

(3) Actions where the effects of a project or operation on the human environment are likely to be highly scientifically uncertain, but are perceived to have potential for significant impacts.

8. SCOPING

Scoping may be used for all NEPA documents in order to streamline the NEPA process by identifying significant issues and narrowing the scope of the environmental review process. The FBI may seek agencies with specialized expertise or authority in environmental planning requirements that may be beneficial to FBI mission planning and encourage such agencies to be cooperating agencies (40 CFR 1501.6, 1508.5). In cases where an EIS is prepared in response to a finding of significant impact following preparation of an EA, the EIS scoping process shall incorporate the results of the EA development process.

9. PUBLIC INVOLVEMENT

The FBI may use such means as newspaper announcements, electronic media, and public hearings to disseminate information to potentially interested or affected parties about NEPA actions, as appropriate. When preparing an EIS, and in certain cases an EA, the FBI shall invite comment from affected Federal, tribal, state, and local agencies, and other interested persons in accordance with 40 CFR part 1503.

10. MITIGATION

(a) Mitigation measures, such as those described in 40 CFR 1508.20, may be used to offset environmental impacts associated with implementation of an action. If a FONSI or ROD is based on mitigation measures, all mitigation measures stipulated in the EA or EIS must be implemented as described in the FONSI or ROD.

(b) Mitigation measures, where applicable, must be included as conditions in grants, permits, and relevant contract documents. Funding of actions shall be contingent on performance of mitigation measures, where such measures are identified in a FONSI or ROD. If mitigation is required, a mitigation monitoring plan shall be developed prior to the initiation of the proposed action. To the extent practicable, the FBI shall make available the progress or results of monitoring upon request by the public or cooperating/commenting agencies.

11. PROGRAMMATIC, TIERED, AND SUPPLEMENTAL NEPA DOCUMENTS

(a) Programmatic EAs or EISs may be prepared to cover broad actions, such as programs or plans (*e.g.*, Master Plan EA).

(b) Tiered EAs or EISs may be prepared to cover narrower actions that are a component

to previously prepared Programmatic EAs or EISs as described in 40 CFR 1508.28.

(c) Supplemental EAs or EISs shall be prepared when the FBI makes substantial changes to the proposed action that are relevant to environmental concerns; when there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (*e.g.*, new study has revealed rare, threatened, and endangered species in the project vicinity); or when the FBI determines that the purposes of NEPA will be furthered by doing so.

(1) Supplemental EAs may either be prepared by tracking changes in the original EA or by preparing a separate document that only discusses the changes in the project scope and/or new information and the associated changes with regard to impacts. The process concludes with a decision regarding whether to issue a revised FONSI (using one of the methods listed in section 9 of these procedures) or a decision to prepare an EIS.

(2) Supplemental EISs are prepared in the same way as an EIS. If, however, a supplemental EIS is prepared within one year of filing the ROD for the original EIS, no new scoping process is required. The process concludes with a decision regarding whether to issue a revised ROD.

[84 FR 14013, Apr. 9, 2019]

PART 63—FLOODPLAIN MANAGEMENT AND WETLAND PROTECTION PROCEDURES

Sec.

- 63.1 Purpose.
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AUTHORITY: 5 U.S.C. 301, Executive Order No. 11988 of May 24, 1977, and Executive Order No. 11990 of May 24, 1977.

SOURCE: Order No. 902–80, 45 FR 50565, July 30, 1980, unless otherwise noted.

§ 63.1 Purpose.

These guidelines set forth procedures to be followed by the Department of Justice to implement Executive Order 11988 (Floodplain Management) and Executive Order 11990 (Protection of Wetlands). (The Orders.)

§ 63.2 Policy.

(a) It is the Department of Justice's policy to avoid to the extent possible the long and short term adverse impacts associated with the destruction or modification of wetlands and floodplains and to avoid direct or indirect support of new construction in floodplains and wetlands whenever there is a practicable alternative. The Department will provide leadership and take affirmative action to carry out the Orders.

(b) It is the Department of Justice's intention to integrate these procedures with those required under statutes protecting the environment, such as the National Environmental Policy Act (NEPA). Whenever possible, the procedures detailed herein should be coordinated with other required documents, such as the environmental impact statement (EIS) or environmental assessment required under NEPA, so that unnecessary paperwork can be eliminated.

§ 63.3 References.

(a) Unified National Program for Floodplain Management, Water Resources Council, which is incorporated in these guidelines.

(b) Water Resources Council Floodplain Management Guidelines, Water Resources Council, 1978 (43 FR 6030).

