

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

§ 385.35 Achievement of the benefits of the Plan.

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

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

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

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

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

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

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

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

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

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

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

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