§ 9.6 Decision-making process.

(a) Purpose. The purpose of this section is to set out the floodplain management and wetlands protection decision-making process to be followed by the Agency in applying the Orders to its actions. While the decision-making process was initially designed to address the floodplain Order’s requirements, the process will also satisfy the wetlands Order’s provisions due to the close similarity of the two directives. The numbering of Steps 1 through 8 does not firmly require that the steps be followed sequentially. As information is gathered throughout the decision-making process and as additional information is needed, reevaluation of lower numbered steps may be necessary.

(b) Except as otherwise provided in § 9.5 (c), (d), (f), and (g) regarding categories of partial or total exclusion when proposing an action, the Agency shall apply the 8-step decision-making process. FEMA shall:

Step 1. Determine whether the proposed action is located in a wetland and/or the 100-year floodplain (500-year floodplain for critical actions); and whether it has the potential to affect or be affected by a floodplain or wetland (see § 9.7);

Step 2. Notify the public at the earliest possible time of the intent to carry out an action in a floodplain or wetland, and involve the affected and interested public in the decision-making process (see § 9.8);

Step 3. Identify and evaluate practicable alternatives to locating the proposed action in a floodplain or wetland (including alternative sites, actions and the “no action” option) (see § 9.9). If a practicable alternative exists outside the floodplain or wetland FEMA must locate the action at the alternative site.

Step 4. Identify the potential direct and indirect impacts associated with the occupancy or modification of floodplains and wetlands and the potential direct and indirect support of floodplain and wetland development that could result from the proposed action (see § 9.10);

Step 5. Minimize the potential adverse impacts and support to or within floodplains and wetlands to be identified under Step 4, restore and preserve the natural and beneficial values served by floodplains, and preserve and enhance the natural and beneficial values served by wetlands (see § 9.11);

Step 6. Reevaluate the proposed action to determine first, if it is still practicable in light of its exposure to flood hazards, the extent to which it will aggravate the hazards to others, and its potential to disrupt floodplain and wetland values and second, if alternatives preliminarily rejected at Step 3 are practicable in light of the information gained in Steps 4 and 5. FEMA shall not act in a floodplain or wetland unless it is the only practicable location (see § 9.9);

Step 7. Prepare and provide the public with a finding and public explanation of any final decision that the floodplain or wetland is the only practicable alternative (see § 9.12); and

Step 8. Review the implementation and post-implementation phases of the proposed action to ensure that the requirements stated in § 9.11 are fully implemented. Oversight responsibility shall be integrated into existing processes.

§ 9.7 Determination of proposed action’s location.

(a) The purpose of this section is to establish Agency procedures for determining whether any action as proposed is located in or affects (1) the base floodplain (the Agency shall substitute the 500-year floodplain for the base floodplain where the action being proposed involves a critical action), or (2) a wetland.

(b) Information needed. The Agency shall obtain enough information so that it can fulfill the requirements of the Orders to (1) avoid floodplain and wetland locations unless they are the only practicable alternatives; and (2) minimize harm to and within
floodplains and wetlands. In all cases, FEMA shall determine whether the proposed action is located in a floodplain or wetland. In the absence of a finding to the contrary, FEMA may assume that a proposed action involving a facility or structure that has been flooded is in the floodplain. Information about the 100-year and 500-year floods and location of floodways and coastal high hazard areas may also be needed to comply with these regulations, especially §9.11. The following additional flooding characteristics shall be identified by the Regional Administrator as appropriate:

(i) Velocity of floodwater;
(ii) Rate of rise of floodwater;
(iii) Duration of flooding;
(iv) Available warning and evacuation time and routes;
(v) Special problems:
(A) Levees;
(B) Erosion;
(C) Subsidence;
(D) Sink holes;
(E) Ice jams;
(F) Debris load;
(G) Pollutants;
(H) Wave heights;
(I) Groundwater flooding;
(J) Mudflow.

(c) Floodplain determination. (1) In the search for flood hazard information, FEMA shall follow the sequence below:
(i) The Regional Administrator shall consult the FEMA Flood Insurance Rate Map (FIRM) the Flood Boundary Floodway Map (FBFM) and the Flood Insurance Study (FIS).
(ii) If a detailed map (FIRM or FBFM) is not available, the Regional Administrator shall consult an FEMA Flood Hazard Boundary Map (FHBM) . If data on flood elevations, floodways, or coastal high hazard areas are needed, or if the map does not delineate the flood hazard boundaries in the vicinity of the proposed site, the Regional Administrator shall seek the necessary detailed information and assistance from the sources listed below.

