

**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:** Proposed rule.

**SUMMARY:** The Army Corps of Engineers proposes 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 within two years to ensure that the goals and purposes of the Comprehensive Everglades Restoration Plan are achieved. We have developed these proposed regulations in response to that statutory requirement. The proposed regulations establish processes and procedures that will guide the Army Corps of Engineers and its partners in the implementation of the Comprehensive Everglades Restoration Plan.

**DATES:** We will accept comments until October 1, 2002.

**ADDRESSES:** If you wish to comment on the proposed regulations, you may submit your comments by any one of several methods:

1. You may submit written comments to U.S. Army Corps of Engineers, ATTN: CESAJ-DR-R, P.O. Box 4970, Jacksonville, FL 32232-0019.

2. You may send comments by electronic mail (e-mail) to: [proregs@usace.army.mil](mailto:proregs@usace.army.mil). See the Public Comments Solicited section below for file formats and other information about electronic filing.

3. You may also submit comments through the Internet by completing a comment form on the programmatic regulations web page at: [http://www.evergladesplan.org/pm/progr\\_regs\\_comment\\_form.shtml/](http://www.evergladesplan.org/pm/progr_regs_comment_form.shtml/).

**FOR FURTHER INFORMATION CONTACT:** Stu Appelbaum, Corps of Engineers, Jacksonville District, at the above address, phone (904) 232-1877; fax (904) 899-5001. You may also access the programmatic regulations web page at: [http://www.evergladesplan.org/pm/progr\\_regs.shtml/](http://www.evergladesplan.org/pm/progr_regs.shtml/).

**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 regulations implement this provision and establish the administrative structure for carrying out the Plan. They 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.

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, operating manuals, and design documentation reports. The more generally applicable system-wide measures include, but are not limited to, the development of guidance memoranda, system-wide performance measures, the Master Implementation Sequencing Plan, interim goals, and targets for evaluating progress towards achieving other water-related needs of the region, including water supply and flood protection. The interim goals and 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 impacted 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 purposes. The authorized purposes 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 authorized purposes, 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 and preserve south Florida's natural ecosystem, while enhancing water supplies and maintaining flood protection. 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. The Plan contains 68 major components that involve creation of approximately 217,000 acres of reservoirs and wetland-based water treatment areas, wastewater reuse plants, seepage management, and 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 maintaining existing Central and Southern Florida Project purposes. 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 native flora and fauna, including those that benefit threatened and endangered species, are expected to occur as a result of the restoration of hydrologic conditions.

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 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." This subsection 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 of 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 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 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 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. The proposed regulations are a specific

response to the requirements of this section.

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 level of service for flood protection that is in existence on the date of enactment and in accordance with applicable law.

## II. Process for Developing the Proposed Regulations

The Army developed the proposed 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 (<http://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, we 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 draft outline.

We also consulted with the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida, and sought their comments on the 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 for 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 we 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 solutions to 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.

Finally, we developed the proposed regulations 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. Major Issues Addressed in Developing the Programmatic Regulations

### A. General

As discussed, we held numerous meetings with agencies, tribes, interest groups, and the public. The initial draft regulations released in December 2001 prompted a number of written comments by agencies, tribes, interest groups, and the public. The major issues identified in those comments and how we considered the comments in developing the proposed rule are described in the following sections.

### B. References to Senate Committee Report Language

A number of comments concerned referring to the Senate Environment and Public Works Committee Report (Senate Report No. 106-362) in the preamble to the proposed regulations. Some commenters believed that the Senate Report sets forth guidance for implementing the Plan and fulfilling the assurances provisions of section 601(h) of WRDA 2000. Others expressed the opinion 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 have referred

to the Senate Report in the proposed regulations, like any other part of the history of the Plan, where we believe it may be helpful to understanding the statute or the issues involved in interpreting or implementing the statute.

### C. Defining Restoration

Many comments concerned the value of defining restoration in the regulation. Some commenters expressed the view that a definition is needed in order to better define what is meant by the phrase "restoration, preservation, and protection of the South Florida ecosystem" used in section 601 of WRDA 2000.

Some commenters maintained that the Plan is only a framework and that Congress expected the implementing agencies to propose improvements to the Plan's goal of restoration through a regular process of adaptive management. These commenters believed that a comprehensive definition of restoration, including environmental and ecological recovery of the natural system, is needed to guide the process.

While recognizing the theoretical merits of these views, other commenters felt that this concept of restoration was too open-ended. These commenters believed that Congress adopted a specific framework for restoration in enacting WRDA 2000 and that framework was set forth in the Comprehensive Everglades Restoration Plan. They maintained that the restoration authorized by this Plan, while extensive, does not envision restoring the Everglades to its natural condition before the intervention of humans.

For the purposes of this regulation, we have adopted a middle ground between these two perspectives. We have defined the term "restoration" to mean the level of recovery and protection described in the plan that was approved by Congress in enacting WRDA 2000 as a framework for hydrologic restoration, and any future Congressional amendments to that framework. However, we have also highlighted in the definition that the Plan is designed to deliver water to and improve water quality in the natural system so that it once again exhibits and sustains essential physical and ecological characteristics that defined the pre-drainage South Florida ecosystem, including more natural hydroperiods, and that these hydrological modifications are a precursor to improvements to native flora and fauna, restoration of key habitats, and promotion of a pattern of

plant communities that form a gradient from aquatic communities to uplands. Our proposed definition also envisions using the principles of adaptive management to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific or technical information, or information developed through the adaptive assessment principles contained in the Plan, or future authorized changes to the Plan that are integrated into the implementation of the Plan.

In adopting this definition, we recognize that the Plan envisions the recovery and maintenance of certain important ecological components and patterns that are thought to have characterized the natural system. Achievement of these attributes is expected to result in the overall improvement of the environment of the South Florida ecosystem, including improvements to native flora and fauna, including threatened and endangered species; restoring the presence of key species in historic habitats; promoting a pattern of plant communities that form a gradient from aquatic communities to uplands; and providing habitat within the Everglades natural system to the species that inhabit the Everglades. These improvements are accomplished generally by increasing water storage and water supply for the Everglades natural system; restoring more natural flows of water, including sheet flow; establishing more natural hydroperiods, including wet and dry season cycles, natural recession rates, surface water depth patterns, and, in coastal areas, salinity and mixing patterns; and protecting water quality for the Everglades natural system as described in the Plan.

It is important to understand that the "restored" Everglades of the future will be different from any version of the Everglades that has existed in the past. While it will be significantly healthier than the current system, it will not completely match the pre-drainage system. The irreversible physical changes made to the ecosystem make a complete match impossible. The restored Everglades will be smaller and somewhat differently arranged than the historic ecosystem. However, it will have recovered those essential hydrological and biological characteristics that defined the original Everglades and made it unique among the world's wetlands systems. It will evoke the wildness and richness of the former Everglades.

### D. Partnership With the State of Florida and With Others

Implementation of the Comprehensive Everglades Restoration Plan will require an effective partnership between the Federal and State governments. The State of Florida has established a trust fund, the Save Our Everglades Trust Fund, to pay for a significant portion of the non-Federal sponsor's share of implementation of the Plan and the South Florida Water Management District will serve as the non-Federal sponsor for implementing many of the projects of the Plan. Section 601 of WRDA 2000 recognizes the importance of this constructive relationship and further encourages this partnership.

The proposed regulations promote the implementation of the Comprehensive Everglades Restoration Plan by defining the processes and procedures needed to accomplish the necessary planning, design, construction, and operation of the projects authorized pursuant to the Plan. In addition, the proposed regulations establish a process of adaptive management where completed projects are monitored and assessed and changes to the Plan, its operations, or the schedule and sequence of projects are considered as appropriate to ensure that the goals and purposes of the Plan are achieved. The processes and requirements included in the proposed regulations also were developed to take into account the interests of the South Florida Water Management District, the State of Florida, or other non-Federal sponsors as the Plan is implemented. The proposed regulations also recognize that the non-Federal sponsor for some projects of the Plan will be governmental entities other than the South Florida Water Management District.

### E. Consultation

The implementation of the Comprehensive Everglades Restoration Plan is the responsibility of the Corps of Engineers and the non-Federal sponsor; however, successful implementation of the Comprehensive Everglades Restoration Plan requires not just the involvement of the implementing agencies, but also extensive involvement by other Federal, State, local agencies, and the Tribes. The proposed regulations envision that the implementing agencies will consult 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 part of the planning and implementation process. The consultation provisions ensure that these interested parties are appropriately involved with the Corps of Engineers and the non-Federal sponsor in implementing, evaluating, and adapting the Plan.

The consultation provisions contemplate a timely exchange of views between parties. In other words, consultation is not to be used as a de facto veto power. Similar to the considerations for setting time limits for consulting under NEPA (40 CFR 1501.8), the regulations envision that the Corps of Engineers and the South Florida Water Management District may set reasonable limits on the amount of time for consultation, giving due consideration to the 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, the consequences of delay, and other time limits imposed on the agency by law, regulations, or executive order.

#### *F. Amount of Detail in the Proposed Regulations*

Many comments addressed the degree of detail in the regulations. Some believed that the programmatic regulations should be very detailed, specific, and prescriptive. Others believed that the programmatic regulations should be more general. Some 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 such as national parks and wildlife refuges.

The proposed regulations attempt to address these concerns and provide guidance in implementing the Plan. We recognize that more detailed guidance memoranda will be needed to assist the implementation of the Plan. We have determined that the guidance memoranda should not be included in the programmatic regulations because they will be very technical, and are intended to provide internal guidance to the implementing agencies, and also because they still are in development. This decision is consistent with the view of some who felt that including the guidance memoranda in the regulations was incompatible with rule-making procedures because of the changing

nature of the adaptive management process. These commenters were concerned that if guidance memoranda were included in these regulations, every revision to them would require us to initiate a rulemaking process. We expect that revisions may occur frequently for some of these procedures, particularly during the early stages of implementation of the Plan.

The programmatic regulations contemplate that the guidance memoranda be developed six months after the effective date of the final rule published in the **Federal Register** or December 31, 2003, whichever is sooner, with the concurrence of the Secretary of the Interior and the Governor. Even though we are not including the guidance memoranda in the regulations, we believe that the public should have an opportunity to review and comment on them in view of its interest in these matters. Accordingly, the programmatic regulations envision that we will provide a notice of availability of the guidance memoranda in the **Federal Register** and seek public comments before they are completed. After they are completed, the Corps of Engineers will consider during the next review and revision of the programmatic regulations, whether or not a particular guidance memorandum that has been completed, is appropriate for inclusion in the regulations.

#### *G. Restoration Coordination and Verification (RECOVER)*

Many comments focused on the role of RECOVER in implementing the Plan. Some of the commenters expressed concerns about how best to integrate individual projects into the Plan to ensure that the goals and purposes of the Plan are achieved. Others articulated concerns about the need to use the best scientific information available. Finally, some urged that RECOVER also focus on achieving the other water-related needs provided for in the Plan such as water supply and flood protection, along with restoration benefits.

RECOVER is an interdisciplinary, interagency scientific and technical team that is described in the Plan. The proposed regulations recognize that the Restoration Coordination and Verification (RECOVER) team already is in place and envision using RECOVER to ensure that a system-wide perspective is applied and that the best available scientific and technical information will be used during the implementation, evaluation, and adaptation of the Plan. The Corps of Engineers and the South Florida Water Management District will oversee the activities of RECOVER. The

regulations also recognize the key role of the Department of the Interior in RECOVER because of its extensive experience in managing the Everglades National Park, and provide an important role for the Department in the Leadership Group of RECOVER, along with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Indians, the U.S. Environmental Protection Agency, the Florida Department of Environmental Protection, and other Federal, State and local agencies as appropriate. While RECOVER is not a policy making body, the regulations outline a series of specific scientific and technical responsibilities for RECOVER that will assist the implementing agencies (the Corps of Engineers and the South Florida Water Management District) in achieving the goals and purposes of the Plan, particularly restoration of the natural system.

RECOVER will be responsible for, among other things, developing system-wide performance measures for consideration by the Corps of Engineers and South Florida Water Management District, in evaluating projects in achieving the system-wide goals and purposes of the Plan, preparing Project Implementation Reports, developing and recommending proposals for a system-wide monitoring plan, conducting assessment activities for the adaptive management program, considering proposed revisions to the Plan, and developing recommendations for interim goals. The proposed regulations memorialize many of the activities already underway by RECOVER. The proposed regulations make it clear that RECOVER is a scientific and technical team. Documents prepared by RECOVER are not self-executing and must be reviewed, discussed, revised, and/or approved by responsible management officials of the Corps of Engineers and the South Florida Water Management District, in 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 appropriate prior to implementation of management responses based on the results and findings contained therein.

