of the Army shall make the final assessment report available to the public.

(c) *Periodic CERP updates.* Not later than June 14, 2004 and whenever necessary to ensure that the goals and purposes of the Plan are achieved, but not any less often than every five years, the Corps of Engineers and the South

Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, conduct an evaluation of the Plan using new or updated modeling that includes the latest scientific, technical, and planning information. As part of the evaluation of the Plan, the Corps of Engineers and the South Florida Water Management District shall determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in conducting the evaluation of the Plan. As appropriate, the results of the evaluation of the Plan may be used to initiate management actions in accordance with paragraph (d) of this section that are necessary to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan. In addition, and as appropriate, the results of the evaluation of the Plan may be used to consider changes to the interim goals in accordance with § 385.38 and changes to the interim targets in accordance with § 385.39.

(d) *Management actions.* (1) In seeking continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan, the Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole

Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, use the assessment report prepared in accordance with paragraph (b) of this section, information resulting from independent scientific review and external peer review in accordance with § 385.22, or other appropriate information including progress towards achievement of the interim goals established pursuant to § 385.38 and the interim targets established pursuant to § 385.39 to determine if the activities described in paragraph (d)(2) of this section should be undertaken to ensure that the goals and purposes of the Plan are achieved. The Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, consider the following actions:

- (i) Modifying current operations of the Plan;
 - (ii) Modifying the design or operational plan for a project of the Plan not yet implemented;
 - (iii) Modifying the sequence or schedule for implementation of the Plan;
 - (iv) Adding new components to the Plan or deleting components not yet implemented;
 - (v) Removing or modifying a component of the Plan already in place; or
 - (vi) A combination of these.
- (2) Such actions should be implemented through revisions to Operating Manuals in accordance with § 385.28, revisions to the Master Implementation Sequencing Plan in accordance with § 385.30, a Comprehensive Plan Modification Report in accordance with § 385.32, or other appropriate mechanisms.

§ 385.32 Comprehensive Plan Modification Report

Whenever the Corps of Engineers and the South Florida Water Management District, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, determine that changes to the Plan are necessary to ensure that

the goals and purposes of the Plan are achieved or that they are achieved cost-effectively, or to ensure that each project of the Plan is justified on a next-added increment basis, the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, prepare a Comprehensive Plan Modification Report using a process that is consistent with the provisions of § 385.10, § 385.14, § 385.18, and § 385.19. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem Restoration Task Force in preparing the Comprehensive Plan Modification Report.

(a) *General requirements.* The Comprehensive Plan Modification Report shall:

- (1) Be initiated at the discretion of the Corps of Engineers and the South Florida Water Management District in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, after consideration of the assessment report prepared in accordance with § 385.31(b), requests from the Department of the Interior or the State, or other appropriate information;
- (2) Comply with all applicable Federal and State laws, including the National Environmental Policy Act, the Endangered Species Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the Coastal Zone Management Act, the Marine Mammal Protection Act, and any other applicable law;

(3) Contain information such as: Plan formulation and evaluation, engineering and design, estimated benefits and costs, and environmental effects; and

(4) Include appropriate analyses of alternatives evaluated by RECOVER;

(5) Include updated water budget information for the Plan, including the total quantity of water that is expected to be generated by implementation of the Plan, and the quantity expected to be generated for the natural system to attain restoration goals as well as the

quantity expected to be generated for use in the human environment;

(6) Contain appropriate NEPA documentation to supplement the Programmatic Environmental Impact Statement included in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999; and

(7) Include coordination with the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Florida Fish and Wildlife Coordination Commission, and other appropriate agencies in the preparation of the Comprehensive Plan Modification Report, as required by applicable law.

(b) *Review and approval of Comprehensive Plan Modification Report.* (1) The Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the draft Comprehensive Plan Modification Report and NEPA document, in accordance with § 385.18 and applicable law and Corps of Engineers policy.

(2) The Comprehensive Plan Modification Report shall contain an appropriate letter of intent from the South Florida Water Management District indicating concurrence with the recommendations of the Comprehensive Plan Modification Report.

(3) Upon the completion of the Comprehensive Plan Modification Report and NEPA document, the District Engineer shall submit the report and NEPA document to the Division Engineer.

(4) Upon receipt and approval of the Comprehensive Plan Modification Report, the Division Engineer shall issue a public notice announcing completion of the Comprehensive Plan Modification Report based upon:

(i) The Division Engineer's endorsement of the findings and recommendations of the District Engineer; and

(ii) The Division Engineer's assessment that the report has been prepared in accordance with current law and policy. The notice shall indicate that the report has been submitted to Corps of Engineers Headquarters for review.

(5) Headquarters, U.S. Army Corps of Engineers shall conduct a review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, U.S. Army Corps of Engineers shall administer the 30-day state and agency review of the Comprehensive Plan Modification Report, and, as appropriate, file the Environmental Impact Statement with the Environmental Protection Agency.

(6) After completion of the policy review and other requirements of law and policy, the Chief of Engineers shall submit the Comprehensive Plan Modification Report and the Chief of Engineers' recommendations to the Assistant Secretary of the Army for Civil Works.

(7) The Assistant Secretary of the Army for Civil Works shall review the Comprehensive Plan Modification Report and shall, prior to submitting the Assistant Secretary's recommendations to Congress, coordinate the proposed recommendations with the Office of Management and Budget.

(c) *Minor changes to the Plan.* The Plan requires a process for adaptive management and incorporation of new information. As a result of this process, minor adjustments in the Plan may be made through Project Implementation Reports. It is not the intent of this section to require a continual cycle of report writing for minor changes. Instead, the intent of this section is to develop a Comprehensive Plan Modification Report for changes to the Plan that would require a supplement to the programmatic Environmental Impact Statement. The Corps of Engineers and the South Florida Water Management District may, in their discretion, elect to prepare a Comprehensive Plan Modification Report for other changes.

§ 385.33 Revisions to models and analytical tools.

(a) In carrying out their responsibilities for implementing the Plan, the Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall rely on the best available science including models and other analytical tools for conducting analyses for the planning, design, construction, operation, and assessment of projects. The selection of models and analytical tools shall be done in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies.

(b) The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors may, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies,

periodically revise models and analytical tools or develop new models and analytical tools as needed. As appropriate, RECOVER shall review the adequacy of system-wide simulation models and analytical tools used in the evaluation and assessment of projects, and shall propose improvements in system-wide models and analytical tools required for the evaluation and assessment tasks.

(c) The Corps of Engineers and the South Florida Water Management District shall determine on a case-by-case basis what documentation is appropriate for revisions to models and analytic tools, depending on the significance of the changes and their impacts to the Plan. Such changes may be treated as Minor Changes to the Plan, in accordance with § 385.32(c) where appropriate.

§ 385.34 Changes to the Plan.

(a) The Plan shall be updated to incorporate approved changes to the Plan resulting from:

(1) Approval by the Secretary of the Army of a project to be implemented pursuant to § 385.13;

(2) Authorization of projects by Congress;

(3) Comprehensive Plan Modification Reports approved by Congress; or

(4) Other changes authorized by Congress.

(b) The Corps of Engineers and the South Florida Water Management District shall annually prepare a document for dissemination to the public that describes:

(1) The components of the Plan, including any approved changes to the Plan;

(2) The estimated cost of the Plan, including any approved changes to the Plan;

(3) A water budget for the Plan; and

(4) The water that has been reserved or allocated for the natural system under State law for the Plan.

(c) The Corps of Engineers shall annually provide to the Office of Management and Budget an updated estimate of total cost of the Plan, the costs of individual project components, and an explanation of any changes in these estimates from the initial estimates contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

Subpart E—Ensuring Protection of the Natural System and Water Availability Consistent With the Goals and Purpose of the Plan

§ 385.35 Achievement of the benefits of the Plan.

(a) *Pre-CERP baseline water availability and quality.* (1) Not later than June 14, 2004 the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, develop for approval by the Secretary of the Army, the pre-CERP baseline to be used to aid the Corps of Engineers and the South Florida Water Management District in determining if existing legal sources of water will be eliminated or transferred as a result of project implementation as described in § 385.36 and memorialize the pre-CERP baseline in an appropriate document. The Corps of Engineers and the South Florida Water Management District shall consult with the South Florida Ecosystem Restoration Task Force in the development of the pre-CERP baseline.

(i) The pre-CERP baseline may express the quantity, timing, and distribution of water in stage duration curves; exceedance frequency curves; quantities available in average, wet, and dry years; or any other method which is based on the best available science.

(ii) The pre-CERP baseline shall include appropriate documentation that includes a description of the assumptions used to develop the pre-CERP baseline.

(iii) In addition to the development of the pre-CERP baseline, the Corps of Engineers and the South Florida Water Management District shall conduct other analyses that they deem necessary to determine if an existing legal source of water has been eliminated or transferred or if a new source of water is of comparable quality to that which has been eliminated or transferred in accordance with § 385.36.

(2) In accordance with § 385.18, the Corps of Engineers and the South Florida Water Management District shall provide opportunities for the public to review and comment on the pre-CERP baseline.

(3) The pre-CERP baseline shall be developed with the concurrence of the Secretary of the Interior and the Governor. Within 180 days of being provided the pre-CERP baseline, or such

shorter period that the Secretary of the Interior and the Governor may agree to, the Secretary of the Interior and the Governor shall provide the Secretary of the Army with a written statement of concurrence or non-concurrence with the pre-CERP baseline. A failure to provide a written statement of concurrence or non-concurrence within such time frame shall be deemed as meeting the concurrency process of this section. A copy of any concurrency or non-concurrence statements shall be made a part of the administrative record and referenced in the final determination of the pre-CERP baseline. Any non-concurrence statement shall specifically detail the reason or reasons for the non-concurrence.

(4) Nothing in this paragraph is intended to, or shall it be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nothing in this section is intended to, nor shall it be interpreted to, prescribe any process of Florida law.

(b) *Identification of water made available and water to be reserved or allocated for the natural system.* (1) Initial modeling showed that most of the water generated by the Plan would go to the natural system in order to attain restoration goals, and the remainder of the water would go for use in the human environment. The Corps of Engineers, the South Florida Water Management District, and other non-Federal sponsors shall ensure that Project Implementation Reports identify the appropriate quantity, timing, and distribution of water to be dedicated and managed for the natural system that is necessary to meet the restoration goals of the Plan. In accordance with the "Comprehensive Everglades Restoration Plan Assurance of Project Benefits Agreement," dated January 9, 2002 pursuant to section 601(h)(2) of WRDA 2000, the South Florida Water Management District or the Florida Department of Environmental Protection shall make sufficient reservations of water for the natural system under State law in accordance with the Project Implementation Report for that project and consistent with the Plan before water made available by a project is permitted for a consumptive use or otherwise made unavailable. In accordance with § 385.31(c), the Corps of Engineers and the South Florida Water Management District shall, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Florida Department of

Environmental Protection, and other Federal, State, and local agencies, determine the total quantity of water that is expected to be generated by implementation of the Plan, including the quantity expected to be generated for the natural system to attain restoration goals as well as the quantity expected to be generated for use in the human environment, and shall periodically update that estimate, as appropriate, based on new information resulting from changed or unforeseen circumstances, new scientific or technical information, new or updated models, or information developed through the adaptive assessment principles contained in the Plan, or future authorized changes to the Plan integrated into the implementation of the Plan.

(2) Each Project Implementation Report shall take into account the availability of pre-CERP baseline water and previously reserved water as well as the estimated total quantity of water that is necessary for restoration for the natural system and the quantity of water anticipated to be made available from future projects in identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, determining whether improvements in water quality are necessary to ensure that water delivered to the natural system meets applicable water quality standards; and identifying the amount of water for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii)(V) of WRDA 2000.

(3) Section 601(h)(3)(C)(i)(I) of WRDA 2000 requires the regulations of this part to establish a process for development of Project Implementation Reports, Project Cooperation Agreements, and Operating Manuals that ensure that the goals and objectives of the Plan are achieved. Section 601(h)(4)(A)(iii)(IV) of WRDA 2000 provides that Project Implementation Reports shall identify the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system. Section 601(h)(4)(A)(iii)(V) of WRDA 2000 provides that Project Implementation Reports shall identify the amount of water to be reserved or allocated for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii)(IV) and (VI) of WRDA 2000. To implement these provisions and § 385.5, the Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the

concurrence of the Secretary of the Interior and the Governor. The guidance memorandum shall provide a process to be used in the preparation of Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system; determining the quantity, timing and distribution of water made available for other water-related needs of the region; determining whether improvements in water quality are necessary to ensure that water delivered by the Plan meets applicable water quality standards; and identifying the amount of water for the natural system necessary to implement, under State law, the provisions of section 601(h)(4)(A)(iii) of WRDA 2000.

(i) The guidance memorandum shall generally be based on using a system-wide analysis of the water made available and may express the quantity, timing and distribution of water in stage duration curves; exceedance frequency curves; quantities available in average, wet, and dry years; or any other method which is based on the best available science. The guidance memorandum shall also provide for projects that are hydrologically separate from the rest of the system. The guidance memorandum also shall address procedures for determining whether improvements in water quality are necessary to ensure that water delivered to the natural system meets applicable water quality standards. These procedures shall ensure that any features to improve water quality are implemented in a manner consistent with the cost sharing provisions of WRDA 1996 and WRDA 2000.

(ii) The guidance memorandum shall generally take into account the natural fluctuation of water made available in any given year based on an appropriate period of record; the objective of restoration of the natural system; the need for protection of existing uses transferred to new sources; contingencies for drought protection; the need to identify the additional quantity, timing, and distribution of water made available by a new project component while maintaining a system-wide perspective on the amount of water made available by the Plan; and the need to determine whether improvements in water quality are necessary to ensure that water delivered by the Plan meets applicable water quality standards.

(iii) Project Implementation Reports approved before December 12, 2003 or before the development of the guidance memorandum may use whatever method that the Corps of Engineers and the non-Federal sponsor deem is

reasonable and consistent with the provisions of section 601 of WRDA 2000.

(iv) Nothing in this paragraph is intended to, or shall it be interpreted to, reserve or allocate water or to prescribe the process for reserving or allocating water or for water management under Florida law. Nothing in this section is intended to, nor shall it be interpreted to, prescribe any process of Florida law.

(c) *Procedures in event that the project does not perform as expected.* The Project Implementation Report shall include a plan for operations of the project in the event that the project fails to provide the quantity, timing, or distribution of water described in the Project Implementation Report. Such plan shall take into account the specific authorized purposes of the project and the goals and purposes of the Plan and shall also provide for undertaking management actions in accordance with § 385.31(d).

§ 385.36 Elimination or transfer of existing legal sources of water.

(a) Pursuant to the provisions of section 601(h)(5)(A) of WRDA 2000, Project Implementation Reports shall include analyses to determine if existing legal sources of water are to be eliminated or transferred as a result of project implementation. If implementation of the project shall cause an elimination or transfer of existing legal sources of water, then the Project Implementation Report shall include an implementation plan that ensures that such elimination or transfer shall not occur until a new source of water of comparable quantity and quality is available to replace the water to be lost as a result of implementation of the Plan. The Corps of Engineers and the non-Federal sponsor shall determine if implementation of the project will cause an elimination or transfer of existing legal sources of water by comparing the availability of water with the recommended project with the pre-CERP baseline developed in accordance with § 385.35(a), by using the water quality and other analyses developed in § 385.35(a)(1)(iii), and by using other appropriate information.

