

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

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

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

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

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

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

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

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

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

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

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

(1) An agricultural or urban water supply;

(2) Allocation or entitlement to the Seminole Indian Tribe of Florida under section 7 of the Seminole Indian Land Claims Settlement Act of 1987 (25 U.S.C. 1772e);

(3) The Miccosukee Tribe of Indians of Florida;

(4) Water supply for Everglades National Park; and

(5) Water supply for fish and wildlife.

(c) Until guidance is issued, issues involving existing legal sources of water should be resolved on a case-by-case basis considering all factors that can be identified as relevant to decisions under the savings clause.

§ 385.37 Flood protection.

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

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

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

(2) Are in accordance with applicable law, will not be reduced by implementation of the project.

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