#### *H. Independent Scientific Review*

Some commenters emphasized the need to maintain the system-wide focus of the Plan during implementation and felt that a mechanism must be developed to ensure that the best and

most current scientific information be used throughout implementation. Other commenters also expressed the view that an independent entity should be responsible for reviewing the science used to support the implementation of the Plan. The regulations recognize that, as required by Section 601(j) of WRDA 2000, an independent scientific review panel should be established. The proposed regulations do not establish this panel, but provide for its establishment. The regulations include provisions for cooperating with the panel, considering the panel's advice, and responding to the panel's recommendations.

#### *I. Project Implementation Reports*

Section 601 of WRDA 2000 establishes a new type of reporting document called a Project Implementation Report to bridge the gap between the conceptual level of detail in the Comprehensive Everglades Restoration Plan and the detail needed for project design. Section 601(h)(4)(A) of WRDA 2000 specifies a number of items required to be in a Project Implementation Report, including identification of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and the identification of the amount of water to be reserved or allocated for the natural system.

Some comments focused on the need to create a clearly defined process for the development of Project Implementation Reports, and, in particular, the formulation and evaluation of individual projects of the Plan. The report of the Senate Committee on Environment and Public Works on the Water Resources Development Act of 2000 (Senate Report No. 106-362) defines Project Implementation Reports as follows:

The project implementation report is a new type of reporting document, similar to a General Reevaluation Report in that it will contain additional project formulation and evaluation. The project implementation report also will contain General Design Memorandum level of detail, or higher, for engineering and design. Some of the tasks associated with the preparation of the project implementation report will include: surveys and mapping; geotechnical analyses; flood damage assessment; real estate analyses; and preparation of supplemental National Environmental Policy Act documents. The project implementation reports will bridge the gap between the programmatic-level design contained in the Plan and the detailed design necessary to proceed to construction. Furthermore, each project implementation report will be accompanied by a Project Management Plan, which will detail schedules, funding requirements, and

resource needs for final design and construction of the project.

The proposed regulations provide guidance for the development of Project Implementation Reports. They describe the requirements of a Project Implementation Report, including providing information required by the State of Florida for the participation of the non-Federal sponsor in the implementation of various components of the Plan. These requirements are set forth in Florida Statutes sections 373.1501 and 373.470, which specify the information that must be available before State agencies can participate in implementation of CERP projects. The proposed regulations contemplate that the Project Implementation Report will contain performance evaluations of alternatives in achieving the system-wide goals and purposes of the Plan, interim goals, and targets for progress toward other water-related needs. The Project Implementation Report also will include evaluations designed to ensure, to the extent practicable and consistent with the system-wide goals and purposes of the Plan, that the project delivers benefits, including benefits to the natural system, that would justify the project, in the context of the then existing Central and Southern Florida Project as modified by any CERP components that have already been implemented. The regulations also envision the development of a guidance memorandum that describes the major tasks necessary to develop a Project Implementation Report and an outline for the content of the Project Implementation Report. Finally, the regulations provide for development of a guidance memorandum establishing procedures for the formulation and evaluation of projects.

#### *J. Project Cooperation Agreements*

The Project Cooperation Agreement is the legal agreement between the Department of the Army and the non-Federal sponsor that must be executed before a project can be constructed. Section 601(h) of WRDA 2000 requires that the Secretary not execute a Project Cooperation Agreement until the State has reserved or allocated water for the natural system under State law as described in the Project Implementation Report. Some commenters questioned how the reservation or allocation would be made in accordance with the Project Implementation Report and how the Project Cooperation Agreement would verify this allocation of reservation had, in fact, been made. These commenters recommended that a guidance memorandum be developed to outline

how the verification would occur. Others commenters were concerned that the Federal government not infringe on the State's authority under state law to make and revise reservations as necessary.

We agree that a guidance memorandum should be developed that outlines how Project Implementation Reports will identify how the appropriate quantity, timing and distribution of water dedicated and managed for the natural system will be determined, and how they will identify the amount of water that is to be reserved or allocated for the natural system in accordance with the provisions of WRDA 2000. The proposed regulations state that the Project Cooperation Agreement must include a finding that the reservation or allocation has been made by the State as required by Section 601(h) of WRDA 2000. This will provide the assurances regarding the reservation and Project Implementation Report that Congress intended without infringing on the State's right to reserve or allocate water under State law. In addition, the regulations further specify that the Project Cooperation Agreement (PCA) include a provision that any change to the reservation or allocation of water for the natural system made under State law shall require an amendment to the PCA. Further, the Secretary shall verify, in consultation with the South Florida Water Management District, the Florida Department of Environmental Protection, 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 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 information since completion of the Project Implementation Report. Finally, the proposed regulations recognize that the Project Cooperation Agreement must include several provisions required by the savings clause of Section 601(h)(5) of WRDA 2000. Accordingly, the Project Cooperation Agreement includes a provision that prohibits the Corps of Engineers and the non-Federal sponsor from eliminating or transferring existing legal sources of water until a new source of comparable quantity and quality is available as that available on the date of enactment of WRDA 2000. Similarly, in satisfaction of the savings clause requirements, the regulations specify

that a Project Cooperation Agreement must include a provision that existing levels of service for flood protection: (1) On the date of enactment of WRDA 2000; and (2) in accordance with applicable law, not be reduced.

#### *K. Operating Manuals*

Operating Manuals provide guidance on how projects are to be operated to ensure that the goals and purposes of the Plan are achieved. To achieve the goals and purposes of the Plan, individual projects must be operated as part of a system. Some commenters sought to ensure that Operating Manuals prepared for individual projects take into account the system-wide purposes of the Plan. Accordingly, the proposed regulations envision the development of two kinds of Operating Manuals. In addition to Project Operating Manuals, a System Operating Manual will be developed to provide a system-wide plan for operating projects and other C&SF Project features to ensure that individual facilities are linked together in a system-wide framework.

The regulations view Project Operating Manuals as supplements to the System Operating Manual, presenting aspects of the project not common to the system. The proposed regulations contemplate that a Project Operating Manual will be developed for each project. A draft Project Operating Manual will be included as an appendix in the Project Implementation Report. This will connect the operation of the project to the expected benefits of the project recommended in the Project Implementation Report. The final Project Operating Manual is to be prepared as soon as possible after completion of the operational testing and monitoring phase of the project.

#### *L. Sequencing and Scheduling of Projects*

The Plan consists of 68 components that will be implemented as approximately 45 separate projects, including pilot projects. The "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" dated April 1, 1999, included a sequence and schedule for implementation of the Plan. In July 2001, the Corps of Engineers and the South Florida Water Management District updated the sequence and schedule to incorporate updated information and requirements from Congress and the Florida legislature. The sequence and schedule of projects was the subject of many comments. Some commenters sought to ensure that the sequencing and schedule of projects would produce restoration benefits early

in the implementation process. Others were apprehensive of this early focus on restoration benefits and were concerned that other water-related needs of the region as provided for in the Plan would be postponed until late in the implementation process. The proposed regulations establish a process for developing a Master Implementation Sequencing Plan and specify 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 at the earliest possible time, to the extent practical given scientific, technical, funding, contracting, and other constraints. The Master Implementation Sequencing Plan will also provide for sequencing and scheduling of projects to ensure, to the extent practicable and consistent with the system-wide goals of the Plan, that each project delivers benefits, including benefits to the natural system, that would justify the project, in the context of the then existing Central and Southern Florida Project as modified by any CERP components that have already been implemented. The Master Implementation Sequencing Plan will base the sequence and schedule of projects on the best scientific, technical, funding, contracting, and other information available.

The proposed regulations also envision 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.

#### *M. Adaptive Management Program*

One of the key components of the Plan is adaptive management. Adaptive management provides the opportunity to improve the design and performance of the Plan based on new information. The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106-362) describes the intent of the adaptive management program:

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.

The regulations define adaptive management as the process of improving the understanding of the natural and human systems in the South Florida ecosystem, specifically as these understandings pertain to the goals and purposes of the Plan, and to ensure continuous improvement of the Plan reflective of new information resulting from changed or unforeseen circumstances, new scientific or technical information, or information developed through the adaptive assessment principles contained in the Plan, or future authorized changes to the Plan. The opportunity for performance improvement offered by the adaptive management program is crucial for dealing with the uncertainties of the ecological responses that will occur as the Plan is implemented. The proposed regulations establish an adaptive management program to guide implementation of the Plan and recognize the importance of assessment reports to this process.

The proposed regulations specify that the implementing agencies will use assessment reports to seek continuous improvement in the Plan. The proposed regulations provide that in considering how the Plan may be improved, the Corps of Engineers and non-Federal project sponsor specifically 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. RECOVER will be responsible for carrying out these assessment tasks and submitting them to the Corps and the South Florida Water Management District for review.

#### *N. Revisions to the Plan*

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 proposed regulations provide that a Comprehensive Plan Modification Report 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 consistent with the processes used to develop a Project Implementation Report. The proposed regulations provide that the final approved Comprehensive Plan Modification Report will be transmitted to Congress.

#### *O. Ensuring Achievement of Plan Benefits*

The Plan will improve the quantity, quality, timing, and distribution of water to the South Florida ecosystem. Section 601(f) of WRDA 2000 specifies that the Secretary in coordination with the non-Federal sponsor prepare Project Implementation Reports prior to implementation of those projects. Section 601(h)(4)(A) of WRDA 2000 specifies a number of items required to be in a Project Implementation Report, including identification of the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system, and the identification of the amount of water to be reserved or allocated for the natural system. The reservation or allocation of water for the natural system will be implemented under State law and must be made before the Army can execute a Project Cooperation Agreement for the project. "State law" includes reservations or allocations of water made by Florida's Water Management Districts under authority of State law.

A number of commenters expressed the view that the Plan required that water be reserved for the natural system on an 80%–20% basis. These commenters rely on the report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) that 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).

Although those percentages were appropriate as an initial estimate for the purpose of evaluating the Plan, the regulations anticipate that each Project Implementation Report will 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 will be continually evaluated through adaptive management. Accordingly, the water

actually allocated to meet the needs of the natural system and the water allocated under the Savings Clause may be greater or less than the initial Plan estimate. Therefore, the regulations do not contemplate that water will be strictly allocated on an 80%–20% basis, either system-wide or on a project-by-project basis.

Many commenters questioned how water would be reserved or allocated for the natural system. These questions focused on how the statutorily-required identification of water reservations and allocations for the natural system in each Project Implementation Report, would be coordinated with the actual reservation or allocation process which is conducted under State law.

Developing the pre-CERP baseline is of central importance to ensuring attainment of the benefits of the Plan and to resolving this issue. This baseline represents the conditions in the region on the date of enactment of WRDA 2000 accounting for natural variations and including existing legal sources of water. The baseline will establish the amount of water that is presently delivered by the Central and Southern Florida Project. The proposed regulations provide that the pre-CERP baseline will be established by June 30, 2003. The proposed regulations also provide that each Project Implementation Report will consider the change of pre-CERP baseline water availability in identifying the quantity, timing, and distribution of water to be made available for the natural system by a project component; whether improvements in water quality are needed in order to ensure that water delivered to the natural system meets applicable water quality standards; whether additional quantity, timing, and distribution of water and/or improved water quality should be made available by subsequent projects; whether to recommend preparation of a Comprehensive Plan Modification Report; and whether to recommend that the State of Florida and its agencies re-examine the reservation or allocation of water needed under State law in order to meet the needs of the natural system and such uses identified under the savings clause.

The Comprehensive Everglades Restoration Plan was developed as an integrated set of components or projects that are intended to work together to successfully achieve the goals and purposes of the Plan. Although individual projects increase the amount of water available, the effect of an individual project extends far beyond the location of the project. Accordingly, it is important that the identification of

water to be reserved for the natural system take into account the synergistic and regional effect of projects. The proposed regulations contemplate that a guidance memorandum will be developed to provide uniform guidance for quantifying water made available by projects and for identifying the water to be reserved for the natural system. The proposed regulations also provide direction for the development of the guidance memorandum.