(c) National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 *et seq.*) and NFIP criteria (44 CFR part 59 *et seq.*).

(d) Flood Disaster Protection Act of 1973 (Pub. L. 93-234, 87 Stat. 975).

(e) National Environmental Policy Act of 1969, as amended (43 U.S.C. 4321 *et seq.*) (NEPA).

§ 63.4 Definitions.

Throughout this part, the following basic definitions shall apply:

(a) *Action*—any Federal activity including:

- (1) Acquiring, managing and disposing of Federal lands and facilities;
- (2) Providing federally undertaken, financed, or assisted construction and improvements; and
- (3) Conducting Federal activities and program affecting land use, including but not limited to water and related

land resources planning, regulating, and licensing activities.

(b) *Agency*—an executive department, a government corporation, or an independent establishment and includes the military departments.

(c) *Base flood*—that flood which has a one percent chance of occurrence in any given year (also known as a *100-year flood*). (This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a community in its floodplain management regulations.)

(d) *Base floodplain*—the 100-year floodplain (one percent chance floodplain). Also see definition of floodplain.

(e) *Channel*—a natural or artificial watercourse of perceptible extent, with a definite bed and banks to confine and conduct continuously or periodically flowing water.

(f) *Critical action*—any activity for which even a slight chance of flooding would be too great.

(g) *Facility*—any man-made or man-placed item other than a structure.

(h) *Flood or flooding*—a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the usual and rapid accumulation or runoff of surface waters from any source.

(i) *Flood fringe*—that portion of the floodplain outside of the regulatory floodway (often referred to as "floodway fringe").

(j) *Floodplain*—the lowland and relatively flat areas adjoining inland and coastal waters including floodprone areas of offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year. The base floodplain shall be used to designate the 100-year floodplain (one percent chance floodplain). The critical action floodplain is defined as the 500-year floodplain (0.2 percent chance floodplain).

(k) *Floodproofing*—the modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out or to reduce effects of water entry.

(l) *Minimize*—to reduce to the smallest possible amount or degree.

(m) *One percent chance flood*—the flood having one chance in 100 of being exceeded in any one-year period (a large flood). The likelihood of exceeding this magnitude increases in a time period longer than one year. For example, there are two chances in three of a larger flood exceeding the one percent chance flood in a 100-year period.

(n) *Practicable*—capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors, such as environment, cost or technology.

(o) *Preserve*—to prevent modification to the natural floodplain environment or to maintain it as closely as possible to its natural state.

(p) *Regulatory floodway*—the area regulated by Federal, State or local requirements; the channel of a river or other watercourse and the adjacent land areas that must be reserved in an open manner, i.e., unconfined or unobstructed either horizontally or vertically, to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the NFIP).

(q) *Restore*—to re-establish a setting or environment in which the natural functions of the floodplain can again operate.

(r) *Structures*—walled or roofed buildings, including mobile homes and gas or liquid storage tanks that are primarily above ground (as set by the NFIP).

(s) *Wetlands*—“those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds” (as defined in Executive Order 11990 (Protection of Wetlands)).

§ 63.5 Responsibilities.

(a) The Assistant Attorney General, Land and Natural Resources Division,

(1) Has overall responsibility for ensuring that the Department’s responsibilities for complying with the Orders are carried out,

(2) Will ensure that the Water Resources Council, the Council on Environmental Quality, and the Federal Insurance Agency (FIA) are kept informed of the Department’s execution of the Orders, as necessary, and

(3) Will determine, and revise on a continuing basis, which components of the Department should take further steps, such as the promulgation of program specific procedures, to comply with the Orders. Considerations for making this selection are whether a component:

(i) Acquires, manages, and disposes of federal lands and facilities;

(ii) Provides federally undertaken, financed or assisted construction and improvements;

(iii) Conducts federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities;

(iv) Reviews and approves component procedures for complying with the Orders;

(b) The heads of offices, boards, bureaus and divisions,

(1) Are responsible for preparing program specific guidelines or procedures, where necessary, to comply with the Orders and for updating these procedures, as required,

(2) Will maintain general supervision over any new construction planning within the office, board, bureau, or division to see that the policy considerations and procedural requirements contained herein are followed in the planning process,

(3) Will furnish, with all requests for new authorizations or appropriations for proposals to be located in floodplains or wetlands, a statement that the proposal is in accord with the Orders,

(4) Will provide information to applicants for licenses, permits, loans or grants in areas in which floodplain and wetland requirements may have to be met,

(5) Will provide conspicuous notice of past flood damage and potential flood

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§ 63.6

hazard on structures under the component's control and used by the general public, and

(6) If responsible for granting a lease, an easement, or right-of-way, or for disposing of federal property in a floodplain or wetland to nonfederal public or private parties, will, unless otherwise directed by law.