(b) The Corps of Engineers and the South Florida Water Management District shall develop a guidance memorandum in accordance with § 385.5 for approval by the Secretary of the Army, with the concurrence of the Secretary of the Interior and the Governor, that describes the process for determining if existing legal sources of water are to be eliminated or transferred and for determining how and when a new source of water of comparable

quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan. The guidance memorandum shall also describe the process for comparing the recommended project with the pre-CERP baseline to determine if existing legal sources of water are to be transferred or eliminated as a result of project implementation. The guidance memorandum shall include a definition for existing legal sources of water for the purposes of determining if existing legal sources of water are to be eliminated or transferred. Existing legal sources of water shall include those for:

- (1) An agricultural or urban water supply;
 - (2) Allocation or entitlement to the Seminole Indian Tribe of Florida under section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e);
 - (3) The Miccosukee Tribe of Indians of Florida;
 - (4) Water supply for Everglades National Park; and
 - (5) Water supply for fish and wildlife.
- (c) Until guidance is issued, issues involving existing legal sources of water should be resolved on a case-by-case basis considering all factors that can be identified as relevant to decisions under the savings clause.

§ 385.37 Flood protection.

(a) *General.* In accordance with section 601 of WRDA 2000, flood protection, consistent with restoration, preservation, and protection of the natural system, is a purpose of the Plan.

(b) *Existing flood protection.* Each Project Implementation Report shall include appropriate analyses, and consider the operational conditions included in the pre-CERP baseline developed pursuant to § 385.35(a), to demonstrate that the levels of service for flood protection that:

- (1) Were in existence on the date of enactment of section 601 of WRDA 2000; and
- (2) Are in accordance with applicable law, will not be reduced by implementation of the project.

(c) *Improved and new flood protection.* The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida Ecosystem while providing for other water-related needs of the region, including water supply and flood protection. As appropriate, the Corps of Engineers and the non-Federal sponsor shall consider opportunities to provide additional flood protection, consistent with restoration of the natural system, and the provisions of section

601(f)(2)(B) of WRDA 2000 and other applicable laws.

§ 385.38 Interim goals.

(a) *Agreement.* (1) The Secretary of the Army, the Secretary of the Interior, and the Governor shall, not later than December 13, 2004, and in consultation with the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force, execute an Interim Goals Agreement establishing interim goals to facilitate inter-agency planning, monitoring, and assessment so as to achieve the overarching objectives of the Plan and to provide a means by which the restoration success of the Plan may be evaluated, and ultimately reported to Congress in accordance with § 385.40 throughout the implementation process.

(2) After execution of the Interim Goals Agreement, the Department of the Army shall memorialize the agreement in appropriate Corps of Engineers guidance.

(b) *Purpose.* (1) Interim goals are a means by which the restoration success of the Plan may be evaluated at specific points by agency managers, the State, and Congress throughout the overall planning and implementation process. In addition, interim goals will facilitate adaptive management and allow the Corps of Engineers and its non-Federal sponsors opportunities to make adjustments if actual project performance is less than anticipated, including recommending changes to the Plan. Interim goals are not standards or schedules enforceable in court.

(2) The interim goals shall:

(i) Facilitate inter-agency planning, monitoring and assessment;

(ii) Be provided to the independent scientific review panel established in accordance with § 385.22(a);

(iii) Be considered in developing the Master Implementation Sequencing Plan, Project Implementation Reports, and Comprehensive Plan Modification Reports; and

(iv) Be considered in making budgetary decisions concerning implementation of the Plan.

(3) To ensure flexibility in implementing the Plan over the next several decades, and to ensure that interim goals may reflect changed circumstances or new information resulting from adaptive management, the interim goals may be modified, consistent with the processes set forth in paragraph (d) of this section, to reflect new information resulting from

changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

(4) The Corps of Engineers and the South Florida Water Management District shall sequence and schedule projects as appropriate to achieve the interim goals and the interim targets established pursuant to § 385.39 to the extent practical given funding, technical, or other constraints.

(5) If the interim goals have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District shall determine why the interim goals have not been met or are unlikely to be met and either:

(i) Initiate adaptive management actions pursuant to § 385.31(d) to achieve the interim goals as soon as practical, consistent with the purposes of the Plan and consistent with the interim targets established pursuant to § 385.39; or

(ii) Recommend changes to the interim goals in accordance with paragraph (b)(3) of this section.

(c) *Principles for developing interim goals.* (1) RECOVER, using best available science and information, shall recommend a set of interim goals for implementation of the Plan, consisting of regional hydrologic performance targets, improvements in water quality, and anticipated ecological responses for areas such as, Lake Okeechobee, the Kissimmee River Region, the Water Conservation Areas, the Lower East Coast, the Upper East Coast, the Everglades Agricultural Area, and the Caloosahatchee River, Everglades National Park, Big Cypress National Preserve, Biscayne Bay, Florida Bay, and other estuaries and nearshore areas. These interim goals shall reflect the incremental accomplishment of the expected performance level of the Plan, and will identify improvements in quantity, quality, timing, and distribution of water for the natural system provided by the Plan in five-year increments that begin in 2005, with the goals reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim goals shall be developed through the use of appropriate models and tools and shall provide a quantitative basis for evaluating the restoration success of the Plan during the period of implementation. In developing the interim goals for the five-year increments, RECOVER shall use the

Master Implementation Sequencing Plan as the basis for predicting performance at a given time. RECOVER may recommend additional interim goals in addition to those initially developed and may propose revisions to the initial set of interim goals as new information is gained through adaptive management. Interim goals shall include incremental improvements in the quantity, quality, timing, and distribution of water anticipated to be required to meet long-term hydrological and ecological restoration goals, based on best available science. These goals may be modified, based on best available science and the adaptive assessment principles contained in the Plan, in accordance with paragraph (d) of this section.