Some agencies, interest groups, and the public were concerned about potential variations from the predicted availability of water once projects actually are implemented and operated. The proposed regulations provide that development of a Comprehensive Plan Modification Report be undertaken to determine the need for revisions to the Plan. The regulations also provide that in the interim during preparation of the Comprehensive Plan Modification Report, operation of the project should be consistent with the procedures identified in the Project Implementation Report and Project Operating Manual.

#### *P. Savings Clause Provisions*

Many commenters questioned the effects of implementation of the Plan on existing legal sources of water and on existing levels of flood protection. As discussed, Section 601(h)(5)(A) of WRDA 2000 contains a savings clause provision that is designed to ensure that existing sources of water and levels of flood protection are preserved. The report of the Senate Committee on Environment and Public Works on WRDA 2000 (Senate Report No. 106–362) describes the intent of this savings clause 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. 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.

Although the savings clause uses the term "existing legal sources of water," it does not define the term. Nor could we find a definition elsewhere in Federal or State law. We have not defined the term in the proposed regulations, leaving the definition of an "existing legal source"

of water to be determined on a case-by-case basis after consideration of all relevant facts. We may include a definition after considering submitted comments. Currently, the proposed regulations specify 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. 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. Existing legal sources of water may include water currently available for agriculture, water supply, tribal use, or elements of the natural system including the Everglades, as well as any other existing legal sources.

The proposed regulations require a Project Implementation Report to include an analysis of the level of service for flood protection that was in existence on the date of enactment of the statute; and is in accordance with applicable law. If this analysis shows that the level of service for flood protection would be reduced by implementation of a project, then the regulations state that the project or its implementation plan will be modified to mitigate or eliminate the adverse effect on flood protection.

Some commenters raised the question of 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. 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 proposed regulations allow for the evaluation of increased levels of flood protection or the provision of flood protection in areas where there is currently no flood protection, provided that such flood protection is consistent with the goals and purposes of the Plan and is in accordance with the provisions of section 601(f)(2)(B) of WRDA 2000 and other applicable laws.

#### *Q. Interim Goals*

Many comments focused on development of the interim goals. Section 601(h)(3)(c)(i)(III) of WRDA 2000 requires that interim goals be

established to provide a means by which the restoration success of the Plan may be evaluated throughout the restoration process. Progress towards meeting the interim goals is to be reported to Congress as part of the periodic reports required by the Act. While there was widespread agreement among agencies, tribes, interest groups, and the public that interim goals should be established to ensure that the goals and purposes of the Plan are achieved, there were different views about whether these interim goals should be a part of the programmatic regulations. Some believed that the interim goals needed to be a part of the programmatic regulations to ensure that the goals would be met. They also believed that goals had to be incorporated into the regulations to enable the public to take part in the process of establishing the goals. Others were concerned that the statute specifically required the regulations to set up the *process* for establishing interim goals rather than the goals themselves. Additional commenters were concerned that placing the interim goals in the programmatic regulations would make goals difficult to adopt and amend, and that the adaptive management process authorized by section 601 of WRDA 2000 was incompatible with the Administrative Procedures Act rule-making process. Other commenters were concerned that incorporating the goals into the regulations would suggest that the goals were meant to set standards or schedules enforceable in court rather than planning targets, and assessment and reporting tools.

In addition, during development of the proposed regulations, it was apparent that there was not complete agreement on exactly what the interim goals should be. Staff of the implementing agencies required additional time to model the implementation schedule to evaluate expected performance at specific points in the implementation process. This modeling is an important first step in developing incremental stages (interim goals) for achieving that performance. Moreover, the South Florida Ecosystem Restoration Task Force and others indicated an interest in reviewing and discussing interim goals before they were adopted. Thus, even among those who thought that interim goals should be included in these regulations, it was clear that more time for modeling was needed.

The proposed regulations recognize these facts and attempt to accommodate the views of commenters by establishing the principles that will guide the development of the interim goals and

appropriately involve the public. The proposed regulations establish the structure for developing and adopting the interim goals, and make it clear that interim goals are targets for use of the agencies and Congress in evaluating the success of the restoration effort. They are not intended to be standards or schedules enforceable in court.

The Restoration Coordination and Verification (RECOVER) team will use the principles set forth in the proposed regulations to develop and recommend a set of interim goals for implementation of the Plan no later than June 30, 2003. The regulations specify that interim goals shall reflect the incremental accomplishment of the expected performance level of the Plan, and will identify improvements in quantity, timing and distribution of water in five-year increments beginning in 2005. The interim goals will also 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. However, the regulations also recognize that achievement of improvements in water quality and desired ecological responses may be dependent on other programs and activities outside the scope of CERP. The extent of this dependence on outside programs and activities should be explicitly assessed and described at the time goals are developed, and should be taken into account as the CERP is subsequently evaluated relative to the goals. The interim goals shall be predicted by appropriate models and tools and shall provide a quantitative basis for evaluating the restoration success of the Plan during the period of implementation. The expected level of the Plan is generally represented by the output of the model run of D-13R as described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" dated April 1, 1999, as modified by section 601 of WRDA 2000, or any subsequent modification authorized in law.

The proposed regulations envision that RECOVER will provide its recommendations to the Corps of Engineers and South Florida Water Management District for review and discussion. Interim goals will be memorialized in an agreement to be signed by the Department of the Army, the Department of the Interior, and the State no later than December 31, 2003. The Department of the Army, the Department of the Interior, and the State will provide a notice of availability of the proposed agreement to the public in the **Federal Register**, seek public

comments, and consult with 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 and the South Florida Ecosystem Restoration Task Force concerning the proposed interim goals. Finally, the proposed regulations establish a process for revising the interim goals in five-year increments or sooner, if appropriate in light of new information.

Finally, some commenters believed that the interim goals should take into account other water-related needs of the region, including water supply and flood protection, as provided for in the Plan. Other commenters believed that the interim goals should not evaluate other water-related needs of the region. We felt that the interim goals should focus solely on restoration success because section 601(h)(3)(c)(i)(III) of WRDA 2000 specifies that the interim goals are to provide a means by which restoration success may be evaluated throughout the implementation process. The proposed regulations reflect this view. However, the statute recognizes that providing for other water-related needs of the region, including water supply and flood protection, are also objectives of the Plan. Therefore, the proposed regulations also provide for separately monitoring progress on other water-related needs of the region as provided for in the Plan during the implementation process, thus ensuring that all of the goals and purposes of the Plan will be achieved.

#### *R. Relationship Among Restoration, Performance Measures, and Interim Goals*

In order to comprehend how the Plan will be evaluated to ensure that its restoration objectives are achieved, it is essential to understand the relationship among the concepts of restoration, performance measures, and interim goals. In this regulation, restoration is defined as the level of recovery and protection to the South Florida ecosystem described in the Plan approved by Congress, with such modifications that Congress may provide for in the future. As the regulations indicate, the concept of restoration in the Plan approved by Congress was expressed in a level of recovery assessed in terms of performance measures, consisting chiefly of hydrologic characteristics. The definition also recognizes that increased flows to the natural system are expected to restore essential

physical and ecological characteristics that defined the pre-drainage ecosystem, including more natural hydroperiods, which are a precursor to improvements to native flora and fauna, presence of key species in historic habitats, and patterns of plant communities that form a gradient from aquatic communities to uplands. The regulations recognize that the concept of restoration anticipates future improvements to the Plan through adaptive management. The regulations also recognize that performance measures will continue to be refined and developed throughout the course of implementing the Plan. Interim goals will show incremental progress towards reaching the expected performance level of the Plan at different time intervals during implementation. The regulations envision that the RECOVER team will provide their recommendations about interim goals to the Corps of Engineers and South Florida Water Management District. These recommendations will be considered during the development of an agreement on interim goals that is to be finalized by the Army, the Department of the Interior, and the State of Florida by December 31, 2003. These interim goals will be used initially to evaluate the success of the restoration effort and will be refined periodically during the implementation of the Plan as appropriate to ensure that the overall restoration objectives of the Plan are achieved.

#### *S. 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. Some commenters urged that, in addition to the interim goals aimed at evaluating restoration success of the Plan, the regulations also should provide incremental targets for the other water-related needs of the region. They believe that this will ensure that all of the goals and purposes of the Plan are achieved. Others commented that, if these other incremental targets were included, progress towards achieving these targets should be evaluated separately from interim goals.

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. Therefore, we have decided to establish in the regulations a mechanism for evaluating progress towards providing for these other water-related needs. The

regulations provide that by June 30, 2003, RECOVER will develop recommendations on targets to evaluate progress on achieving the other water-related needs of the region, for consideration by the Corps of Engineers and the South Florida Water Management District, in consultation with others. The Corps of Engineers and the South Florida Water Management District will also consult with the South Florida Ecosystem Restoration Task Force in establishing targets for evaluating progress towards achieving other water-related needs of the region provided for in the Plan. These targets shall be established by the Corps of Engineers and the South Florida Water Management District by December 31, 2003. These targets are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not intended to be standards or schedules enforceable in court.

Interim goals, which are directed at restoration success of the Plan, and targets for achieving the other water-related needs of the region, which are not directed at restoration, are set out in two distinct sections to make clear that they are intended to evaluate two different types of goals of the Plan.

In recognition of the significant technical and scientific analyses that are needed in the development of interim goals and targets, RECOVER has already begun the work necessary in order to meet the June 30, 2003 deadline for providing recommendations on interim goals and targets for other water-related needs to the Corps of Engineers and the South Florida Water Management District.

#### *T. Role of the Department of the Interior*

Several commenters urged that the Department of the Interior play a significant role in implementation of the Plan because of its stewardship role over Federal lands and natural resources involved in the Plan. The regulations give the Department of the Interior a special concurring 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: (1) General format and content of Project Implementation Reports; (2) processes for Project Delivery Team evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts; (3) process for system-wide evaluation of PIR alternatives by RECOVER; (4) the general content of operating manuals; (5) general processes for the conduct of assessment activities of RECOVER; and

(6) the process used in Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system. The regulations also give the Secretary of the Interior and the Governor of the State of Florida a concurring role in the Secretary of the Army's determination of the pre-CERP baseline. They also specify that interim goals will be established through a formal Interim Goals Agreement between the Corps of Engineers, the State, and the Department of the Interior. Further, the Department of the Interior is provided an important role in the Leadership Group of RECOVER, along with several other Federal and State agencies and the two 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 Development Teams; development of the Adaptive Management Program; selection and revision of hydrologic models; development of Project Management Plans and Program Management Plans; development of Project Implementation Reports; development of Operating Manuals; development, review and revision of changes to the Master Implementation Sequencing Schedule; recommending and developing Comprehensive Plan Modification Reports; and developing means for monitoring progress towards other water-related needs of the region as provided for in the Plan.

#### *U. Role of South Florida Ecosystem Restoration Task Force*

Several commenters suggested that the Programmatic Regulations create a specific role for the South Florida Ecosystem Restoration Task Force, an interagency group created by section 528(f) of the Water Resources Development Act of 1996 (110 Stat. 3770) (hereinafter "WRDA 96"). The legal basis for the Task Force's role in the restoration effort is found both in Section 528 of WRDA 96 and in Section 601 of WRDA 2000. 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 South Florida ecosystem restoration. In Section 601(j) of WRDA 2000, the Task Force is also given 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. Some members of the Task Force and its associated working group represent agencies involved in implementing CERP under the programmatic regulations, such as the Jacksonville District Corps of Engineers and the South Florida Water Management District. As recognized by this regulation, the South Florida Water Management District and the Jacksonville District already regularly report to the Task Force and its working group on CERP matters. The Task Force also has appointed the Water Resources Advisory Commission (WRAC) of the South Florida Water Management District as an advisory body to the Task Force. The Corps of Engineers serves on this body and regularly briefs that body on CERP. The Department of the Army recognizes the important role that these collaborative groups play in discussion and resolution of CERP issues.

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. If a regular process evolves, it can be incorporated into revisions of the Programmatic Regulations.

At recent meetings, the Task Force expressed an interest in consultation on several subjects. Accordingly, this draft regulation incorporates consultation with the Task Force on those subjects. They include: interim goals; targets for other water-related needs of the region as provided for in the Plan; certain assessment reports; Comprehensive Plan Modification Reports; Pilot Project Technical Data Reports; and periodic reports to Congress by the Secretary of Army and Secretary of Interior in consultation with EPA, Department of Commerce, and the State of Florida. The final regulation may provide for additional subjects upon which the Task Force may consult, if deemed appropriate after consideration of public comments.

