



September 27, 2002

Mr. Stuart J. Appelbaum, Chief
Ecosystem Restoration Branch
Jacksonville District
ATTN: CESAJ-DR-R
U.S. Army Corps of Engineers
P. O. Box 4970
Jacksonville, FL 32232-0019

Re: Programmatic Regulations for the Comprehensive Everglades Restoration Plan

Dear Mr. Appelbaum:

I am writing this letter on behalf of the Southeast Florida Utility Council ("SEFLUC") and the Florida/American Water Works Association Utility Council ("FS/AWWA Utility Council"), who wish to comment on the Proposed Programmatic Regulations for the Comprehensive Everglades Restoration Plan ("CERP"). The SEFLUC is an unincorporated association composed of twenty six (26) water utilities located in Miami-Dade, Broward, Palm Beach and Martin Counties, which supply the potable water needs of over 4 million persons in south Florida. The FS/AWWA is a not-for-profit corporation affiliated with the American Water Works Association, which is composed of State-wide utility members, manufacturer's representatives, consultants and other professionals associated with the drinking water industry in Florida. It is the goal of both these organizations to ensure the public a safe, secure and dependable source of drinking water. This objective has guided both organizations in their review of the programmatic regulations. SEFLUC and the FS/AWWA Utility Council would like to offer the following comments regarding the Proposed Rule.

1. The Savings Clause applies to existing legal sources of water and not just permitted uses.

Section 601(h)(5)(A) of Water Resources Development Act of 2000 ("WRDA 2000") provides that until new sources of water supply of comparable quantity and quality, as those in existence on December 11, 2000 are available to replace the water to be lost as a result of the

Stuart J. Appelbaum
September 27, 2002
Page 2 of 13

implementation of CERP, the U.S. Army Corps of Engineers and the South Florida Water Management District cannot eliminate or transfer existing legal *sources* of water, including urban water supply. Additionally, Section 10.2.9 of CERP specifically recognizes that urban water supply includes prevention of saltwater intrusion, maintenance of canal stages and protection of non-Everglades wetlands, in addition to consumptive uses of water. The Proposed Rule is not consistent with these standards. In a few instances, it continues to refer to existing *uses* of water rather than existing *sources* of water. Additionally, the Proposed Rule does not recognize that a "source of water supply... available on the date of enactment of this Act" means water that could have been used, as well as water that was actually used or permitted to be used on the date of enactment.

For local government water utilities in South Florida that will need to rely on the sources of water protected by the Savings Clause, a clear and predictable definition of the existing legal sources of water upon which they can rely is critical. Under state legislation passed last spring, each local government is required as part of the state comprehensive planning process to identify the sources of water it will use to supply its residents over the next 10 years. See Ch. 2002-296, § 2, Laws of Florida (2002). In this planning process the local governments are required consider the sources of water identified in the applicable water management district's regional water supply plans, such as Lower East Coast Regional Water Supply Plan. If the local government cannot identify water sufficient for its residents, it must submit a work plan to the Florida Department of Community Affairs "for building water supply facilities . . . necessary to serve existing and new development and for which the local government is responsible." This new statutory requirement places an urgency on public suppliers' requests for a clearly defined definition of legal sources of water protected by the Savings Clause. If a local government cannot confidently rely upon its existing sources of water to meet its water supply needs, it will be required to embark on a state mandated work plan to develop supplies of water it can rely upon.

The Savings Clause is intended to protect the available quantity and quality of water available for urban water supplies, but this is not fully implemented in the Proposed Rule. The terms "legal sources of water" and "urban water uses" are used throughout the Proposed Rule, but they are not defined. In some instances the lack of definition of these terms could render the implementation of the Savings Clause in the Proposed Rule virtually meaningless. For instance, in proposed Section 385.36, entitled Elimination or Transfer of Existing Legal Sources of Water, paragraph (a) requires Project Implementation Reports ("PIR") to determine if "existing legal sources of water are to be eliminated or transferred as a result of project implementation." The lack of a definition of the key term "legal sources of water" makes it very difficult to determine what will be protected, or for water users to have a level of comfort that the existing sources of water they have relied on will be protected. At a minimum, the term "sources of water" should be defined to provide some level of guidance for the evaluation impacts of projects on existing sources of water in PIRs. Without clear definitions of key terms any protections for existing sources in the Proposed Rule may prove to be illusory.