(i) Reference uses in the conveyance that are restricted under identified Federal, State or local floodplain regulations; and

(ii) Attach other appropriate restrictions; or

(iii) Refuse to convey.

§ 63.6 Procedures.

Prior to taking any action, as defined in § 63.4(a) of this part, an office, board, bureau or division shall:

(a) Determine whether the proposed action is located in a wetland and/or the 100-year floodplain (or the 500-year floodplain for critical actions) and determine whether the proposed action has the potential to affect or be affected by a floodplain or wetland. The determination concerning location in a floodplain or wetland shall be performed in accordance with § 63.7 of this part. For actions which are in both a floodplain and wetland, the wetland should be considered as one of the natural and beneficial values of the floodplain.

(b) Notify the public at the earliest possible time of the intent to carry out the action affecting or affected by a floodplain or wetland, and involve the broadest affected and interested public in the decisionmaking process. At a minimum, all notices shall be published in the newspaper serving the project area that has the widest circulation and shall be distributed through the A-95 review process if subject to that process. In addition, notices of actions shall be published in the FEDERAL REGISTER, if so required by the Assistant Attorney General, Land and Natural Resources Division, or by law. For certain actions, notice may entail other audiences and means of distribution. All actions shall be reviewed according to the following criteria to determine the appropriate audience for and means of notification beyond those required above: Scale of

action, potential for controversy, degree of public need for the action, number of affected persons, and anticipated potential impacts. Each notice shall include the following: A statement of the purpose of and a description of the proposed action, a map of the general area clearly delineating the action's locale and its relationship to its environs, a statement that it has been determined to be located in or that it affects a floodplain or wetland, a statement of intent to avoid the floodplain or wetland where practicable, and to mitigate impacts where avoidance cannot be achieved, and identification of the responsible official for receipt of comments and for further information.

(c) Identify and evaluate practicable alternatives to locating in a floodplain or wetland (including alternative sites outside the floodplain or wetland; alternative actions which serve essentially the same purpose as the proposed action, but which have less potential to adversely affect the floodplain or wetland; and the "no action" option). The following factors shall be analyzed in determining the practicability of alternatives: Natural environment (topography, habitat, hazards, etc.); social concerns (aesthetics, historical and cultural values, land use patterns, etc.); economic aspects (costs of space, construction, services, and relocation); and legal constraints (deeds, leases, etc.). The component shall not locate the proposed action in the base floodplain (500-year floodplain for critical actions) or in a wetland if a practicable alternative exists outside the base floodplain (500-year floodplain for critical actions) or wetland.

(d) Identify the full range of potential direct or indirect adverse impacts associated with the occupancy and modification of floodplains and wetlands and the direct and indirect support of floodplain and wetland development that could result from the proposed action. Flood hazard-related factors shall be analyzed for all actions. These include, for example, the following: Depth, velocity and rate of rise of flood water; duration of flooding, high hazard areas (riverine and coastal); available warning and evacuation time and routes; effects of special problems, e.g., levees and other protection

works, erosion, subsidence, sink holes, ice jams, combinations of flood sources, etc. Natural values-related factors, shall be analyzed for all actions. These include, for example, the following: water resource values (natural moderation of floods, water quality maintenance, and ground water recharge); living resource values (fish and wildlife and biological productivity); cultural resource values (archeological and historic sites, and open space for recreation and green belts); and agricultural, aquacultural and forestry resource values. Factors relevant to a proposed action's effects on the survival and quality of wetlands, shall be analyzed for all actions. These include, for example, the following: Public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards, sediment and erosion; maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

(e) Where avoidance of floodplains or wetlands cannot be achieved, design or modify its actions so as to minimize harm to or within the floodplain, minimize the destruction, loss or degradation of wetlands, restore and preserve natural and beneficial floodplain values, and preserve and enhance natural and beneficial wetland values. The component shall minimize potential harm to lives and property from the 100-year flood (500-year flood for critical actions), minimize potential adverse impacts the action may have on others, and minimize potential adverse impacts the action may have on floodplain and wetland values. Minimization of harm to property shall be performed in accord with the standards and criteria set out at 44 CFR part 59 *et seq.*, (formerly 24 CFR part 1901 *et seq.*), substituting the 500-year standard for critical actions and, where practicable, elevating structures on open works—walls, columns, piers, piles, etc.—rather than on fill. Minimization of harm to lives shall include, but not be lim-

ited to, the provision for warning and evacuation procedures for all projects and shall emphasize adequacy of warning time and access and egress routes.