#### *V. NEPA Compliance*

As required by regulations of the Council on Environmental Quality (40

CFR 1505.1 and 1507.3), agencies must issue regulations identifying classes of actions generally requiring an Environmental Impact Statement (EIS), generally not subject to the National Environmental Policy Act (NEPA), and actions requiring an Environmental Assessment (EA) of whether a full NEPA EIS is required or not. The Corps of Engineers has adopted procedures generally implementing NEPA in § 230 of this chapter. The Programmatic Regulations consider on a system-wide basis, the kinds of actions needed to implement the Plan, and apply the principles of § 230 to those activities. The programmatic regulations identify certain actions which generally require preparation of a NEPA document (either an Environmental Impact Statement or an environmental assessment), or which are categorically excluded from NEPA. Actions, such as the development or revision of methods or guidance memoranda, are listed as categorically excluded. Although the development or revision of a method or guidance memorandum itself would not require a NEPA analysis, use of the method or guidance memorandum would be analyzed under NEPA, as appropriate, in a decision document such as a Project Implementation Report.

In general, the NEPA documentation for a particular project will be included in the Project Implementation Report. For this reason, other project-specific documents such as the Design Documentation Report, Project Cooperation Agreement, Project Management Plan, and detailed plans and specifications for the project are listed as categorically excluded from NEPA documentation requirements. The Corps recognizes that these documents may address elements of the project that have a potential to significantly affect the quality of the human environment, and fully intends that these effects should be analyzed and considered as required by NEPA, but believes that this analysis and consideration can be most effectively accomplished by including one comprehensive NEPA analysis for each project in the Project Implementation Report, rather than having piecemeal analyses in each of the supporting documents.

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 was not considered to be a "major Federal action" under NEPA. It is important to note that NEPA would apply to the decision made in a PIR for a specific project applying a guidance memorandum to that project and determining that a certain quantity, timing or distribution of water was required for the project.

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. In proposing these regulations, we determined that it was not appropriate at this time to make a programmatic decision on precisely how NEPA applied to interim goals because the interim goals have not yet been established and since the extent to which interim goals will be used in planning is still under consideration. When specific interim goals are proposed for adoption, a decision can be made on exactly how NEPA applies. Moreover, when the Programmatic Regulations are revised for the first time, the Corps will consider whether interim goals should be listed as categorically excluded, generally requiring an EIS, or generally requiring an Environmental Assessment but not necessarily an EIS.

#### IV. 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 the Project Implementation Reports approved prior to the date of promulgation of those regulations.

A number of Project Implementation Reports are underway currently, but no Project Implementation Reports have been approved to date. The Project Implementation Report for the Southern Golden Gates Estates project in Collier County is scheduled to be completed prior to promulgation of the final rule. If the final Project Implementation Report on Southern Golden Gates Estates is approved before the date of

promulgation of the final rule, then the preamble to the final rule will contain a statement concerning the consistency of that Project Implementation Report with the programmatic regulations.

#### V. Concurrence Requirements 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 with a written statement of concurrence or non-concurrence on the proposed programmatic regulations within 180 days from the end of the public comment period. This statute specifies that a failure to provide a written statement of concurrence or nonconcurrence within the 180-day time frame will be deemed as meeting the concurrency requirements. A copy of any concurrency or nonconcurrency statement shall be made a part of the administrative record and be referred to in the final programmatic regulations. Any nonconcurrency statements shall specifically detail the reason or reasons for the nonconcurrence. Throughout the process of developing the proposed regulations, we have maintained close coordination with the Department of the Interior and the State of Florida. The Army will give good faith consideration to the concurrence or non-concurrence statements of the Secretary of Interior and the Governor. The final regulations will include a reference to these statements before making a decision to issue final regulations.

#### VI. Organization of the Proposed Rule

We have organized the proposed regulations under five major headings. The first heading, General Provisions, provides the purpose of the regulations, the applicability of the rule, definitions pertaining to the regulations and other general information. The second heading, Program Goals and Responsibilities, describes the goals and purposes of the Plan; implementation principles; and implementation responsibilities, consultation, and coordination. The remaining headings were designed to be consistent with the content required by section 601(h)(3)(C). These headings 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.

#### VII. Public Comments Solicited

We are soliciting comments and suggestions from the public, governmental organizations, and other

interested parties on the proposed regulations.

If you wish to comment on this proposed rule, you may submit your comments and materials by any one of several methods (see **ADDRESSES** section). If submitting comments by electronic format, please submit them in ASCII file format or Word file format and avoid the use of special characters and any form of encryption. Please include your name and return e-mail address in your e-mail message. Please note that your e-mail address will not be retained at the termination of the public comment period.

#### VIII. Administrative Requirements

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

These regulations do not impose any information collection requirements for which 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 (OMB) 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 these 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." These regulations do not have significant federalism implications. The proposed regulations define the relationships between the Federal and State partners in implementing the Comprehensive Everglades Restoration Plan. These proposed regulations are 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, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule. Nonetheless, the Corps of Engineers has consulted closely with the State and local officials in developing the proposed rule.

### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996) 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. After considering

the economic impacts of the proposed rule on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. The proposed 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) These 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 proposed regulations do not establish new or different requirements for non-Federal sponsors for implementation of projects for the Comprehensive Everglades Restoration Plan.

(b) The proposed regulations will not produce a Federal mandate of \$100 million or greater in any year, and therefore, does not constitute a "significant regulatory action" under the Unfunded Mandates Reform Act. The 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, imposes 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, 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 we considered. The regulations are not subject to Executive Order 13045 because it is not an economically significant regulatory action as defined by Executive Order 12866. The 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, they 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 proposed regulations are required by section 601(h)(3) of WRDA 2000. Additionally, the proposed rule does 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 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 this proposed rule, 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 are also 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 proposed regulations will not effect a taking of private property or otherwise have taking implications. A takings implication assessment is not required. The regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan.

#### *J. Civil Justice Reform*

In accordance with Executive Order 12988, we have determined that the proposed regulations do not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The regulations establish processes to be used in implementing the Comprehensive Everglades Restoration Plan and defines 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 proposed 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. Environmental Documentation*

We have determined that these proposed 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 these proposed regulations. The Corps of Engineers has prepared appropriate environmental documentation, including a Programmatic Environmental Impact Statement, for the Comprehensive Everglades Restoration Plan. Moreover, the proposed regulations establish requirements for the preparation of appropriate environmental documentation as part of the implementation process.

#### **List of Subjects in 33 CFR Part 385**

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

Dated: July 19, 2002.

#### **R.L. Brownlee,**

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

For the reasons set forth in the preamble, the Army Corps of Engineers proposes to add 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 CERP guidance memoranda.
- 385.6 Review of programmatic regulations.
- 385.7 Concurrence statements.

#### **Subpart B—Program Goals and Responsibilities**

- 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**

- 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.
- 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**

- 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**

- 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 on achieving 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 regulations in 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 these programmatic regulations is to establish the processes necessary for implementing the Comprehensive Everglades Restoration Plan (the Plan) to ensure that the goals and purposes of the Plan are achieved. Some of these processes are project specific, including, but not limited to, development of Project Implementation Reports, project-specific performance measures, Project Cooperation Agreements, plans and specifications, Design Documentation Reports, 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, system-wide performance measures, interim goals, targets for monitoring progress on other goals and purposes of the Plan, and the Master Implementation Sequencing Plan. Taken together these documents establish the process by which the programmatic regulations ensure that the restoration success and other goals and purposes of the Plan are achieved. These programmatic regulations also describe the relationship among the various Federal, State, tribal, and local governmental entities charged with Plan implementation responsibilities.

### § 385.2 Applicability of the programmatic regulations.

(a) This part applies to all activities conducted to implement the Comprehensive Everglades Restoration Plan.

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

(1) The 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).

(c) This part is intended to aid the internal management of the implementing agencies and are 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.

(d) 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.

The following terms are defined for the purposes of this Part 385:

*Adaptive management* means the process of improving understandings of the natural and human systems in the South Florida ecosystem, specifically as these understandings pertain to the goals and purposes of the Plan, and to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific or technical information, new or updated models, or information developed through the assessment principles contained in the Plan, or as future authorized changes to the Plan are integrated into the implementation of the Plan.

*Assessment* means the process whereby the actual performance of implemented projects is measured and interpreted based on analyses of information obtained from research, monitoring and 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, or the removal of canals, levees, pumps, and water control structures.

*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, or any subsequent modification authorized in law.

*Comprehensive Plan Modification Report* means the report prepared by the Corps of Engineers and the South Florida Management District for approval by Congress of major modifications to the Plan that are needed to ensure that the goals and purposes of the Plan are achieved. The Comprehensive Plan Modification Report describes alternative plans considered, the 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 non-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 system-wide and project-level implementation reports, manuals, plans, and other documents from Federal, State, and local agencies, and 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. 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.

*Design Documentation Report* means the document that describes the results of investigations, analyses, and calculations made during the detailed design phase that provides the technical basis for the plans and specifications.

*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* refers to 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, or national origin, 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, as appropriate, disproportionately high and adverse human health or environmental effects of a Federal agency's programs, policies, and activities on minority and low-income populations.

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

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

*Governor* means the Governor of the State of Florida.

*Improved or new flood protection benefits* mean an increased or new level of service for flood protection that is 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, or other process that is independent of the Corps of Engineers, the South Florida Water Management District, and other entities involved in the implementation of the Plan, to review and validate the scientific and technical processes and information developed for the Plan.

*Independent 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.

*Indicator* means an element or component of the natural or human systems that is expected to be influenced by the Plan, and has been selected to be monitored as representative of a class of system responses.

*Individual features of the Plan* means a feature of the Plan related to and limited to one specific project of the Plan.

*Interim goal* is a means by which success of restoration, as defined for purposes of this part, may be evaluated throughout the implementation process.

*Last added increment* means the evaluation of a project as the last project to be added to a system of projects. For the purposes of the Plan, this means analyzing a proposed project assuming that all the other components of the Plan have been implemented.

*Level of service for flood protection* means the water level or flow duration and frequency, which the Central and Southern Project and other water management systems in the South Florida ecosystem provide in order to prevent flooding of the related surface water basins.

*Master Implementation Sequencing Plan* means the document that describes the sequencing and scheduling of the pilot projects, individual projects, and program-level activities that comprise the Plan.

*Mediation* means a non-binding dispute resolution process designed to assist the disputing parties to resolve the dispute. 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 natural and

human systems at predetermined locations and times.

*Natural system* means all land and water managed by the Federal government or the State within the South Florida ecosystem and includes 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; and any tribal land that is designated and managed for conservation purposes, as approved by the tribe.

*Next added increment* means the evaluation of a project as the next project to be added to a system of projects already implemented.

*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 may include water control plans, regulation schedules, and operating criteria for project and/or system regulations as well as additional provisions to collect, analyze, and disseminate basic data in order to operate projects to ensure that the goals and purposes of the Plan are achieved.

*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 implementation of the Plan.

*Performance measure* means an indicator and the target that has been set for that indicator.

*Pilot project* means a project undertaken to better determine the technical viability of a component in the Plan prior to full-scale implementation of that component.

*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, or any subsequent modification authorized in law.

*Plans and Specifications* means the information required to bid and construct the project detailed in the Project Implementation Report and documented in the Design Documentation Report.

*Pre-CERP baseline* means the hydrologic conditions in the South Florida ecosystem that existed on December 11, 2000, the date of enactment of section 601 of WRDA 2000, accounting for natural variations and including existing legal sources of water. The pre-CERP baseline will be established through modeling using a multi-year period of record and will take into account such things as land use, population, water demand, and 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 Plan-wide in scope.

*Program Management Plan* means a document that defines the activities, tasks, and responsibilities for completing program-level activities.

*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 group led by the Corps of Engineers and the non-Federal sponsor that develops the products necessary to implement projects or program-level activities.

*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 a document that establishes the project's scope, requirements and technical performance requirements, including

various functions and quality criteria that will be used to produce and deliver the products that compromise the 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, Native American (Indian) tribes, and individuals.