Stuart J. Appelbaum
September 27, 2002
Page 3 of 13

Paragraph (b) of proposed Section 385.36 identifies the types of water uses that will be protected by the Savings Clause and must be addressed in each PIR, including urban water supply. This requirement is an improvement over prior drafts of the Programmatic Regulations and should be included in the Final Rule. However, public water suppliers fear that these protections will prove to be illusory because the key term "urban water supply" is not defined. Apparently, since the key terms identified above are not defined in the Proposed Rule, the authors of each Project Implementation Report will have the discretion to directly interpret the Savings Clause in WRDA 2000 on a case-by-case basis. This will result in inconsistent interpretations and possibly litigation over these issues. An even more problematic approach would be for the U.S. Army Corps of Engineers to address this issue in the guidance memorandum in the proposed Section 385.35(b), without full participation by the stakeholders and the notice and comment provisions in the federal Administrative Procedures Act.

For the reasons discussed above, we believe it is imperative that the terms used in the Proposed Rule be clearly defined in the Programmatic Regulations. We suggest the inclusion of the following definitions in proposed 33 CFR § 385.3:

Legal Sources of Water means a Source of Water, which the State of Florida allows to be used or is relied upon for Agricultural or Urban Water Supply, allocation or entitlement to the Seminole Indian Tribe of Florida and the Miccosukee Tribe of Indians of Florida, water supply for Everglades National Park or water supply for fish and wildlife.

Source of Water means lakes, streams, surface water impoundments, groundwater in confined and unconfined aquifers and any other surface or groundwater in whatever form, which may be used or relied upon for Agricultural or Urban Water Supply, allocation or entitlement to the Seminole Indian Tribe of Florida and the Miccosukee Tribe of Indians of Florida, water supply for Everglades National Park or water supply for fish and wildlife.

Urban Water Supply means the use or reliance upon Sources of Water for non-agricultural consumptive use, prevention of saline water intrusion, maintenance of canal stages, protection of Urban Wetlands and other urban water needs.

Urban Wetlands means wetlands and other surface waters located within the South Florida Ecosystem, but outside the water conservation areas, the Everglades National Park, Biscayne National Park and Big Cypress National Preserve.

If the U.S. Army Corps of Engineers will not address these issues in the Programmatic Regulations, it should defer to the South Florida Water Management District ("SFWMD"). SFWMD has extensive data on local water use and is in the best position to define and determine the legal sources of water available on December 11, 2000, the date of enactment of WRDA 2000. This approach would also be consistent with the Congressional direction in WRDA 2000

Stuart J. Appelbaum
September 27, 2002
Page 4 of 13

that Florida law control use and allocation of water. Although not a consumptive use in the traditional sense, the determination of the legal sources of water available on the date of enactment WRDA 2000 for purposes of the Savings Clause is a form of water allocation. Accordingly it should be left to the sound discretion of SFWMD, after consultation with all interested parties.

If U.S. Army Corps of Engineers defers this issue to SFWMD, we recommend the following revisions to the Proposed Rule:

§ 385.35 Achievement of the benefits of the Plan.

(a) *Pre-CERP baseline and water availability.* (1) Not later than June 30, 2003 the U.S. Army 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 for use as a baseline for evaluating the performance of Plan components. 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) Not later than June 30, 2003 the South Florida Water Management District shall, in consultation with the Corps of Engineers, 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, determine the existing Legal Sources of Water in the South Florida ecosystem available for use on December 11, 2000, the date of enactment of section 601 of WRDA 2000, in accordance with State law.

