

*Regulatory Floodway* means the area regulated by federal, State or local requirements 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 National Flood Insurance Program).

*Restore* means to reestablish a setting or environment in which the natural functions of the floodplain can again operate.

*SLPS* means the State and Local Programs and Support Directorate.

*Structures* means walled or roofed buildings, including mobile homes and gas or liquid storage tanks.

*Substantial Improvement* means any repair, reconstruction or other improvement of a structure or facility, which has been damaged in excess of, or the cost of which equals or exceeds, 50% of the market value of the structure or replacement cost of the facility (including all "public facilities" as defined in the Disaster Relief Act of 1974) (a) before the repair or improvement is started, or (b) if the structure or facility has been damaged and is proposed to be restored, before the damage occurred. If a facility is an essential link in a larger system, the percentage of damage will be based on the relative cost of repairing the damaged facility to the replacement cost of the portion of the system which is operationally dependent on the facility. The term "substantial improvement" does not include any alteration of a structure or facility listed on the National Register of Historic Places or a State Inventory of Historic Places.

*Support* means to encourage, allow, serve or otherwise facilitate floodplain or wetland development. Direct support results from actions within a floodplain or wetland, and indirect support results from actions outside of floodplains or wetlands.

*Wetlands* means those areas which are inundated or saturated by surface or ground water with a frequency sufficient to support, or that under normal hydrologic conditions does or would support, a prevalence of vegetation or aquatic life typically adapted for life in saturated or seasonally saturated soil conditions. Examples of wetlands include, but are not limited to, swamps,

fresh and salt water marshes, estuaries, bogs, beaches, wet meadows, sloughs, potholes, mud flats, river overflows and other similar areas. This definition includes those wetlands areas separated from their natural supply of water as a result of activities such as the construction of structural flood protection methods or solid-fill road beds and activities such as mineral extraction and navigation improvements. This definition is intended to be consistent with the definition utilized by the U.S. Fish and Wildlife Service in the publication entitled *Classification of Wetlands and Deep Water Habitats of the United States* (Cowardin, et al., 1977).

[45 FR 59526, Sept. 9, 1980, as amended at 47 FR 13149, Mar. 29, 1982; 50 FR 40006, Oct. 1, 1985]

#### § 9.5 Scope.

(a) *Applicability.* (1) These regulations apply to all Agency actions which have the potential to affect floodplains or wetlands or their occupants, or which are subject to potential harm by location in floodplains or wetlands.

(2) The basic test of the potential of an action to affect floodplains or wetlands is the action's potential (both by itself and when viewed cumulatively with other proposed actions) to result in the long- or short-term adverse impacts associated with:

(i) The occupancy or modification of floodplains, and the direct and indirect support of floodplain development; or

(ii) The destruction or modification of wetlands and the direct or indirect support of new construction in wetlands.

(3) This regulation applies to actions that were, on the effective date of the Orders (May 24, 1977), ongoing, in the planning and/or development stages, or undergoing implementation, and are incomplete as of the effective date of these regulations. The regulation also applies to proposed (new) actions. The Agency shall:

(i) Determine the applicable provisions of the Orders by analyzing whether the action in question has progressed beyond critical stages in the floodplain management and wetlands protection decision-making process, as

set out below in § 9.6. This determination need only be made at the time that followup actions are being taken to complete or implement the action in question; and

(ii) Apply the provisions of the Orders and of this regulation to all such actions to the fullest extent practicable.

(b) *Limited exemption of ongoing actions involving wetlands located outside the floodplains.* (1) Executive Order 11990, Protection of Wetlands, contains a limited exemption not found in Executive Order 11988, Floodplain Management. Therefore, this exemption applies only to actions affecting wetlands which are located outside the floodplains, and which have no potential to result in harm to or within floodplains or to support floodplain development.

(2) The following proposed actions that impact wetlands located outside of floodplains are exempt from this regulation:

(i) Agency-assisted or permitted projects which were under construction before May 24, 1977; and

(ii) Projects for which the Agency has proposed a draft of a final environmental impact statement (EIS) which adequately analyzes the action and which was filed before October 1, 1977. Proposed actions that impact wetlands outside of floodplains are not exempt if the EIS:

(A) Only generally covers the proposed action;

(B) Is devoted largely to related activities; or

(C) Treats the project area or program without an adequate and specific analysis of the floodplain and wetland implications of the proposed action.

(c) *Decision-making involving certain categories of actions.* The provisions set forth in this regulation are *not applicable* to the actions enumerated below except that the Regional Directors shall comply with the spirit of the Order to the extent practicable. For any action which is excluded from the actions enumerated below, the full 8-step process applies (see § 9.6) (except as indicated at paragraphs (d), (f) and (g) of this section regarding other categories of partial or total exclusions). The provisions of these regulations do not apply to the

following (all references are to the Disaster Relief Act of 1974, Pub. L. 93-288, as amended, except as noted):

(1) Assistance provided for emergency work essential to save lives and protect property and public health and safety performed pursuant to sections 305 and 306;

(2) Emergency Support Teams (section 304);

(3) Unemployment Assistance (section 407);

(4) Emergency Communications (section 415);

(5) Emergency Public Transportation (section 416);

(6) Fire Management Assistance (Section 420);

(7) Community Disaster Loans (section 414), except to the extent that the proceeds of the loan will be used for repair of facilities or structures or for construction of additional facilities or structures;

(8) The following Individual and Family Grant Program (section 408) actions:

(i) Housing needs or expenses, except for restoring, repairing or building private bridges, purchase of mobile homes and provision of structures as minimum protective measures;

(ii) Personal property needs or expenses;

(iii) Transportation expenses;

(iv) Medical/dental expenses;

(v) Funeral expenses;

(vi) Limited home repairs;

(vii) Flood insurance premium;

(viii) Cost estimates;

(ix) Food expenses; and

(x) Temporary rental accommodations.