SOURCES OF MAPS AND TECHNICAL INFORMATION

Department of Agriculture: Soil Conservation Service
Department of the Army: Corps of Engineers
Department of Commerce: National Oceanic and Atmospheric Administration
Federal Insurance Administration
FEMA Regional Offices: Natural and Technological Hazards Division
Department of the Interior:
Geological Survey
Bureau of Land Management
Bureau of Reclamation
Tennessee Valley Authority
Delaware River Basin Commission
Susquehanna River Basin Commission
States

(iii) If the sources listed do not have or know of the information necessary to comply with the Orders’ requirements, the Regional Administrator shall seek the services of a Federal or other engineer experienced in this type of work.

(2) If a decision involves an area or location within extensive Federal or state holdings or a headwater area, and an FIS, FIRM, FBFM, or FHBM is not available, the Regional Administrator shall seek information from the land administering agency before information and/or assistance is sought from the sources listed in this section. If none of these sources has information or can provide assistance, the services of an experienced Federal or other engineer shall be sought as described above.

(d) Wetland determination. The following sequence shall be followed by the Agency in making the wetland determination.

(1) The Agency shall consult with the U.S. Fish and Wildlife Service (FWS) for information concerning the location, scale and type of wetlands within the area which could be affected by the proposed action.

(2) If the FWS does not have adequate information upon which to base the determination, the Agency shall consult wetland inventories maintained by the Army Corps of Engineers, the Environmental Protection Agency, various states, communities and others.

(3) If state or other sources do not have adequate information upon which to base the determination, the Agency shall carry out an on-site analysis performed by a representative of the FWS or other qualified individual for wetlands characteristics based on the performance definition of what constitutes a wetland.

(4) If an action is in a wetland but not in a floodplain, and the action is
new construction, the provisions of this regulation shall apply. Even if the action is not in a wetland, the Regional Administrator shall determine if the action has the potential to result in indirect impacts on wetlands. If so, all adverse impacts shall be minimized. For actions which are in a wetland and the floodplain, completion of the decision-making process is required. (See § 9.6.) In such a case the wetland will be considered as one of the natural and beneficial values of floodplain.

§ 9.8 Public notice requirements.

(a) Purpose. The purpose of this section is to establish the initial notice procedures to be followed when proposing any action in or affecting floodplains or wetlands.

(b) General. The Agency shall provide adequate information to enable the public to have impact on the decision outcome for all actions having potential to affect, adversely, or be affected by floodplains or wetlands that it proposes. To achieve this objective, the Agency shall:

(1) Provide the public with adequate information and opportunity for review and comment at the earliest possible time and throughout the decision-making process; and upon completion of this process, provide the public with an accounting of its final decisions (see §9.12); and

(2) Rely on its environmental assessment processes, to the extent possible, as vehicles for public notice, involvement and explanation.

(c) Early public notice. The Agency shall provide opportunity for public involvement in the decision-making process through the provision of public notice upon determining that the proposed action can be expected to affect or be affected by floodplains or wetlands. Whenever possible, notice shall precede major project site identification and analysis in order to preclude the foreclosure of options consistent with the Orders.

(1) For an action for which an environmental impact statement is being prepared, the Notice of Intent to File an EIS is adequate to constitute the early public notice, if it includes the information required under paragraph (c)(5) of this section.

(2) For each action having national significance for which notice is being provided, the Agency shall use the FEDERAL REGISTER as the minimum means for notice, and shall provide notice by mail to national organizations reasonably expected to be interested in the action. The additional notices listed in paragraph (c)(4) of this section shall be used in accordance with the determination made under paragraph (c)(3) of this section.

(3) The Agency shall base its determination of appropriate notices, adequate comment periods, and whether to issue cumulative notices (paragraphs (c)(4), (6) and (7) of this section) on factors which include, but are not limited to:

(i) Scale of the action;

(ii) Potential for controversy;

(iii) Degree of public need;

(iv) Number of affected agencies and individuals; and

(v) Its anticipated potential impact.

(4) For each action having primarily local importance for which notice is being provided, notice shall be made in accordance with the criteria under paragraph (c)(3) of this section, and shall entail as appropriate:

(i) [Reserved]

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Information required in the affected State’s public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(x) Holding a public hearing.

(5) The notice shall include: