

## Department of Justice

## § 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.