* * *

(3) In preparing a Project Implementation Report, the U.S. Army Corps of Engineers and the South Florida Water Management District shall determine whether ~~the pre-CERP baseline quantity~~ existing Legal Sources of wWater of comparable quality and quantity ~~is~~ are still available. The U.S. Army Corps of Engineers and the non-Federal sponsor shall consider any change in availability of ~~pre-CERP baseline existing Legal Sources of wWater~~ 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.

Stuart J. Appelbaum
September 27, 2002
Page 5 of 13

2. The Pre-CERP Baseline must include all existing legal sources of water

In order to fully effectuate the intent of the Savings Clause, the pre-CERP baseline must include all urban water uses. Presently the pre-CERP baseline is defined in proposed 33 CFR § 385.3 to consider only land use, population, water demand and operation of the Central and South Florida Project, based on a multi-year model. This determination should be primarily a state function that recognizes *all* legal sources of water available on December 11, 2000, including urban water supply as defined in item 1 above. To fully implement the Savings Clause and recognize all urban water uses the definition of pre-CERP baseline in proposed 33 CFR § 385.3 should be revised as follows:

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 and levels of service for flood protection~~. 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, Urban Wetlands, operations of the Central and Southern Florida Project.

In addition to the term pre-CERP baseline being defined to include all legal sources of water available on the date WRDA 2000 was enacted, it is important the application of the pre-CERP baseline also fully recognize the breadth of sources of water protected under the Savings Clause. Proposed 33 CFR § 385.35(a)(1) suggests that the only legal sources of water protected by the Savings Clause are waters delivered by the Central and Southern Florida Flood Control Project. This interpretation is not consistent with the plain reading of the Savings Clause, other paragraphs in proposed 33 CFR § 385.35, and the definition of pre-CERP baseline as it in the Proposed Rule or as we have suggested modifying it above. Accordingly, we suggest revising proposed 33 CFR § 385.35(a)(1), as follows, to conform it to the Savings Clause in WRDA 2000 and the other provisions in the Proposed Rule.

385.35 Achievement of the benefits of the Plan.

(a) *Pre-CERP baseline water availability.* (1) Not later than June 30, 2003, the U.S. Army 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 and other Sources of Water in the South Florida ecosystem prior to the date of enactment of Section 601 of WRDA 2000. In developing the pre-CERP baseline, the U.S. Army Corps of Engineers and the South Florida Water Management District shall use a

Stuart J. Appelbaum
 September 27, 2002
 Page 6 of 13

method that is consistent with the guidance memorandum approved in accordance with paragraph (b)(2) of this Section.

In addition, the Proposed Rule appears to provide the Department of the Interior and the Governor concurrence authority over the pre-CERP baseline. The preamble of the Proposed Programmatic Regulations states the Department of the Interior and the Governor will have concurrence authority over the pre-CERP Baseline. Proposed 33 CFR § 385.35(a)(1) only provides for a consulting role, but proposed 33 CFR § 385.35(a)(2) provides a concurrence role. Any requirement that the Secretary of the Interior and the Governor concur with the pre-CERP baseline is contrary to WRDA 2000. Section 601(h)(A)&(B) limits the concurrency authority of the Department of the Interior and the Governor to the Programmatic Regulations. In addition, Section 601(h)(3)(C)(ii) of WRDA 2000 expressly prohibits the requirement for concurrence by the Secretary of the Interior or the Governor with any document relating to the development, implementation and management of individual features of CERP. Any such requirement for concurrence with additional actions to be taken by the U.S. Army Corps of Engineers and the non-federal sponsor, especially when directly related to specific project components, is in conflict with WRDA 2000. Since proposed 33 CFR § 385.35(a)(3) now requires that each PIR determine whether the pre-CERP baseline is still available at the time the PIR is completed, the initial establishment and maintenance of the pre-CERP baseline will become a key component of each PIR.