(2) In developing its recommendations for interim goals, RECOVER shall consider indicators including, but not limited to:

(i) Hydrologic indicators, including:

(A) The amount of water, in addition to the pre-CERP baseline and assumptions regarding without project conditions, which will be available to the natural system;

(B) Hydroperiod targets in designated sample areas throughout the Everglades;

(C) The changes in the seasonal and annual overland flow volumes in the Everglades that will be available to the natural system;

(D) The frequency of extreme high and low water levels in Lake Okeechobee; and

(E) The frequency of meeting salinity envelopes in estuaries such as the St. Lucie, Caloosahatchee, Biscayne Bay, and Florida Bay and nearshore areas.

(ii) Improvement in water quality; including:

(A) Total phosphorus concentrations in the Everglades; and

(B) Lake Okeechobee phosphorus concentrations.

(iii) Ecological responses, including:

(A) Increases in total spatial extent of restored wetlands;

(B) Improvement in habitat quality; and

(C) Improvement in native plant and animal abundance.

(3) In developing the interim goals based upon water quality and expected ecological responses, the Corps of Engineers, The Department of the Interior, and the South Florida Water Management District shall take into consideration the extent to which actions undertaken by Federal, State, tribal, and other entities under programs not within the scope of this part may affect achievement of the goals.

(d) *Process for establishing interim goals.* (1) The recommendations of RECOVER shall be provided to the

Corps of Engineers, the Department of the Interior, and the South Florida Water Management District. These recommendations shall be provided no later than June 14, 2004. The proposed Interim Goals Agreement shall be developed by the Secretary of the Army, the Secretary of the Interior and the Governor in consultation with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. In considering the interim goals to be included in the Interim Goals Agreement, the Secretary of the Army, the Secretary of the Interior, and the Governor, shall be provided with, and consider, the technical recommendations of RECOVER and any modifications to those recommendations by the Corps of Engineers, the Department of Interior, or the South Florida Water Management District. The Secretary of the Army shall provide a notice of availability of the proposed agreement to the public in the **Federal Register** and seek public comments. After considering comments of the public on the proposed agreement, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary of the Army, the Secretary of the Interior, and the Governor, shall execute the final agreement, and the Secretary of the Army shall provide a notice of availability to the public in the **Federal Register** by no later than December 13 2004.

(2) In developing its recommendations for interim goals, RECOVER shall use the principles in paragraph (c) of this section.

(3) The Secretary of the Army, the Secretary of the Interior, and the Governor shall review the Interim Goals Agreement at a minimum of every five years after the date of the Interim Goals Agreement, to determine if the interim goals should be revised. Thereafter, the Secretary of the Army, the Secretary of the Interior, and the Governor shall revise the interim goals and execute a new agreement as appropriate. However, the Secretary of the Army, the Secretary of the Interior, and the Governor may review and revise the interim goals whenever appropriate as new information becomes available. Any revisions to the interim goals shall be consistent with the process established in this section.

§ 385.39 Evaluating progress towards other water-related needs of the region provided for in the Plan.

(a) *Purpose.* (1) The overarching objective of the Plan is the restoration, preservation, and protection of the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. Progress towards providing for these other water-related needs shall also be evaluated.

(2) As provided for in paragraph (c) of this section, the Secretary of the Army and the Governor shall establish interim targets for evaluating progress towards other water-related needs of the region provided for in the Plan throughout the implementation process. The interim targets and interim goals shall be consistent with each other.

(3) The Department of the Army shall include these interim targets in appropriate Corps of Engineers guidance.

(4) To ensure flexibility in implementing the Plan over the next several decades, and to ensure that interim targets may reflect changed circumstances or new information resulting from adaptive management, the interim targets may be modified, consistent with the processes set forth in paragraph (c) of this section, to reflect new information resulting from changed or unforeseen circumstances, new scientific and technical information, new or updated modeling; information developed through the assessment principles contained in the Plan; and future authorized changes to the Plan integrated into the implementation of the Plan.

(5) The Corps of Engineers and the South Florida Water Management District shall sequence and schedule projects as appropriate to achieve the interim goals and interim targets for other water-related needs of the region provided for in the Plan, to the extent practical given funding, technical, or other constraints.

(6) If the interim targets have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District shall determine why the interim targets have not been met or are unlikely to be met and either:

(i) Initiate adaptive management actions pursuant to § 385.31(d) to achieve the interim targets as soon as practicable, consistent with the purposes of the Plan and consistent with the interim goals established pursuant to § 385.38; or

(ii) Recommend changes to the interim targets in accordance with paragraph (a)(4) of this section.

(b) *Principles for developing interim targets.* (1) RECOVER, using best available science and information, shall recommend a set of interim targets for evaluating progress towards other water-related needs of the region provided for in the Plan. These interim targets shall reflect the incremental accomplishment of the expected performance level of the Plan, and will identify improvements in quantity, quality, timing and distribution of water in five-year increments that begin in 2005, with the targets reflecting the results expected to be achieved by 2010 and for each five-year increment thereafter. The interim targets shall be developed through the use of appropriate models and tools and shall provide a quantitative basis for evaluating progress towards other water-related needs of the region provided for in the Plan during the period of implementation. In developing the interim targets for the five-year increments, RECOVER shall use the Master Implementation Sequencing Plan as the basis for predicting the performance at a given time. RECOVER may recommend additional interim targets for implementation of CERP in addition to those initially developed and may propose revisions to the initial set of interim targets as new information is gained through adaptive management.