*Quality control plan* means the plan prepared in accordance with applicable regulations or 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* for the purposes of this part means to bring about the level of recovery and protection to the South Florida ecosystem described in the Plan as approved by Congress in Section 601 of the Water Resources Development Act of 2000, with such modifications as Congress may provide for in the future. This is accomplished by increasing water storage and water supply, improving water quality, and increasing the connectivity of the natural system so that the ecosystem once again exhibits and sustains essential physical and ecological characteristics that defined the pre-drainage South Florida ecosystem, including establishing more natural hydropatterns, including wet and dry season cycles, natural recession rates, surface water depth patterns, and, in coastal areas, salinity and mixing patterns for the natural system. These actions are a precursor to achieving anticipated ecological benefits, including improvements to native flora and fauna; restoring the presence of key species in historic habitats; and promoting patterns of plant communities that form a gradient from aquatic communities to uplands. Restoration for the purpose of this

regulation also incorporates a process of adaptive management to seek continuous improvement of the Plan based upon new information resulting from changed or unforeseen circumstances, new scientific or technical information, 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.

*Restoration Coordination and Verification (RECOVER)* means the interagency and interdisciplinary scientific and technical team, established by the Corps of Engineers and the South Florida Water Management District to assess, evaluate, and integrate the projects of the Plan with the overall goal of ensuring that the system-wide goals and purposes of the Plan are achieved.

*Secretary* means the Secretary of the Army, unless indicated otherwise. The Secretary of the Army acts through the Assistant Secretary of the Army (Civil Works) with respect to the Army's civil works program pursuant to 10 U.S.C. 3016.

*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 and includes the Everglades, the Florida Keys, and the contiguous near-shore coastal water of South Florida.

*South Florida Ecosystem Restoration Task Force* means the task force established pursuant to section 528(f) of the Water Resources Development Act of 1996 (110 Stat. 3770), including the Florida-based working group and any advisory bodies established by the task force.

*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 C&SF Project.

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

*Target* means a measure of a level of output of an indicator that is expected and desired during or following the implementation of the Plan.

*Technical review* means the process that confirms the proper selection and application of established criteria,

regulations, laws, codes, principles, and professional procedures 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.

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

*Water made available* means water generated pursuant to the implementation of the components of the Plan and operation of the C&SF Project over and above water that was available on the date of enactment of WRDA 2000.

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

*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 any 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 CERP guidance memoranda.**

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

(2) Guidance on the following six program-wide subjects will be developed 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 Project Delivery Team evaluation of alternatives developed for Project Implementation Reports, their cost effectiveness and impacts (§ 385.26(b));

(iii) Guidance for system-wide evaluation of Project Implementation Report alternatives by RECOVER (§ 385.26(c));

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

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

(vi) Instructions relevant to Project Implementation Reports for identifying the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system (§ 385.35(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. In addition to consultation with the South Florida Ecosystem Restoration 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 matters related to these guidance memoranda, as the Task Force from time to time may request.

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

(2) The public shall be given notice of the guidance memoranda through the issuance of a notice of availability in the **Federal Register** and be afforded an opportunity to comment on the proposed guidance memoranda.

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

(4) Any guidance memorandum specifically referenced in this part shall be developed not later than six months after the effective date of the final rule published in the **Federal Register** or December 31, 2003, whichever is sooner.

(5) Concurrence by the Secretary of the Interior and the Governor shall be required on the six guidance memoranda described in paragraph (a) of this section. Within 180 days from the development of the proposed 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 may provide the Secretary with a written statement of concurrence or nonconcurrence with the proposed

guidance memorandum. A failure to provide a written statement of concurrence or nonconcurrence within such time frame shall be deemed as meeting the concurrency requirements of this section. Any nonconcurrency statement shall specifically detail the reason or reasons for the non-concurrence. The Corps of Engineers and the South Florida Water Management District shall give good faith consideration to any nonconcurrency statement, and take the reason or reasons for the nonconcurrency into account in the final decision to promulgate or revise the guidance memoranda specified in this section. 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 on that special procedure. In lieu of concurrence on such a special procedure, the Corps of Engineers and the South Florida Water Management District shall consult with the Department of the Interior and the State of Florida.

(c) *Revisions to six Program-wide guidance memoranda.* The Corps of Engineers and the South Florida Water Management District may, whenever they believe it is necessary, and in consultation with the Department of the Interior and the State, 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, revise guidance memoranda that have been completed. Such revisions shall be developed consistent with the provisions of paragraph (a) of this section. Concurrence of the Secretary of the Interior and the Governor shall be required for revisions to those guidance memoranda to which initial concurrence was required.

(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 and regulations.

**§ 385.6 Review of programmatic regulations.**

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

(b) Upon completing the review of the programmatic regulations in this part, the Secretary shall promulgate any revisions to the programmatic regulations after notice and opportunity for public comment in accordance with applicable law, with the concurrence of the Governor and the Secretary of the Interior, 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 from the end of the public comment period on the proposed revisions to the programmatic regulations in 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 may provide the Secretary with a written statement of concurrence or nonconcurrence with the proposed revisions. A failure to provide a written statement of concurrence or nonconcurrence within such time frame shall be deemed as meeting the concurrency requirements of paragraph (b) of this section. A copy of any concurrency or nonconcurrence statements shall be made a part of the administrative record and referenced in the final revised programmatic regulations. Any nonconcurrence statement shall specifically detail the reason or reasons for the nonconcurrence. The Secretary shall give good faith consideration to any nonconcurrence statement, and take the reason or reasons for the nonconcurrence into account in the final decision to promulgate or revise the programmatic regulations.

**§ 385.7 Concurrency statements.**

Pursuant to section 601(h)(3)(B) of WRDA 2000, a copy of any concurrency or nonconcurrence statements by the Secretary of the Interior or the Governor to the Secretary shall be made a part of the administrative record for this part.

**Subpart B—Program Goals and Responsibilities****§ 385.8 Goals and purposes of the Comprehensive Everglades Restoration Plan.**

(a) The Comprehensive Everglades Restoration Plan is a framework for modifications and operational changes to the Central and Southern Florida Project that are needed to restore, preserve, and protect the South Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection. 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 and 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 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 provide the quantity, quality, timing, and distribution of water necessary to achieve the goals and purposes of the Plan. The Corps of Engineers and non-Federal sponsors shall implement the projects of the Plan with the goal of achieving the expected performance level of the Plan and to seek continuous improvement of the Plan based upon 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.

**§ 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 projects of 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 based on their contribution to the system-wide goals and purposes of the Plan and the achievement of the expected performance level of the Plan, as well as on their ability to provide benefits without regard to projects not yet implemented.

(b) Interim goals shall be established pursuant to this part to provide a means for evaluating restoration success at specific time intervals during implementation. Progress on achieving other water-related needs of the region as provided for in the Plan shall also be evaluated at specific time intervals during implementation.

(c) Endorsement of the Plan as a restoration framework is not intended as a constraint on innovation in its 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 or technical information, or information developed through the adaptive assessment principles contained in the Plan, or future authorized changes to the Plan are integrated into the implementation of the Plan. The adaptive management process provides a means for analyzing 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 either 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, or delivering Plan benefits at reduced cost.

**§ 385.10 Implementation responsibilities, consultation, and coordination.**

(a) *Implementing agencies.* Implementation of the projects of the Plan shall be the responsibility of the Corps of Engineers and the non-Federal sponsors as the implementing agencies for projects or program-level activities.

(b) *Consultation.* (1) *Consultation with Indian Tribes.* (i) In addition to the provision for consultation with Native

American Tribes provided for by Executive Order, 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.

(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 Federal and State laws, such as the Fish and Wildlife Coordination Act, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, the National Historic Preservation 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. 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 consulted will consult in a timely and 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 may consider relevant considerations such as sequencing of projects, planning, contracting and funding, and any factor listed for setting time limits for consulting under 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 addition, the agencies 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 to consult with, 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, its working group, and its other advisory bodies play in the discussion and resolution of issues related to the South Florida ecosystem. The Department of the Army and the South Florida Water Management District regularly brief the Task Force on CERP issues and regularly serve on the working group and other advisory bodies. It is the intent of the Department of the Army that 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

requested 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. Providing information to, or consulting with, the Task Force usually will occur on a case-by-case basis.

### 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 a process that is shown in figure 1 in Appendix A of this part. This process covers planning, design, construction and operation of the projects. Typical steps in this process involve:

(a) *Project Management Plan.* The purpose of the Project Management Plan is to establish the project's initial scope, schedule, costs, funding requirements, and technical performance requirements, including the various functional areas performance and quality criteria that shall be used to produce and deliver the products that comprise the project.

(b) *Project Implementation Report.* The Project Implementation Report provides information on plan formulation and evaluation, engineering and design, economic benefits and estimated costs, and environmental effects to bridge the gap between the conceptual design included in the Plan and the detailed design necessary to ready a project for construction.

(c) *Design Documentation Report.* The Design Documentation Report describes the results of investigations, analyses and calculations made during the detailed design phase and provides the technical basis for the plans and specifications.

(d) *Plans and Specifications.* Plans and Specifications contain information required to bid and construct the projects detailed in the Project Implementation Report and documented in the Design Documentation Report.

(e) *Real estate acquisition.* The non-Federal sponsor is primarily responsible for acquisition of lands, easements, and rights-of-way needed for the project.

(f) *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.

(g) *Operation and monitoring.* After the project has been constructed, it is operated in accordance with the Operating Manuals. Monitoring is also conducted to determine the effectiveness of the project and to provide information that will be used in adaptive management.

#### **§ 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 determine the technical viability 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 proceeding with implementation, 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 analyses.

(2) The Pilot Project Design Report shall include a detailed operational testing and monitoring plan to develop information to assist in determining the technical viability 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 implementation and testing of the pilot 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) As appropriate, RECOVER shall conduct activities to support the preparation of the Pilot Project Technical Data Report.

(2) The independent scientific review panel established pursuant to § 385.22 shall be given the opportunity to review the draft Pilot Project Technical Data 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 Technical Data Report.

(4) The Corps of Engineers and the non-Federal sponsor shall prepare and make public the final Pilot Project Technical Data Report.

#### **§ 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) In implementing the CERP the Corps of Engineers shall comply with the requirements of NEPA (42 U.S.C. 4371, *et seq.*) and applicable implementing regulations.

(b) *Actions normally requiring an Environmental Impact Statement (EIS).* In addition to the actions listed in § 230.6 of this chapter, actions normally requiring an EIS are:

(1) Comprehensive Plan Modification Report;

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

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

(4) Pilot Project Design Report, including the detailed operational testing and monitoring plan;

(5) Proposed major changes in operation and/or maintenance of completed projects; and

(6) Project Operating Manuals for any project where a Project Implementation Report is not prepared.

(c) The District Engineer may consider the use of an environmental assessment (EA) on the types of actions described in paragraph (b) of this section 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.

(d) *Actions normally requiring an EA.* In addition to the actions listed in § 230.7 of this chapter, actions normally requiring an EA, but not necessarily an EIS, are:

(1) Modifications to Project Operating Manuals for projects or groups of projects, not expected to be a major change in operation and/or maintenance; and

(2) Changes in the System Operating Manual not expected to be a major change in operation and/or maintenance.

(e) *Categorical exclusions.* In addition to the activities listed in § 230.9 of this chapter, the following actions, when considered individually and cumulatively, do not have significant effects on the quality of the human environment and are categorically excluded from NEPA documentation.

(1) Design Documentation Reports;

(2) Project Cooperation Agreements;

(3) Project Management Plans;

(4) Plans and Specifications for projects;

(5) Pilot Project Technical Data Reports;

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

(7) Minor technical changes to the System Operating Manual or Project Operating Manuals, not significant enough to warrant notice and opportunity for public comment under section 601(h)(4)(B)(ii) of WRDA 2000;

(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 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."

(f) 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, and the Marine Mammal Protection Act.

**§ 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 Comprehensive Everglades Restoration Plan projects. Project Implementation Reports shall include such information and analyses as are necessary to facilitate review and approval of projects by the non-Federal sponsor 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 of 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) The Corps of Engineers and the non-Federal sponsor shall assign individual project managers to be responsible for the successful implementation of projects, and to ensure that projects are planned, designed, and constructed consistent with the design agreement, Project Management Plan, and achieving the goals and purposes of the Plan.

(b) The Corps of Engineers and the non-Federal sponsor shall form a Project Delivery Team to develop the products necessary to implement the project. Project Delivery Teams shall be interdisciplinary in composition.

(c) It shall be the intent of the Corps of Engineers and the South Florida Water Management District to 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 to use the expertise of other agencies on Project Delivery Teams to ensure that information developed by the Project Delivery Team is shared 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 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 or coordination required by applicable law or this part.

(d) Documents, work products, or recommendations prepared by the Project Delivery Team shall not be self-executing, but shall be provided to the Corps of Engineers and the non-Federal sponsor for review, discussion, revision, and/or approval, 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 in order to:

- (i) Provide information about proposed activities to the public;
- (ii) Make the public's desires, needs, and concerns known to decision-makers before decisions are reached; and
- (iii) Consider the public's views in reaching decisions.

(2) In carrying out implementation activities for the Plan, the Corps of Engineers and the non-Federal sponsor 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 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 on solutions to emerging issues.

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

(2) The Corps of Engineers and the non-Federal sponsor shall develop and conduct outreach activities for each project or program-level activity in order to provide information to the public and to provide opportunities for involvement by the public.

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

(4) In general, 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 given the opportunity to comment at such meetings.

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

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

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

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

(3) The Corps of Engineers and the non-Federal sponsor shall make project and program information available in languages other than English for individuals of limited English proficiency.

(4) The Corps of Engineers and the non-Federal sponsor 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 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 the non-Federal sponsor shall consider and evaluate environmental justice issues and concerns in the implementation of projects.

(c) 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)).

**§ 385.20 Restoration Coordination and Verification (RECOVER).**

(a) RECOVER (Restoration Coordination and Verification) is an interagency and interdisciplinary scientific and technical team, outlined 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 assess, evaluate, and integrate the projects of the Plan with the overall goal of ensuring that the system-wide 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 a number of teams that accomplish activities such as: developing performance measures; conducting the monitoring and assessment program;

evaluating projects and components developed by Project Delivery Teams in achieving the system-wide goals and purposes of the Plan; conducting system-wide water quality analyses; developing, refining, and applying system-wide models and tools; and considering modifications to the Plan. RECOVER is not a policy making body, but has technical and scientific responsibilities that assist the Corps of Engineers and the South Florida Water Management District in achieving the goals and purposes of the Plan.

(b) Any documents, reports, or recommendations, including performance measures or evaluations of alternatives developed for the Project Implementation Report, prepared or developed by RECOVER shall not be self-executing, but shall be provided to the Corps of Engineers and the South Florida Water Management District for review, discussion, revision, and/or approval, 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.

(c) It shall be the intent of the Corps of Engineers and the South Florida Water Management District to 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 and to use the expertise of other agencies and the tribes on RECOVER, to ensure that information developed by RECOVER is shared at the earliest possible time, 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 Marine Fisheries Service of the Department of Commerce and the Florida Fish and Wildlife Conservation Commission in marine system issues. The Corps of Engineers and the South Florida Water Management District recognize the special role of 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, 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 or coordination required by applicable law or this part.

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

(1) Assign program managers to be responsible for carrying out the activities of RECOVER;

(2) Establish a RECOVER Leadership Group that shall 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;

(3) Determine the structure and functions of the RECOVER Leadership Group, but membership shall include the Department of the Interior, the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Indians, the U.S. Environmental Protection Agency, the Florida Department of Environmental Protection, and may include other Federal, State, and local agencies; and

(e) RECOVER shall perform functions, including, but not limited to:

(1) Developing performance measures for achieving the system-wide goals and purposes of the Plan;

(2) Conducting evaluations of alternatives developed for the Project Implementation Report in achieving the system-wide goals and purposes of the Plan;

(3) Developing and implementing a monitoring plan to support the adaptive management program;

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

(5) Conducting analyses associated with preparation of the Master Implementation Sequencing Plan;

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

(7) Developing and refining system-wide models and tools;

(8) Conducting activities associated with the preparation of Pilot Project Technical Reports;

(9) Conducting activities associated with preparation of Comprehensive Plan Modification Reports;

(10) Conducting activities associated with the preparation of Operating Manuals;

(11) Developing recommendations for interim goals pursuant to § 385.38;

(12) Assessing progress towards meeting the interim goals established pursuant to § 385.38;

(13) Developing recommendations for targets for evaluating progress in achieving other water-related needs of the region as provided for in the Plan pursuant to § 385.39;

(14) Assessing progress towards achieving other water-related needs of the region as provided for in the Plan pursuant to § 385.39;

(15) Cooperating with the independent scientific review panel constituted pursuant to § 385.22;

(16) Evaluating new information and science that could have an effect on the Plan; and

(17) Preparing technical information to be used in the development of the periodic reports to Congress prepared in accordance with § 385.40.

(f) RECOVER shall assist Project Delivery Teams in ensuring that project design and performance is fully linked to the system-wide goals and purposes of the Plan and to incorporate, as appropriate, information developed for Project Implementation Reports into the Plan.

(g) In carrying out its responsibilities, RECOVER shall consider projects that are not part of the Plan, but could affect the ability of the Plan to achieve its goals and purposes.

(h) As appropriate, the Corps of Engineers and the South Florida Water Management District shall consider seeking independent scientific review or other similar assistance to RECOVER in carrying out its responsibilities, including review of documents developed by RECOVER.

#### **§ 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 an Independent Technical Review Team to conduct reviews to ensure that products are consistent with established criteria, guidance, procedures, and policy. The members of the Independent 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) Independent technical review is intended to be a continuous process throughout project implementation. Project managers shall coordinate accomplishment of technical reviews. The Independent 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.**

(a) The Secretary, the Secretary of the Interior, and the Governor, in consultation with the South Florida Ecosystem Restoration Task Force, shall 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 pursuant to section 601(j) WRDA 2000.

(1) The Secretary, the Secretary of the Interior, and the Governor shall prepare agreements, procedures, and guidance as necessary to establish the panel and to provide for its operation in accordance with section 601(j) of WRDA 2000.

(2) Completed reports, documents, or other materials prepared by the panel shall be provided to the Secretary, the Secretary of the Interior, the Governor and the South Florida Ecosystem Restoration Task Force and shall also be made available to the public.

(3) The panel shall produce a biennial report to Congress, the Secretary, the Secretary of the Interior, and the Governor, pursuant to section 601(j) 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.

(b) The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall cooperate with the independent scientific review panel constituted pursuant to Section 601 (j) of WRDA 2000, including responding to

reasonable requests for information concerning the implementation of the Plan, and shall consider and respond to recommendations made by such panel.

(c) Notwithstanding the provisions of Section 601(j) of WRDA 2000, the Corps of Engineers, the State, or the non-Federal sponsor may establish other independent scientific review panels or peer reviews as necessary to provide assistance in implementation of the Plan.

#### **§ 385.23 Dispute resolution.**

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

(b) Disputes with the non-Federal sponsor concerning design activities shall be resolved under the specific 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 developed by the Secretary and the Governor 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 such as Project Implementation Reports, Pilot Project Design Reports, Design Documentation Reports, plans and specifications, real estate acquisition, construction contracts and construction, Comprehensive Plan Modification Reports, and other activities necessary to support the delivery of projects.

(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) *Changes 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, Design Documentation Report, or Plans and Specifications.

#### § 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 program-level activities.

(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) *Changes 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.

#### § 385.26 Project Implementation Reports.

(a) *General requirements.* (1) The Project Implementation Report is a document containing additional project formulation and evaluation as well as more detailed engineering and design. 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" and the detailed design necessary to proceed to construction. Prior to 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 component's economic and environmental benefits, engineering feasibility, 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) The Project Implementation Report shall:

(i) Be consistent with the Plan and this part;

(ii) Be based on the best available science;

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

(iv) Contain sufficient information for proceeding to final design of the project, such as: additional plan formulation and evaluation, engineering and design, economics, environmental analyses, flood damage assessment, real estate

analyses, and the preparation of supplemental National Environmental Policy Act documents;

(v) In accordance with section 601(b)(2)(A)(ii) of WRDA 2000, comply with applicable water quality standards and applicable water quality permitting requirements;

(vi) Identify, pursuant to § 385.35, the appropriate quantity, timing, and distribution of water dedicated and managed for the natural system;

(vii) Identify the amount of water to be reserved or allocated for the natural system under State law necessary to implement the provisions in paragraphs (a)(2)(v) and (vi) of this section;

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

(ix) Determine, pursuant to § 385.36, if existing legal sources of water are to be transferred or eliminated;

(x) Determine, pursuant to § 385.37(b) if a proposed implementation of the Plan would reduce levels of service for flood protection:

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

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

(xi) Include an analysis concerning costs and benefits, cost-effectiveness, and engineering feasibility of the project;

(xii) Include an analysis, prepared by RECOVER as described in paragraph (c)(2) of this section, of the project's effect on achieving the system-wide goals and purposes of the Plan, and recommendations, if necessary, concerning modifications to the Plan to ensure that the goals and purposes of the Plan are achieved and a response, as appropriate, to the analysis and recommendations prepared by RECOVER; and

(xiii) To eliminate duplication with State and local procedures, 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.

(3) 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.

(4) The Corps of Engineers and the South Florida Water Management District shall, with the concurrence of the Secretary of the Interior and the Governor, develop a guidance

memorandum in accordance with § 385.5 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.*

(1) In preparing a Project Implementation Report, the Corps of Engineers and the non-Federal sponsor shall formulate and evaluate alternatives to better define and refine project plan components to optimize the project's contributions towards the system-wide goals and purposes of the Plan. In designing individual project components, Project Delivery Teams shall attempt to stay within the funding target for the project established in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999, adjusted for inflation. In cases where it is not feasible to accomplish the project goals and purposes without exceeding this target, or where the project ratio of benefits to costs can be significantly improved by exceeding the target, the PIR shall document deviations from the funding target in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement," dated April 1, 1999 and explain the need for such deviations.

(i) *General.* The Corps of Engineers and the South Florida Water Management District shall, with the concurrence of the Secretary of the Interior and the Governor, develop a guidance memorandum in accordance with § 385.5 that describes the processes to be used to formulate and evaluate alternatives, their costs and benefits, both monetary and non-monetary, and their cost effectiveness, and the basis for scoping and selecting the features which comprise the selected alternative. Project Implementation Reports approved before the date of promulgation of these regulations or the development of a guidance memorandum may use whatever method that, in the District Engineer's discretion, and in cooperation with the non-Federal sponsor, is deemed appropriate and is consistent with applicable law and the Programmatic Regulations in this part.

(ii) *System formulation and evaluation.* The guidance memorandum shall describe the process for formulating alternatives to optimize contributions to the system-wide goals and purposes of the Plan by including each alternative with all of the other components of the Plan and comparing total benefits and costs of the alternative under both the with-CERP and the without CERP condition.

(iii) *Interim project assessment.* The guidance memorandum shall also include a process for evaluation of each alternative as the next added increment of the Plan for the purposes of impact assessment, evaluating the project's contribution toward achieving the interim goals and targets for other water related needs, determining appropriate sequencing of the project and determining if the benefits of the alternative justify its costs without regard to projects not yet implemented.

(iv) *Identification of selected alternative.* The guidance memorandum shall also include a process for identification of the selected alternative, based on the analyses conducted in paragraphs (b)(1)(ii) and (iii) of this section. This alternative should be justified based on the project's contributions to both the system-wide goals and purposes of the Plan and the interim goals and targets. If the alternative cannot be justified on a next added basis, it should be justified based on sequencing factors, dependency of other CERP projects on its completion, and/or operational considerations. The Guidance Memorandum shall also include an evaluation of the selected alternative as the last added increment of the Plan to determine the incremental benefits and costs of the project in terms of how it contributes to achievement of the system-wide goals and purposes of the Plan. This analysis should also identify the extent to which benefits are dependent on other components of the Plan, and note any benefits that will also be included in the last added increment analysis for other projects. The PIR should also include an identification of the water to be reserved for the natural system, based on the next added increment analysis.

(c) *RECOVER Performance Evaluation of Alternatives for a Project Implementation Report.* (1) The Corps of Engineers and the South Florida Water Management District shall, with the concurrence of the Secretary of the Interior and the Governor, develop a guidance memorandum in accordance with § 385.5 that describes the process to be used by RECOVER for the evaluation of alternatives developed for the Project Implementation Report in achieving the goals and purposes of the Plan.

(2) RECOVER shall evaluate the performance of alternatives developed for the Project Implementation Report towards achieving the goals and purposes of the Plan using appropriate performance measures.

(3) RECOVER shall prepare information for the Project Delivery Team describing the results of the

evaluations of alternatives developed for the Project Implementation Report towards achieving the goals and purposes of the Plan, including, as appropriate, recommendations and suggestions for improving the performance of the alternatives.