The Proposed Rule should be clarified as follows to eliminate any concurrence requirements for the pre-CERP baseline:

§ 385.35 Achievement of the benefits of the Plan.

(a) Pre-CERP baseline water availability.

* * *

~~(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 U.S. Army Corps of Engineers and the South Florida Water Management District shall determine~~

Stuart J. Appelbaum
September 27, 2002
Page 7 of 13

whether the pre-CERP baseline quantity of water of comparable quality is still available....

3. The programmatic regulations must ensure that all the goals and objectives of CERP are achieved.

The objective of CERP is multi-purpose -- restoration of the South Florida Ecosystem, while providing for other water-related needs of the region, including water supply and flood protection. The U.S. Army Corps of Engineers has attempted to strike a balance between the water-related need of the region, including the needs of natural systems. We believe it is critical that the U.S. Army Corps of Engineers maintain this balance of the various needs of the region and avoid attempts to prioritize uses of water. The clear Congressional intent in WRDA 2000 was for Florida law to control the allocation and reservation of water. Prioritizing regional uses of water is generally not consistent with the state policy of water allocation as stated in Chapter 373, Florida Statutes. For instance Sections 373.016(2)(d) and 373.0831(3), Florida Statutes, clearly articulate state policy and directs the water management districts to provide "sufficient water for all existing and future reasonable-beneficial uses and natural systems." While water can be reserved for the natural systems and some other specific purposes, the Florida Legislature has clearly articulated a general policy of parity between the each of the various water-related needs of the state, including the needs of the natural systems.

The procedures adopted by the Proposed Rule do a good job of guaranteeing restoration of the natural system, and the targets for achieving the other water-related needs of the region are an improvement over the draft rules released in December 2001. However, providing for the other water-related need of the region still does not appear to be on parity with providing water for the natural system. For instance, proposed 33 CFR § 385.35, entitled "Achieving Benefits of the Plan," includes a subsection outlining the process to be used to establish a procedure to identify water to be reserved or allocated for the natural system in the PIR, without providing a similar process for identifying in the PIR water to be made available for the other water related needs of the region. Consequently, the Proposed Rule fails to adequately describe a balanced process that will ensure the other water-related needs of the region will be met. To remedy this problem and ensure that the is multi-purpose objective of CERP is achieved, we propose the following revisions to 33 CFR § 385.35(b):

(b) Identification of water to be reserved or allocated for the natural system and to meet the other water-related needs of the region 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

Stuart J. Appelbaum
September 27, 2002
Page 8 of 13

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, and identifying the appropriate quantity, timing and distribution of water dedicated and managed for other water-related needs of the region, including water supply and flood protection.~~

(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 U.S. Army 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 U.S. Army 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, and identify the appropriate quantity, timing and distribution of water dedicated and managed for other water-related needs of the region, including water supply and flood protection.~~

(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, and the water identified to replace existing Legal Sources of Water is of equivalent quality. These procedures shall ensure that any features to improve water quality are

Stuart J. Appelbaum
September 27, 2002
Page 9 of 13

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 objective of meeting the other water-related needs of the region, including flood protection, 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 U.S. Army Corps of Engineers and the non-Federal sponsor deem is reasonable and consistent with the provisions of Section 601 of WRDA 2000.

(iv) The guidance memorandum shall provide for re-examination of actual performance after a Project component has been in operation for an appropriate period of time.

(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.

In addition, in order to ensure that existing legal sources of water protected by the WRDA 2000 Savings Clause continue to be available or are replaced with water of comparable quality and quantity, the U.S. Army Corps of Engineers and the SFWMD should continue to monitor the availability of existing legal sources of water for the duration of each project. We suggest that the following paragraph be added as 33 CFR § 385.36(c).