(2) In developing its recommendations for interim targets, RECOVER shall consider indicators including, but not limited to:

(i) The frequency of water restrictions in the Lower East Coast Service Areas at each time increment;

(ii) The frequency of water restrictions in the Lake Okeechobee Service Areas at each time increment;

(iii) The frequency of meeting salt-water intrusion protection criteria for the Lower East Coast Service Area at each time increment; and

(iv) The frequency of water shortage restrictions on lands covered under the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District at each time increment.

(c) *Process for establishing interim targets.* (1) The recommendations of RECOVER shall be provided to the Corps of Engineers and the South Florida Water Management District. These recommendations shall be provided no later than June 14, 2004. The proposed interim targets shall be developed by the Secretary of the Army and the Governor, in consultation with the Department of the Interior, the Environmental Protection Agency, the Department of Commerce, the Miccosukee Tribe of Indians of Florida,

the Seminole Tribe of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. In considering the interim targets, the Secretary of the Army and the Governor, shall be provided with, and consider, the technical recommendations of RECOVER and any modifications to those recommendations by the Corps of Engineers or the South Florida Water Management District. The Secretary of the Army shall provide a notice of availability of the proposed interim targets to the public in the **Federal Register** and seek public comments. After considering comments of the public on the proposed interim targets, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary of the Army and the Governor, shall establish the final interim targets, and the Secretary of the Army shall provide a notice of availability to the public in the **Federal Register** by no later than December 13, 2004, but not prior to the execution of the Interim Goals Agreement pursuant to § 385.38. Interim targets are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not standards or schedules enforceable in court.

(2) In developing its recommendations for interim targets, RECOVER shall use the principles in paragraph (b) of this section.

(3) The Secretary of the Army and the Governor shall review the interim targets at a minimum every five years beginning five years after the establishment of the interim targets to determine if they should be revised and to determine what those revisions should be. The public shall also be provided with an opportunity to comment on the proposed revisions. The Secretary of the Army and the Governor may also revise the interim targets whenever appropriate as new information becomes available. Any revisions to the interim targets shall be established consistent with the process described in this section.

§ 385.40 Reports to Congress.

(a) Beginning on October 1, 2005 and periodically thereafter until October 1, 2036, the Secretary of the Army and the Secretary of the Interior shall jointly submit to Congress a report on the implementation of the Plan as required by section 601(l) of WRDA 2000. Such reports shall be completed not less often than every five years.

(b) This report shall be prepared in consultation with the Environmental Protection Agency, the Department of Commerce, the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, the South Florida Water Management District, and other Federal, State, and local agencies and the South Florida Ecosystem Restoration Task Force.

(c) Such reports shall include a description of planning, design, and construction work completed, the amount of funds expended during the period covered by the report, including a detailed analysis of the funds expended for adaptive management, and the work anticipated over the next five-year period and updated estimates of total cost of the Plan and individual component costs and an explanation of any changes from the initial estimates contained in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999.

(d) In addition, each report shall include:

(1) The determination of each Secretary, and the Administrator of the Environmental Protection Agency, concerning the benefits to the natural system and the human environment achieved as of the date of the report and whether the completed projects of the Plan are being operated in a manner that is consistent with the requirements of section 601(h) of WRDA 2000;

(2) Progress towards the interim goals established in accordance with § 385.38 for assessing progress towards achieving the benefits to the natural system;

(3) Progress towards interim targets for other water-related needs of the region provided for in the Plan established pursuant § 385.39 for

assessing progress towards achieving the benefits to the human environment; and

(4) A review of the activities performed by the Secretary pursuant to section 601(k) of WRDA 2000 and § 385.18 and § 385.19 as they relate to socially and economically disadvantaged individuals and individuals with limited English proficiency.

(e) The discussion on interim goals in the periodic reports shall include:

(1) A discussion of the performance that was projected to be achieved in the last periodic report to Congress;

(2) A discussion of the steps taken to achieve the interim goals since the last periodic Report to Congress and the actual performance of the Plan during this period;

(3) If performance did not meet the interim goals, a discussion of the reasons for such shortfall;

(4) Recommendations for improving performance; and

(5) The interim goals to be achieved in the next five years, including any revisions to the interim goals, reflecting the work to be accomplished during the next five years, along with a discussion of steps to be undertaken to achieve the interim goals.

(f) The discussion on interim targets in the periodic reports shall include:

