

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

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

S. Shortfall in Performance by a Project

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

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

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

T. Elimination or Transfer of Existing Legal Sources of Water

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

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

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

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

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

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

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

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