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

* * *

(c) The U.S. Army Corps of Engineers and the Non-federal sponsor will monitor and assess the continuing availability and quality of the Legal Sources of Water existing on December 11, 2000, the date of enactment of Section 601 of the Act, or any new Source of Water intended to replace an existing Legal Source of Water, as long as the project is authorized to achieve the goals and objectives of the Plan.

Stuart J. Appelbaum
September 27, 2002
Page 10 of 13

4. Reservation of water for the natural system must be left to the exclusive jurisdiction of the State of Florida and should be flexible.

Under WRDA 2000, the establishment of reservations for the protection of the natural system is left to the sound discretion of the State of Florida. Section 601(h)(4) of WRDA 2000 only requires that the PIR identify the amount of water to be reserved or allocated for the natural system and that the reservation or allocation for the natural system be in force prior to execution of the Project Cooperation Agreement ("PCA"). The Proposed Rule authorizes the U.S. Army Corps of Engineers to go beyond these very specific provisions. Section 385.27(c) of the Proposed Rule could be interpreted to require reservations made pursuant to Florida law and approved by the U.S. Army Corps of Engineers in a PCA, to remain in effect for as long as CERP is authorized unless the U.S. Army Corps of Engineers agrees to an amendment to the PCA. This requirement limits the State of Florida's discretion to make appropriate reservations of water under state law. This provision also has the effect of restricting the U.S. Army Corps of Engineers' and the South Florida Water Management District's ability to deal with variations between the new water estimated to be produced and the new water actually produced by CERP projects. The state process for revising reservations will most certainly require rulemaking in some form. This can be a time consuming and burdensome process, but it provides ample opportunity for review and comment by interested parties. If the U.S. Army Corps of Engineers requires that an additional verification, consultation and PCA amendment process precede the state's initiation of the rulemaking process for revision to a reservation, as the Proposed Rule appears to intend, it will create an unnecessarily duplicative process with essentially the same stakeholders providing comments first to the U.S. Army Corps of Engineers and then to SFWMD.

To avoid unnecessary duplication, the verification process described in the Proposed Rule should occur simultaneously with SFWMD's process for revising a reservation. If the U.S. Army Corps of Engineers ultimately determines that the new reservation is not sufficient to provide for appropriate quantity, timing and distribution of water dedicated and managed for the natural system, SFWMD would be required, by virtue of the State-Federal Agreement, to either maintain the reservation previously agreed to by the U.S. Army Corps of Engineers in the PCA or develop a new reservation acceptable to the U.S. Army Corps of Engineers. To remedy the above referenced problems with proposed 33 CFR § 385.27(c), we recommend the following revisions:

(c) *Changes to water reservations.* Reservations or allocations of water are exclusively a State responsibility. Any change to the reservation or allocation of water for the natural system made under State law ~~shall require an~~ may be made prior to any amendment to the Project Cooperation Agreement. 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. Concurrent with the process under state law for changing the reservation, ~~The~~ Secretary shall verify, in consultation with the South Florida Water Management District, the Florida Department of

Stuart J. Appelbaum
September 27, 2002
Page 11 of 13

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.~~ Upon completion of the process under state law for changing the reservation, and the Army Corps' verification of the changed reservation, the applicable PCA shall be considered amended to incorporate the changed reservation.

How deficiencies in the performance of project components will be managed, including shortfalls in the water designated for the natural system through reservations, should be fully addressed in the Programmatic Regulations. The Proposed Rule does not fully address this issue, but instead defers such determinations to be made on a case-by-case basis. The Programmatic Regulations should establish in the PIR process a default approach for addressing shortfalls, and enable the PIR to provide otherwise in unique circumstances. We suggest the following addition to proposed 33 CFR § 385.35:

(b) *Shared adversity in event of Project performance shortfall.* In the event that a Project fails to produce water of sufficient quality and quantity to meet all or any of the goals, objectives and targets identified in the PIR pursuant to paragraph 385.26(a)(2), the water delivered by the Project to meet these goals, objectives and targets shall be modified proportionally on a pro-rata basis. Where unique circumstances exist justifying a different apportionment of the shortfall, the PIR may expressly provide for an alternate apportionment of the shortfall.