(d) *National Environmental Policy Act Documentation.* (1) The Corps of Engineers and the non-Federal sponsor shall prepare the appropriate NEPA document for inclusion in 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) Whenever possible, the NEPA document shall be integrated into the Project Implementation Report.

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

(4) 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 CERP implementation shall follow the NEPA procedures established in part 230 of this chapter.

(5) 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 any activities to be conducted for compliance with the Fish and Wildlife Coordination Act and other applicable laws.

(3) As appropriate, coordination shall include preparation of the following as shown in figure 2 in Appendix A of this part:

(i) Planning Aid Letter that describes the fish and wildlife resources in the

project area and any recommendations to assist the planning process;

(ii) Fish and Wildlife Issues and Recommendations on effects, concerns, and issues about alternative plans; and

(iii) Draft and final Coordination Act Reports that provide the formal views of the U.S. Fish and Wildlife Service, 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 review and comment by the public on the draft Project Implementation Report and NEPA document, in accordance with applicable law.

(2) Upon approval of the Project Implementation Report by the Division Engineer and the non-Federal sponsor, the Division Engineer shall issue a public notice announcing completion of the Project Implementation Report based upon:

(i) His/her endorsement of the findings and recommendations of the District Engineer and the non-Federal sponsor; and

(ii) His/her assessment that the report is in accord with current policy. The notice shall indicate that the report has been submitted for Washington level review.

(3) Headquarters, US Army Corps of Engineers shall coordinate the Washington level review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, US Army Corps of Engineers shall administer the 30-day state and agency review of the Project Implementation Report as required by law.

(4) After completion of the policy review, the Chief of Engineers shall transmit the Chief of Engineers Report to the Assistant Secretary of the Army for Civil Works for review.

(5) The Assistant Secretary of the Army for Civil Works shall review all Project Implementation Reports.

(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 transmit the Project Implementation Report 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 transmit the Project Implementation Report to Congress for authorization.

(6) The non-Federal sponsor may use the Project Implementation Report as the basis for obtaining approval under applicable Florida law.

#### **§ 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 a reservation or allocation of water for the natural system as identified in the Project Implementation Report has been executed under State law.

(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. The Secretary shall verify, 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 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.

(d) *Savings clause provisions.* The Project Cooperation Agreement shall include a provision that the Corps of Engineers and the non-Federal sponsor shall 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 for the Plan shall consist of a System Operating Manual and Project Operating Manuals. In general, the System Operating Manual shall provide a system-wide operating plan for the operation of the projects of the Plan and other C&SF Project features. The Project Operating Manuals shall provide the details necessary for integrating the operation of the individual projects with the system operation described in the System Operating Manual.

(3) The Division Engineer and the non-Federal sponsor shall approve Operating Manuals prior to their development or revision.

(4) In accordance with applicable law the Corps of Engineers and the non-Federal sponsor shall only carry out any significant modifications to Operating Manuals after notice and opportunity for public comment.

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

(6) Operating Manuals shall:

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

(ii) 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;

(iii) Be consistent with the identification of the appropriate quantity, timing, and distribution of water for the natural system;

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

(v) Be consistent with the water reservation or allocation 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;

(vi) Include a drought contingency plan as required by § 222.5(i)(5) of this chapter and Engineer Regulation ER 1110-2-1941;

(vii) Include NEPA documentation, as appropriate;

(viii) Allow for adjustments during the year when substantial departures from expected rainfall and runoff occur, or are necessary based on adaptive management; and

(ix) Include provisions authorizing temporary deviations from all applicable regulations for emergencies and unplanned minor deviations 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.

(7) As appropriate, RECOVER shall conduct activities associated with the preparation of Operating Manuals as described in § 385.20.

(8) 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) 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 C&SF 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 initially 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 shall remain in effect until development of the System Operating Manual.

(3) The System Operating Manual shall be revised whenever 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, believe it is necessary due to making operational changes that have system-wide effects or prior to the completion of new projects that are expected to have system-wide effects.

(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.

(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 as 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 necessary, the draft Project Operating Manual shall be revised for project construction phase and the 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.

#### § 385.29 Other project documents.

(a) Whenever necessary, the Corps of Engineers and the non-Federal sponsor shall prepare a Design Documentation Report to provide additional design details needed for the preparation of Plans and Specifications for the project. 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 the project. 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 necessary during the real estate acquisition and construction phases of the project. 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) 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 sequence and schedule 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.

(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, including the achievement of the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant § 385.39, to the extent

practical given funding, engineering, and other constraints.

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

(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 Master Implementation Sequencing Plan.

(4) The existing sequence and schedule developed by the Corps of Engineers and the South Florida Water Management District shall remain in effect until the Master Implementation Sequencing Plan is developed.

(b) At least annually, 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 necessary, and consistent with the goals and purposes of the Plan, to incorporate new information such as:

- (i) Updated schedules from Project Management Plans;
- (ii) The results of pilot projects and other studies;
- (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) Progress towards achieving the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant to § 385.39.

(2) As appropriate, proposed revisions to the Master Implementation Sequencing Plan shall be evaluated by RECOVER for effects on plan performance.

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

(4) 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 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 system 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 targets for achieving progress towards other water-related needs of the region provided for in the Plan 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 benefits or improve cost effectiveness; and to seek continuous improvement of the Plan based upon 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. 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 design an assessment program to assess responses of the system to implementation of the Plan, and the Corps of Engineers and the South Florida Water Management District shall, with the concurrence of the Secretary of the Interior and the Governor, develop a guidance memorandum, in accordance with § 385.5, that describes the processes to be used to conduct these assessments.

(2) RECOVER shall develop and implement a monitoring plan that is designed to measure status and trends towards achieving the system-wide goals and purposes of the Plan.

(3) RECOVER shall 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 undesirable or are falling short of achieving interim goals 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 annual reports on the monitoring program.

(4) Whenever it is deemed necessary, but at least every five years, RECOVER shall prepare an assessment report for approval 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 Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, that presents an assessment of whether the goals and purposes of the Plan are being achieved, including whether interim goals and targets for evaluating progress on achieving other water-related needs of the region are being achieved or are likely to be achieved.

(i) 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 report.

(ii) The independent scientific review panel established pursuant to § 385.22 shall be provided an opportunity to review the draft assessment report.

(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.

(c) *Management actions.* (1) *General.* In seeking continuous improvement of the Plan based upon 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, the Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors, 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, shall

use the assessment reports prepared by RECOVER, information resulting from the activities of the independent scientific review panel pursuant to § 385.22, or other appropriate information including progress towards achievement of the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant to § 385.39. In developing improvements to the Plan, 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) *Operational changes.* 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 operations are necessary to ensure that the goals and purposes of the Plan are achieved or that they are achieved cost-effectively, including achievement of the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant to § 385.39, 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 revisions to the Operating Manuals in accordance with the provisions of § 385.28.

(3) *Sequence and schedule changes.* 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 sequence and schedule for implementation of the Plan are necessary to ensure that the goals and purposes of the Plan are achieved or that they are achieved cost-effectively, including achievement of the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant to § 385.39, 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 revisions to the Master Implementation Sequencing Plan in accordance with the provisions of § 385.30.

(4) *Plan changes.* 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, including achievement of the interim goals established pursuant to § 385.38 and the targets for achieving progress towards other water-related needs of the region provided for in the Plan established pursuant to § 385.39, 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 in accordance with § 385.32.

#### **§ 385.32 Comprehensive Plan Modification Report.**

Whenever the Corps of Engineers and the South Florida Water Management District determine, 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, 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, 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, § 385.18, 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 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 after consideration of the recommendations of RECOVER, 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, and any other applicable law;

(3) Contain information such as: plan formulation and evaluation, engineering and design, economics, environmental analyses, flood damage assessment, and real estate analyses;

(4) Include appropriate analyses conducted by RECOVER;

(5) 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

(6) 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 review and comment by the public on the draft Comprehensive Plan Modification Report and NEPA document, in accordance with applicable law.

(2) Upon approval of the Comprehensive Plan Modification Report by the Division Engineer and the non-Federal sponsor, the Division Engineer shall issue a public notice announcing completion of the Comprehensive Plan Modification Report based upon:

(i) His/her endorsement of the findings and recommendations of the District Engineer and the non-Federal sponsor; and

(ii) His/her assessment that the report is in accord with current policy. The notice shall indicate that the report has been submitted for Washington level review.

(3) Headquarters, US Army Corps of Engineers shall coordinate the Washington level review in accordance with applicable policies and regulations of the Corps of Engineers. Headquarters, US Army Corps of Engineers shall administer the 30-day state and agency review of the Comprehensive Plan Modification Report as required by law.

(4) After completion of the policy review, The Chief of Engineers shall transmit the Chief of Engineers Report to the Assistant Secretary of the Army for Civil Works for review.

(5) Upon approval, the Assistant Secretary of the Army for Civil Works shall transmit the Comprehensive Plan Modification Report to Congress.

(6) As appropriate, the non-Federal sponsor may use the Comprehensive Plan Modification Report as the basis for obtaining approval under applicable Florida law.

(c) *Minor changes to the Plan.* The Plan requires a process for adaptive management and incorporation of new information into the Plan. As a result of

this process, each Project Implementation Report may make minor adjustments in the Plan. 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 major changes to the Plan comparable to those that would require a supplement to the programmatic Environmental Impact Statement. The Corps of Engineers and 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 Comprehensive Everglades Restoration Plan and this part, 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 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.

(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 necessary, RECOVER shall review the adequacy of system-wide simulation models and analytical tools used in the evaluation and assessment of projects, and shall make recommendations for improvements in 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 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 periodically 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 provide annually to the Office of Management and Budget an updated estimate of total CERP cost, 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 Purposes of the Plan**

#### **§ 385.35 Achievement of the benefits of the Plan.**

(a) *Pre-CERP baseline water availability.* (1) Not later than June 30, 2003, 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 the pre-CERP baseline to determine the quantity, quality, timing, and distribution of water delivered by the existing Central

and Southern Florida Project prior to the date of enactment of section 601 of WRDA 2000. In developing the pre-CERP baseline, the Corps of Engineers and the South Florida Water Management District shall use a method that is consistent with the guidance memorandum approved in accordance with paragraph (b)(2) of this section.

(2) Concurrence by the Secretary of the Interior and the Governor shall be required on the proposed pre-CERP baseline. Within 180 days from the development of the pre-CERP baseline, or December 31, 2003, whichever is sooner, or such shorter period that the Secretary of the Interior and the Governor may agree to, the Secretary of the Interior and the Governor may provide the Secretary with a written statement of concurrence or nonconcurrence with the proposed pre-CERP baseline. A failure to provide a written statement of concurrence or nonconcurrence within such time frame shall be deemed as meeting the concurrency requirements of this section. Any nonconcurrency statement shall specifically detail the reason or reasons for the non-concurrence. The Corps of Engineers and the South Florida Water Management District shall give good faith consideration to any nonconcurrency statement, and take the reason or reasons for the nonconcurrence into account in the final decision to determine the pre-CERP baseline.

(3) In preparing a Project Implementation Report, the Corps of Engineers and the South Florida Water Management District shall determine whether the pre-CERP baseline quantity of water of comparable quality is still available. The Corps of Engineers and the non-Federal sponsor shall consider any change in availability of pre-CERP baseline water and previously reserved water in identifying the quantity, timing, and distribution of water to be made available for the natural system by a project component in preparing the Project Implementation Report. The Project Implementation Report shall consider: whether additional quantity, timing, and distribution of water should be made available by subsequent projects; whether improvements in water quality are needed in order to ensure that water delivered to the natural system meets applicable water quality standards; whether to recommend preparation of a Comprehensive Plan Modification Report as described in § 385.32; and whether to recommend that the State of Florida and its agencies re-examine the reservation or allocation of water made pursuant to State law in order to

provide for restoration of the natural system consistent with the Plan. In preparing a Project Implementation Report, the concurrence provisions of paragraph (a)(2) of this section shall not apply to a determination of whether the pre-CERP baseline is still available.

(b) *Identification of water to be reserved or allocated for the natural system in the Project Implementation Report.* (1) Each Project Implementation Report shall take into account the pre-CERP baseline water and previously reserved water 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.

(2) Section 601(h)(3)(C)(i)(I) of WRDA 2000 requires the programmatic regulations in 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, with the concurrence of the Secretary of the Interior and the Governor, develop a guidance memorandum for use of the Corps of Engineers and the non-federal sponsor. 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 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) of WRDA 2000.

(i) The guidance memorandum shall generally be based on a system-wide analysis that adds the project recommended in the Project Implementation Report to the projects of the Plan for which Project Implementation Reports have already been implemented 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 the Water Resources Development Acts of 1996 and 2000.

(ii) The guidance memorandum shall generally take into account the natural fluctuation of water made available in any given year; 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 to the natural system meets applicable water quality standards.

(iii) Project Implementation Reports approved before the date of promulgation of these regulations or 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 section 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.

**§ 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 transferred or eliminated as a result of project implementation. If implementation of the project shall cause a transfer or elimination of existing legal sources of water, then the Project Implementation Report shall include an implementation plan that ensures that such transfer or elimination 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.

(b) In determining if implementation of a project shall cause an elimination or transfer of existing legal sources of water, the Corps of Engineers and the non-Federal sponsor 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; or
- (5) Water supply for fish and wildlife.

**§ 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) *Level of service.* (1) For each Project Implementation Report, the level of service for flood protection that:

- (i) Was in existence on the date of enactment of section 601 of WRDA 2000; and
  - (ii) Is in accordance with applicable law, shall be determined for the area affected by the project.
- (2) The Project Implementation Report shall include analyses to demonstrate that the level of service for flood protection in paragraph (b)(1) of this section will not be reduced by implementation of the project.

(c) *Improved and new flood protection benefits.* 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. In preparing the Project Implementation Report, the Corps of

Engineers and the non-Federal sponsor may 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.* The Secretary, the Secretary of the Interior, and the Governor shall, by December 31, 2003, and in consultation with 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, 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 Comprehensive Everglades Restoration Plan and to ensure the means by which the restoration success of the Plan may be evaluated, and ultimately reported to the Congress pursuant to § 385.40 throughout the implementation process.

(b) *Purpose.* (1) Interim goals are targets 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 any changes to the Plan. Interim goals are not intended to be standards or schedules enforceable in court.

(2) 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 (c) of this section, to reflect 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.

(3) The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall sequence and schedule projects as

necessary to achieve the interim goals and the targets for achieving progress towards other water-related needs of the region provided for in the Plan, to the extent practical given funding, technical, or other constraints.

(4) 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:

(i) Document why the interim goals have not been met or are unlikely to be met and either

(ii) Develop a plan of action that achieves the interim goals as soon as practical consistent with the other objectives of the Plan, and initiate adaptive management actions pursuant to § 385.31(c) based on the plan of action; or

(iii) Recommend changes to the interim goals in accordance with paragraph (b)(2) of this section.

(c) *Process for establishing interim goals.* (1) In developing proposed goals for inclusion in the Interim Goals Agreement, the Secretary, 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 or the South Florida Water Management District. These recommendations shall be provided no later than June 30, 2003. Thereafter, the Secretary, the Secretary of the Interior, and the Governor shall provide a notice of availability of the proposed agreement to the public in the **Federal Register**, seek public comments, and consult with the Miccosukee Tribe of Indians of Florida, the Seminole Tribe of Florida, the Environmental Protection Agency, the Department of the Commerce, the Florida Department of Environmental Protection, and other Federal, State, and local agencies, and the South Florida Ecosystem Restoration Task Force. After considering comments of the public and consulted agencies on the proposed agreement, and incorporating any suggestions that are appropriate and consistent with the goals and purposes of the Plan, the Secretary, the Secretary of the Interior, and the Governor, shall execute the final agreement, and provide a notice of availability to the public in the **Federal Register** by no later than December 31, 2003.

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

(3) The Secretary, Secretary of the Interior, and the Governor shall review the proposed interim goals agreement at

a minimum every five years beginning October 1, 2005, to determine if the Interim Goals should be revised. Thereafter, the Secretary, the Secretary of the Interior, and the Governor shall revise the interim goals as appropriate and execute a new agreement every five years. However, they may revise interim goals whenever appropriate as new information becomes available. Any revisions to interim goals shall be adopted consistent with the process established pursuant to this part.

(d) *Principles for developing interim goals.* (1) RECOVER, using best available science and information, shall recommend a set of interim goals for implementation of CERP, 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, and the estuaries. 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 in five-year increments beginning in 2005. The interim goals shall be predicted by appropriate models and tools and shall provide a quantitative basis for evaluating the restoration success of the Plan during the period of implementation. The expected performance level of the Plan is generally represented by the output of the model run of D-13R as described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" dated April 1, 1999, as modified by section 601 of WRDA 2000, or any subsequent modification authorized in law. In developing the interim goals for the five-year increments, RECOVER shall use the Master Implementation Sequencing Plan as the basis for predicting the increments. RECOVER may recommend additional interim goals for implementation of CERP in addition to those initially developed and may propose revisions to the initial set of hydrologic interim goals as new information is gained through adaptive management.

(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 which will be available to the natural system;

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

(E) The frequency of meeting salinity envelopes for the St. Lucie and Caloosahatchee estuaries; and

(ii) Improvement in water quality; and

(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 Secretary of the Army, the Secretary of the Interior, and the Governor 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 effect achievement of the goals.

**§ 385.39 Evaluating Progress on achieving 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 (b) of this section, the Corps of Engineers and the South Florida Water Management District shall establish targets for evaluating progress towards achieving other water-related needs of the region, including water supply and flood protection, throughout the implementation process.

(3) The Corps of Engineers and the South Florida Water Management District and other non-Federal sponsors shall sequence and schedule projects as necessary to achieve the targets for other water-related needs of the region provided for in the Plan, consistent with the interim goals established pursuant to § 385.38, to the extent practical given funding, technical, or other constraints.

(4) If the targets for evaluating progress towards achieving other water-

related needs of the region have not been met or are unlikely to be met, then the Corps of Engineers and the South Florida Water Management District shall:

(i) Document why the targets have not been met or are unlikely to be met; and either

(ii) Develop a plan of action that achieves the targets as soon as practical consistent with the purposes of the Plan and initiate adaptive management actions pursuant to § 385.31(c) based on the plan of action; or

(iii) Adopt changes to the targets in accordance with paragraph (b)(3) of this section.

(b) *Process for establishing targets.* (1) Not later than June 30, 2003 RECOVER shall develop recommendations on targets to evaluate progress on achieving the other water-related needs of the region, for consideration by the Corps of Engineers and the South Florida Water Management District, 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. The Corps of Engineers and the South Florida Water Management District shall also consult with the South Florida Ecosystem

Restoration Task Force in establishing targets for evaluating progress towards achieving other water-related needs of the region provided for in the Plan. These targets shall be established by the Corps of Engineers and the South Florida Water Management District by December 30, 2003. Targets for evaluating progress towards achieving other water-related needs of the region provided for in the Plan are intended to facilitate inter-agency planning, monitoring, and assessment throughout the implementation process and are not intended to be standards or schedules enforceable in court.

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

(3) The Corps of Engineers and the South Florida Water Management District shall review the targets for evaluating progress towards achieving the other water-related needs of the region under the Plan at a minimum every five years beginning in 2005, to determine if they should be revised, and revise them as appropriate. However, they may revise the targets for achieving the other water-related needs of the

region whenever appropriate as new information becomes available.

(c) *Principles for evaluating progress.*

(1) RECOVER, using best available science and information, shall recommend a set of targets for evaluating progress on achieving other water-related needs of the region provided for in the Plan. These 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 beginning in 2005. The targets shall be predicted by appropriate models and tools and shall provide a quantitative basis for evaluating progress on achieving other water-related needs of the region provided for in the Plan during the period of implementation. The expected performance level of the Plan is generally represented by the output of the model run of D-13R as described in the "Final Integrated Feasibility Report and Programmatic Environmental Impact Statement" dated April 1, 1999, as modified by section 601 of WRDA 2000, or any subsequent modification authorized in law. In developing the targets for the five-year increments, RECOVER shall use the Master Implementation Sequencing Plan as the basis for predicting the increments. RECOVER may recommend additional targets for implementation of CERP in addition to those initially developed and may propose revisions to the initial set of hydrologic targets as new information is gained through adaptive management.

(2) In developing its recommendations for targets, RECOVER shall consider the following indicators, 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.

**§ 385.40 Reports to Congress.**

(a) Beginning on October 1, 2005 and periodically thereafter until October 1, 2036, the Secretary 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 5 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 5-year period and updated estimates of total CERP cost 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;

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

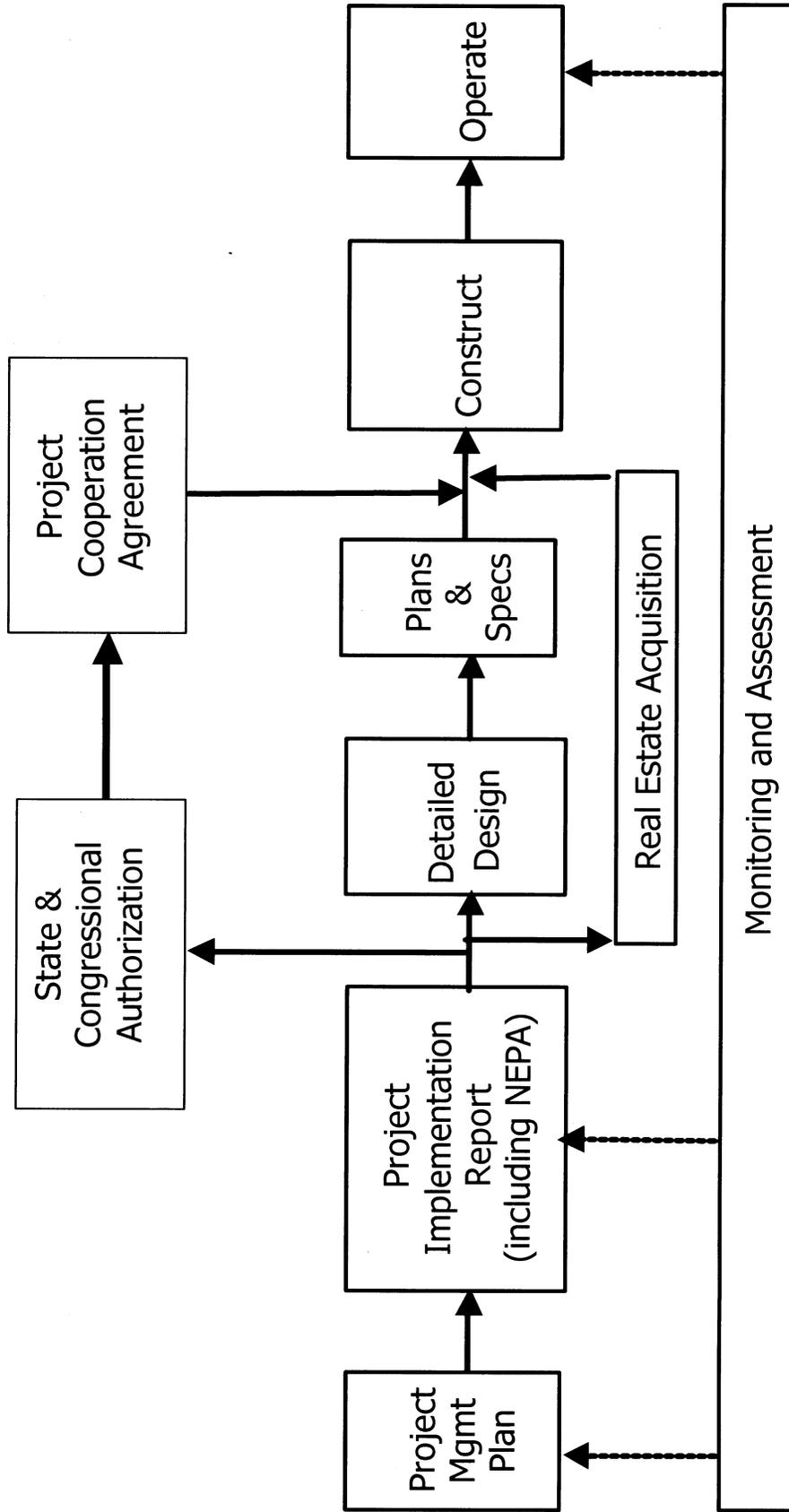
(5) The interim goals to be achieved in the next five years, including any revisions to the interim goals, reflecting the work to be accomplished during the next five years, along with a discussion of steps to be undertaken to achieve the interim goals.

(f) 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.

**Appendix A to Part 385—Illustrations to Part 385**

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# Project Development Process



Appendix A

Figure 1

