



Federal Emergency Management Agency

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Re: Comments on the Nationwide Permit Program and Other Corps §404 Permit Programs

This document responds to the District's notice regarding regional conditions the District proposes to put on nationwide permits in Florida. However, it covers more than the proposed regional conditions. It covers all aspects of the nationwide permit program as the U.S. Army Corps of Engineers (Corps) proposes to implement in Florida. In addition, this is a blanket comment covering each and every §404 dredge and fill permit being issued or proposed to be issued by the Jacksonville District.

Commenting on each permit individually, or commenting in one place on the Nationwide Permit Program and in another place on general and individual permits would be redundant. FEMA's response concerning Corps permits is limited to Presidential Executive Order (EO) 11988. The issues that arise from EO 11988 are few and apply broadly, regardless of which type of permit may be proposed. Consequently, this blanket comment covers all of the issues and all proposed §404 permits in this one document.

We only wish to comment on projects that are within or may directly or indirectly affect floodplains as defined in EO 11988. Generally, this is the "100-year" floodplain, and in the case of "critical facilities," the "500-year" floodplain.

We are aware that in some cases, it is Corps policy to consider floodplains to exist only if they are depicted on FEMA maps. This appears to be contrary to Section 2(a)(1) of EO 11988, which states, "each agency shall determine whether the proposed action will occur in a floodplain ... according to a [FEMA] floodplain map or more detailed map of an area, if available. If such maps are not available, the agency shall make a determination of the location of the floodplain based on the best available information." EO 11988 is clear: the Corps must determine whether each applicant proposes to do work in the floodplain and it must base its determination on the best information available regardless of whether or not area floodplains have been mapped by FEMA.

We note that the Corps defines *waters of the United States* in terms of the *ordinary high water mark* where one exists. By definition, the 100-year flood elevation is the same as the 100-year high water mark. Clearly, the 100-year high water mark cannot be less than the ordinary high water mark. Consequently, whenever the Corps has §404 jurisdiction, an argument can be made that EO 11988 applies to the proposed work. However, in areas where flood studies have been

performed, waters of the United States may be mapped as outside the 100-year floodplain because the depth of flooding is calculated to be trivial. In such cases, we grant that EO 11988 may not apply. However, when no flood study has been done in an area, it is apparent that the best evidence for the 100-year floodplain includes, to a first approximation, all waters of the United States. In addition, the floodplain includes any adjacent areas regarding which evidence is available suggesting that the risk of flooding in any given year is 0.01 (1%) or more.

Section 2(a)(2) of EO 11988 allows an agency to permit activities in a floodplain only if there is no practicable alternative to locating in the floodplain. FEMA accepts that there is no practicable alternative in the case of functionally dependent uses such as roads and utility lines not parallel to the water body. Whenever a project must be located in the floodplain because there is no practicable alternative, section 2(a)(2) requires that the project be designed to minimize potential harm.

We understand *designed to minimize potential harm* to mean compliant with the following:

1. All new construction and substantial improvements-
 - (i) are designed (or modified) and adequately anchored to prevent flotation, collapse, or lateral movement of involved structures resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy,
 - (ii) are constructed with materials resistant to flood damage,
 - (iii) are constructed by methods and practices that minimize flood damages, and
 - (iv) are constructed with electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities that are designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding.
2. All utility lines are designed to minimize or eliminate infiltration of floodwaters into the utility line.
3. All utility lines that cross a watercourse do so in a manner that maintains the flood carrying capacity of the watercourse.
4. All construction that is to occur within the boundaries of a city or county that participates in the National Flood Insurance Program (NFIP) complies with any applicable ordinance promulgated locally to implement NFIP guidelines.

All projects that must be located in the floodplain should meet these criteria. EO 11988 appears to forbid issuance of a permit for any project in a floodplain that does not meet these criteria.

Residential, commercial, institutional, and recreational developments are seldom functionally dependent. There are usually one or more practicable alternative locations for such projects. If there is a critical need for the proposed development and the entire area is within the floodplain, we grant that there is no practicable alternative. Also, if the proposed construction consists of adding a functionally dependent unit (e.g., a dock) to a residential, commercial, institutional or recreational development, we grant that there is no practicable alternative. However, in all other cases, residential, commercial, institutional and recreational developments should not be granted a §404 permit. The main purpose of EO 11988 is to minimize floodplain development to the extent possible. The fact that a project is not functionally dependent is *prima facie* evidence that there are alternative places it could be located, and hence, it should not be located in a floodplain.

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Accepting anything less than clear proof for the lack of alternative locations is inconsistent with EO 11988.

Section 1 of EO 11988 requires the Corps to "provide leadership and ... take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains." In its *Proposal to Reissue and Modify Nationwide Permits* (66 FR 42070 at 42081, August 9, 2001), the Corps states that it believes "the NWP Program, with its ... expanded requirements that all projects in the floodplain comply with FEMA approved management requirements, fully complies with Executive Order 11988." FEMA's management requirements all flow from the National Flood Insurance Program, and because of this, they are designed to minimize flood risks for developments in the floodplain. They do not address whether the development should be located in the floodplain in the first place. Consequently, they cannot insure compliance with EO 11988, fully or otherwise. Hence, more is required of the Corps to "provide leadership and ... take action." Until it addresses alternative locations outside the floodplain, the Corps permitting program will continue to fall short of EO 11988 requirements.

In summary, the current Corps permitting programs appear to be inconsistent with EO 11988 for the following reasons: The Corps appears to make no effort to determine whether proposed projects are located in the floodplain. The Corps assumes that floodplains do not exist if they have not been mapped by FEMA. The Corps fails to consider whether practicable alternatives exist to locating in the floodplain and, for projects that will be located in the floodplain, fails to consider whether the project design minimizes flood risks. These assumptions and failures are inconsistent with the express language of EO 11988. We hope that the Jacksonville District will make appropriate adjustments to bring its permitting program into full compliance with EO 11988.

If you have any questions or comments on these issues, or if we can be of assistance with these and related matters, please feel free to call Brett Bowen (770-220-5387) of my staff.

Sincerely,

William R. Straw
Regional Environmental Officer

CB/ws

cc: Brett Bowen