~~(b)~~ *Identification of water to be reserved or allocated for the natural system . . .*

The relationship between the reservation of water and PIRs should also be clarified in the Rule. WRDA 2000 paragraph 601(h)(4)(A) uses the two similar, but distinct, phrases "water to be reserved or allocated for the natural system," and "water dedicated and managed for the natural system." The Proposed Rule, in describing the requirements for PIRs requires that both phrases be applied without providing guidance as to any difference or distinction between the terms. Read in context in WRDA 2000, it is apparent the phrase "water dedicated and managed for the natural system," refers to water previously reserved or allocated for the natural system. The term "water to be reserved or allocated for the natural system," refers to water to be reserved from the project that is the subject of the PIR. This distinction should be clarified in the Rule. We suggest the following revision to proposed 33 CFR § 385.26(2)(vi)

Stuart J. Appelbaum
September 27, 2002
Page 12 of 13

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

5. Congress has limited concurrence authority to the Programmatic Regulations.

WRDA 2000 limits concurrence by the Department of Interior and the Governor to the Programmatic Regulations. (Section 601(h)(3)(A)&(B) WRDA 2000). The Programmatic Regulations cannot require concurrence with decisions not included in the regulations and concurrence authority cannot be deferred under WRDA 2000 to guidance memorandum or non-rule agreements between agencies. Section 601(h)(3)(C)(ii) of WRDA 2000 requires the Programmatic Regulations to expressly prohibit the concurrence of the Secretary of Interior and the Governor with respect to any document relating to the development, implementation and management of individual features of CERP.

Programmatic Regulations promulgated under this paragraph shall expressly prohibit the 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.

WRDA 2000 Section 601(h)(3)(C)(ii). Contrary to this provision of WRDA 2000, 33 CFR § 385.5(b) requires that six guidance memoranda be developed with *concurrence* of the Department of the Interior and the Governor six months after the effective date of the final rules, is in direct violation of the legislative mandate quoted above.

Proposed 33 CFR § 385.4 recognizes that the Department of the Interior and the Governor are prohibited from concurrence on PIRs, PCAs, operating manuals and any other documents related to individual features of the plan. The description in proposed 33 CFR § 385.35(b)(2) of the functions of the guidance memoranda required in proposed 33 CFR § 385.5(a)(2)(vi) is clear that the guidance memorandum will describe in detail how PIRs will address key issues, such as determining the water to be reserved or allocated for the natural system, or the evaluation of individual features of CERP. Thus, the guidance memoranda attempt to avoid the clear intent of Congress to limit the concurrence authority of the Department of Interior and the Governor. Such private agreements between agencies may not be subject to the protections and process provided in the federal Administrative Procedures Act for promulgation of rules. Decisions of great importance to the success of CERP, such as how the pre-CERP baseline will be determined and how availability of existing legal sources of water will be evaluated in PIR's should not be the subject to private agreements in the form of the guidance memoranda.

Stuart J. Appelbaum
September 27, 2002
Page 13 of 13

We believe that to conform to the requirements of WRDA 2000 and ensure full participation and input from all interested parties, all stakeholders should be on an equal footing in the development and guidance memoranda on any documents related to the individual components of CERP. Accordingly, we recommend the Proposed Rule be revised to strike the concurrence requirements in proposed 33 CFR § 358.5(b)(5).

In conclusion, I would like to thank you for the opportunity to comment on the Draft Rule. We appreciate the time and effort you and your colleagues have invested in this rule development. If you have any questions concerning our recommended revisions or the matters discussed herein, please don't hesitate to call me.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Rapach", written in a cursive style.

Fred Rapach
Chairman FS/AWWA Utility Council