(9) Mortgage and rental assistance under section 404(b);

(10) Use of existing resources in the temporary housing assistance program [section 404(a)], except that Step 1 (§ 9.7) shall be carried out;

(11) Minimal home repairs [section 404(c)];

(12) Debris removal (section 403), except those grants involving non-emergency disposal of debris within a floodplain or wetland;

(13) Repairs or replacements under section 402, of less than \$5,000 to damaged structures or facilities.

(14) Placement of families in existing resources and Temporary Relocation Assistance provided to those families so placed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Public Law 96-510.

(d) For each action enumerated below, the Regional Director *shall apply steps 1, 2, 4, 5 and 8* of the decision-making process (§§9.7, 9.8, 9.10 and 9.11, see §9.6). Steps 3 and 6 (§9.9) shall be carried out except that alternative sites outside the floodplain or wetland need not be considered. After assessing impacts of the proposed action on the floodplain or wetlands and of the site on the proposed action, alternative actions to the proposed action, if any, and the “no action” alternative shall be considered. The Regional Director may also require certain other portions of the decision-making process to be carried out for individual actions as is deemed necessary. For any action which is excluded from the actions listed below. (except as indicated in paragraphs (c), (f) and (g) of this section regarding other categories of partial or total exclusion), the full 8-step process applies (see §9.6). The references are to the Disaster Relief Act of 1974, Public Law 93-288, as amended.

(1) Actions performed under the Individual and Family Grant Program (section 408) for restoring or repairing a private bridge, except where two or more individuals or families are authorized to pool their grants for this purpose.

(2) Small project grants (section 419), except to the extent that Federal funding involved is used for construction of new facilities or structures.

(3) Replacement of building contents, materials and equipment. (sections 402 and 419).

(4) Repairs under section 402 to damaged facilities or structures, except any such action for which one or more of the following is applicable:

(i) FEMA estimated cost of repairs is more than 50% of the estimated reconstruction cost of the entire facility or structure, or is more than \$100,000, or

(ii) The action is located in a floodway or coastal high hazard area, or

(iii) The facility or structure is one which has previously sustained structural damage from flooding due to a major disaster or emergency or on which a flood insurance claim has been paid, or

(iv) The action is a critical action.

(e) *Other categories of actions.* Based upon the completion of the 8-step decision-making process (§9.6), the Director may find that a specific category of actions either offers no potential for carrying out the purposes of the Orders and shall be treated as those actions listed in §9.5(c), or has no practicable alternative sites and shall be treated as those actions listed in §9.5(d), or has no practicable alternative actions or sites and shall be treated as those actions listed in §9.5(g). This finding will be made in consultation with the Federal Insurance Administration and the Council on Environmental Quality as provided in section 2(d) of E.O. 11988. Public notice of each of these determinations shall include publication in the FEDERAL REGISTER and a 30-day comment period.

(f) *The National Flood Insurance Program (NFIP).* (1) Most of what is done by FIA or SLPS, in administering the National Flood Insurance Program is performed on a program-wide basis. For all regulations, procedures or other issuances making or amending program policy, FIA or SLPS, shall apply the 8-step decision-making process to that program-wide action. The action to which the 8-step process must be applied is the establishment of programmatic standards or criteria, not the application of programmatic standards or criteria to specific situations. Thus, for example, FIA or SLPS, would apply the 8-step process to a programmatic determination of categories of structures to be insured, but not to whether to insure each individual structure. The two prime examples of where FIA or SLPS, does take site specific actions which would require individual application of the 8-step process are property acquisition under section 1362 of the National Flood Insurance Act of 1968, as amended, and the issuance of an exception to a community under 44 CFR 60.6(b). (See also §9.9(e)(6) and §9.11(e).)

(2) The provisions set forth in this regulation are not applicable to the actions enumerated below except that the Federal Insurance Administrator or the Associate Director, SLPS, as appropriate shall comply with the spirit of the Orders to the extent practicable:

(i) The issuance of individual flood insurance policies and policy interpretations;

(ii) The adjustment of claims made under the Standard Flood Insurance Policy;

(iii) The hiring of independent contractors to assist in the implementation of the National Flood Insurance Program;

(iv) The issuance of individual flood insurance maps, Map Information Facility map determinations, and map amendments; and

(v) The conferring of eligibility for emergency or regular program (NFIP) benefits upon communities.

(g) For the action listed below, the Regional Director *shall apply steps 1, 4, 5 and 8* of the decision-making process (§§ 9.7, 9.10 and 9.11). For any action which is excluded from the actions listed below, (except as indicated in paragraphs (c), (d) and (f) of this section regarding other categories of partial or total exclusion), the full 8-step process applies (See § 9.6). The Regional Director may also require certain other portions of the decision-making process to be carried out for individual actions as is deemed necessary. The references are to the Disaster Relief Act of 1974, Public Law 93-288. The above requirements apply to repairs, under section 402, between \$5,000 and \$25,000 to damaged structures of facilities except for:

(1) Actions in a floodway or coastal high hazard area; or

(2) New or substantially improved structures or facilities; or

(3) Facilities or structures which have previously sustained structural damage from flooding due to a major disaster or emergency.

[45 FR 59526, Sept. 9, 1980, as amended at 47 FR 13149, Mar. 29, 1982; 49 FR 35583, Sept. 10, 1984; 50 FR 40006, Oct. 1, 1985; 51 FR 39531, Oct. 29, 1986; 66 FR 57347, Nov. 14, 2001]

#### **§ 9.6 Decision-making process.**

(a) *Purpose.* The purpose of this section is to set out the floodplain man-

agement 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