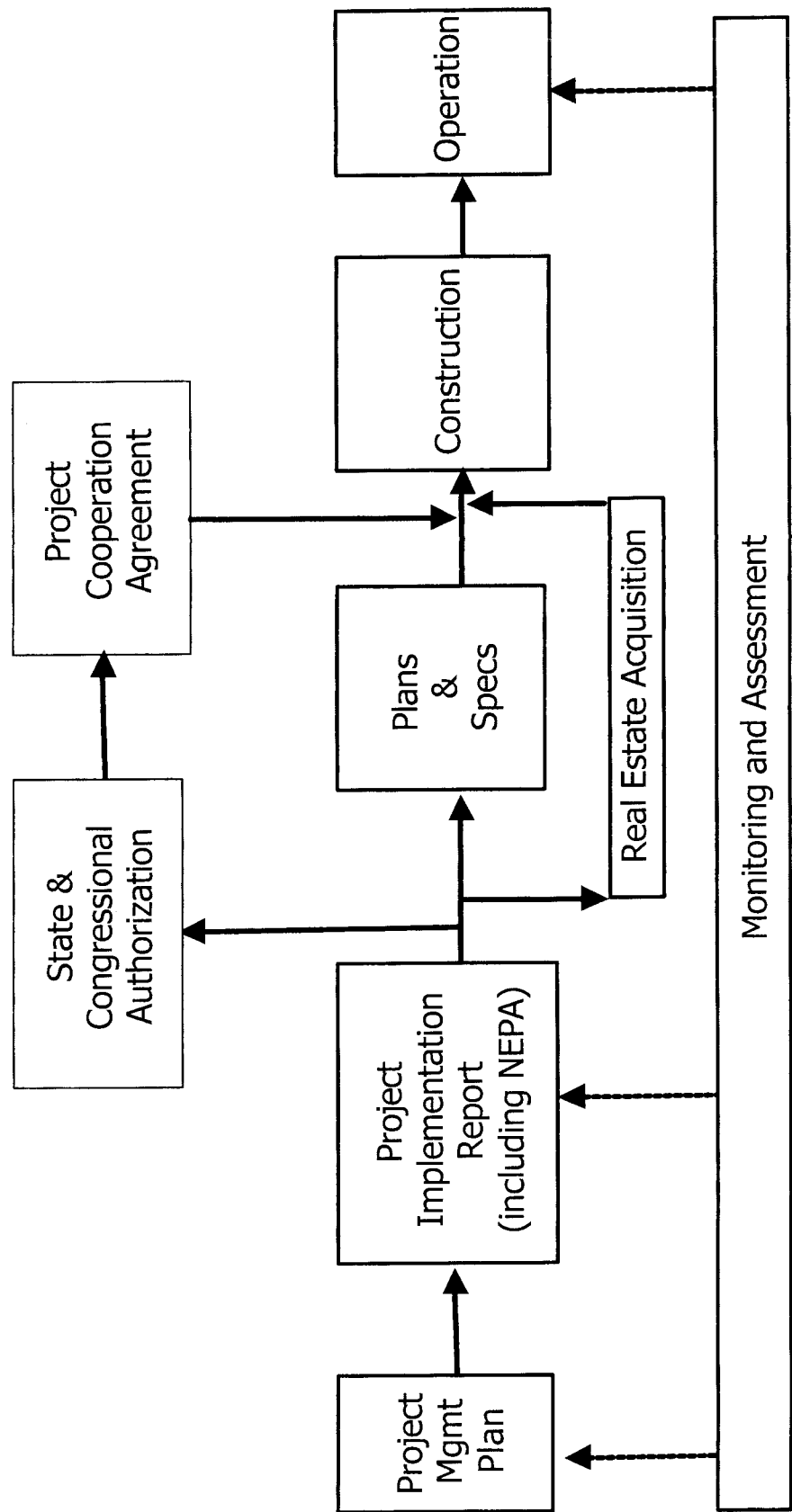
(1) A discussion of the expected and actual performance of the Plan in achieving interim targets since the last periodic Report to Congress, including the reasons for any deviations from expected performance; and

(2) A discussion of the interim targets expected to be achieved during the next five years, including specific activities to achieve them and any recommendations for improving performance.

(g) In preparing the report to Congress required pursuant to this section, the Corps of Engineers and the Department of the Interior shall provide an opportunity for public review and comment, in accordance with § 385.18.

BILLING CODE 3710-92-P

CERP Project Development Process



Appendix A

Figure 1

TYPICAL PROJECT IMPLEMENTATION REPORT (PIR) PROCESS

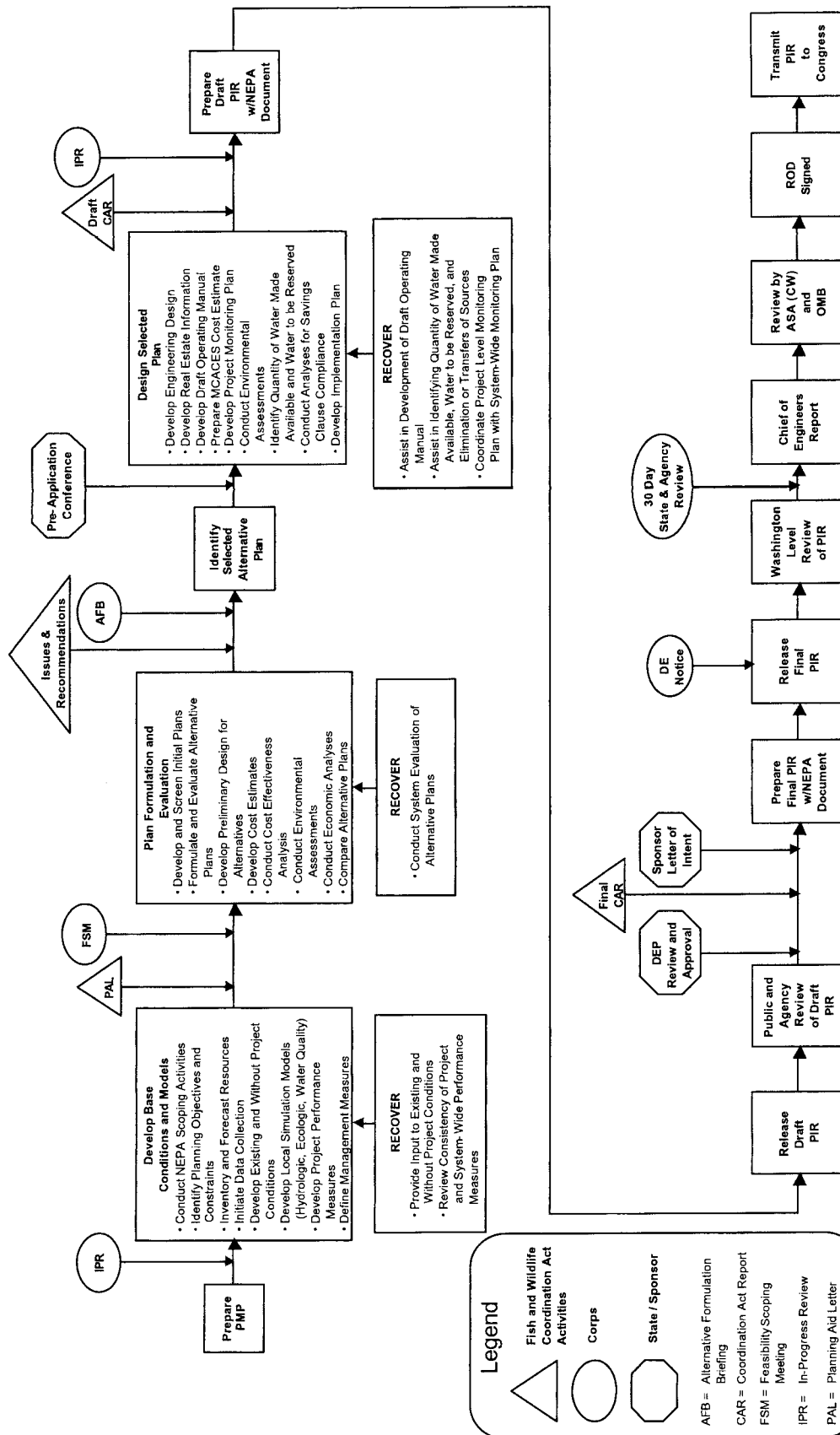


Figure 2

Appendix A

[The following concurrency statements are an appendix to this **Federal Register** document and will not appear in the Code of Federal Regulations.]



THE SECRETARY OF THE INTERIOR
WASHINGTON

OCT 28 2003

The Honorable Les Brownlee
Acting Secretary of the Army
Office of the Under Secretary of the Army
102 Army Pentagon, Rm. 3E732
Washington, DC 20310-0102

Dear Secretary Brownlee:

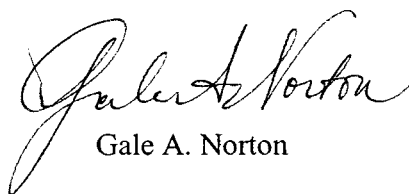
The Department of the Interior appreciates the tremendous effort of the Jacksonville District of the Army Corps of Engineers to develop the programmatic regulations to implement the Comprehensive Everglades Restoration Plan (Plan). We appreciate the extra opportunities afforded to the public, and all stakeholders, to participate in the development of the regulations.

Issuance of the final programmatic regulations is an important and significant step toward a restored Everglades. Along with the Assurances of Project Benefits Agreement, which was signed by the President and the Governor of Florida in January 2002, the programmatic regulations prescribe processes to ensure that the Everglades natural system environment will once again receive the appropriate quantity, timing and distribution of water. Restoration is clearly defined and procedures are set forth to adaptively manage the implementation of the Plan so that it may be adjusted as new information is developed.

We are pleased that the programmatic regulations recognize the role of Interior and its agencies in the Plan's implementation. We look forward to working with the Army on the guidance memoranda, the pre-CERP baseline, and the joint development of interim goals. As steward of one-half the remaining Everglades, we pledge to work closely with our Federal and State partners to ensure that the goals and purposes of the Plan are achieved.

The Department believes that the final programmatic regulations fully meet the legal requirements of Section 601(h)(3)(C) of the Water Resources Development Act of 2000. As a result, I concur with your issuance of the final programmatic regulations.

Sincerely,



Gale A. Norton



JEB BUSH
GOVERNOR

STATE OF FLORIDA

Office of the Governor

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

www.flgov.com
850-488-7146
850-487-0801 fax

October 30, 2003

The Honorable Les Brownlee
Acting Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0108

Dear Mr. Brownlee:

The State of Florida concurs with the Programmatic Regulations established by the United States Army Corps of Engineers to guide the 30-year Comprehensive Everglades Restoration Plan. This concurrence letter is submitted in accordance with Section 601(h)(3) of the Water Resources Development Act of 2000 ("Act").

The framework established by these regulations embodies the letter and spirit of the law that launched Everglades restoration – a 50-50 partnership between Florida and the federal government to restore a more natural flow of water to the famed River of Grass.

Since passage of the Act, Florida has committed more than \$2.5 billion to clean up pollution and replenish the watery landscape of the Everglades. More than 80 percent of the land for initial restoration projects and half the total land needed to complete restoration have been acquired. Within the last month, Florida began operating a wetland treatment system to clean water before it enters the pristine marsh, donated the last of more than 42,000 acres to complete the expansion of Everglades National park, and started work on the first restoration construction project, ahead of schedule and under budget.

The Programmatic Regulations strengthen the fair and equitable partnership to save the habitat of more than 60 endangered species and replenish the underground supply of water for millions of Floridians.

Sincerely,

A handwritten signature in black ink that reads "Jeb Bush".

Jeb Bush

JB/pan

cc: Mr. John Paul Woodley



Governor's Mentoring Initiative
BE A MENTOR. BE A BIG HELP.
1-800-825-3786