(f) Re-evaluate the proposed action to determine, first, if it is still practicable in light of its exposure to flood hazards and its potential to disrupt floodplain and wetland values and, second, if alternatives rejected at paragraph (c) of this section are practicable, in light of the information gained in paragraphs (d) and (e) of this section. Unless required by law, the proposed action shall not be located in a floodplain or wetland unless the importance of the floodplain or wetland site clearly outweighs the requirements of E.O. 11988 and E.O. 11990 to avoid direct or indirect support of floodplain and wetland development; reduce the risk of flood loss; minimize the impact of floods on human safety, health and welfare; restore and preserve floodplain values; and minimize the destruction, loss or degradation of wetlands. In addition, where there are no practicable alternative sites and actions, and where the potential adverse effects of using the floodplain or wetland site cannot be minimized, no action shall be taken, unless required by law.

(g) Prepare, and circulate a finding and public explanation of any final decision that there is no practicable alternative to locating an action in, or affecting a floodplain or wetland. The same audience and means of distribution used in paragraph (b) of this section, shall be used to circulate this finding. The finding shall include the following: the reasons why the action is proposed to be located in a floodplain or wetland, a statement indicating whether the action conforms to applicable State or local floodplain management standards, a list of alternatives considered, and a map of the general area clearly delineating the project locale and its relationship to its environs. A brief comment period on the finding shall be provided wherever practicable prior to taking any action.

(h) Review the implementation and post implementation phase of the proposed action to ensure that the provisions of paragraph (e) of this section,

are fully implemented. This responsibility shall be fully integrated into existing review, audit, field oversight and other monitoring processes, and additional procedures shall be prepared where existing procedures may be inadequate to ensure that the Orders' goals are met.

§ 63.7 Determination of location.

(a) In order to determine whether an action is located on or affects a *floodplain*, the component shall:

(1) Consult the FIA Flood Insurance Rate Map (FIRM) and the Flood Insurance Study (FIS); or

(2) If a detailed map (FIRM) is not available, consult an FIA Flood Hazard Boundary Map (FHBM); or

(3) If data on flood elevations, floodways, or coastal high hazard areas are needed, or if none of the maps delineates the flood hazard boundaries in the vicinity of the proposed site, seek detailed information and assistance as necessary and appropriate from the Department of Agriculture's Soil Conservation Service, the Army Corps of Engineers, the National Oceanic and Atmospheric Administration, the Federal Emergency Management Agency's Regional Offices/Division of Insurance and Hazard Mitigation, the Department of the Interior's Geological Survey, Bureau of Land Management, and Bureau of Reclamation, the Tennessee Valley Authority, the Delaware River Basin Commission, the Susquehanna River Basin Commission, individual states and/or land administering agencies; or

(4) If the sources listed above do not have or know of the information necessary to comply with the Orders' requirements, seek, as permitted by law, the services of a federal or other engineer experienced in this work to

(i) Locate the site and the limits of the coastal high hazard area, floodway and of the applicable floodplain, and

(ii) Determine base flood elevations.

(b) In the absence of a finding to the contrary, the component shall assume that action involving a facility or structure that has been flooded in a major disaster or emergency is in the applicable floodplain for the site of the proposed action.

(c) In order to determine whether an action is located on or affects a *wetland*, the component shall:

(1) Consult with the United States 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; or

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

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

§ 63.8 Implementation.

Agencies and divisions within the Department of Justice shall amend existing regulations and procedures, as appropriate, to incorporate the policy and procedures set forth in these guidelines. Such amendments will be made within 6 months of final publication of these guidelines.

§ 63.9 Exception.

Nothing in these guidelines shall apply to assistance provided for emergency work essential to save lives and protect property and public health and safety performed pursuant to sections 305 and 306 of the Disaster Relief Act of 1974 (88 Stat. 148, 42 U.S.C. 5145 and 5146).

PART 64—DESIGNATION OF OFFICERS AND EMPLOYEES OF THE UNITED STATES FOR COVERAGE UNDER SECTION 1114 OF TITLE 18 OF THE U.S. CODE

Sec.

64.1 Purpose.

64.2 Designated officers and employees.

AUTHORITY: 18 U.S.C. 1114, 28 U.S.C. 509, 5 U.S.C. 301.