

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

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

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

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

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

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

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

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

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