U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-7000

OFFICE OF COMMUNITY PLANNING
AND DEVELOPMENT

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MEMORANDUM FOR: Regional Environmental Officers
Field Environmental Officers

FROM: Danielle Schopp, Director, Office of Environment and Energy, DGE

SUBJECT: Floodplain Management and Protection of Wetlands Rulemaking

I. Background

HUD recently finalized a rule that changes HUD regulations of floodplains and wetlands at 24 CFR part 55. Federal departments and agencies are charged by executive orders with incorporating floodplain management and wetland protection considerations in their respective planning, regulatory, and decision making processes. This document offers guidance and explanations for the changes to HUD policy and regulations.

II. Executive Orders

The floodplain regulations are derived from Executive Order 11988 (E.O. 11988) entitled "Floodplain Management," dated May 24, 1977 (42 FR 26951). HUD implements E.O. 11988 through regulations at 24 CFR part 55. The final rule that was published in the Federal Register on November 15, 2013 updated the floodplain regulations and added a process for wetlands. The rule is available at: (https://federalregister.gov/a/2013-27427).

E.O. 11988 requires each federal agency to identify and evaluate practicable alternatives to locating in the floodplain. If it is not practicable to avoid the floodplain, then each federal agency must identify and evaluate the potential effects of any actions it may take in or affecting a floodplain. The goals of E.O. 11988 are: to avoid adversely impacting the natural functions of floodplains wherever possible; to ensure that the agency's planning programs and budget requests reflect consideration of flood hazards and floodplain management, including the restoration and

preservation of such land areas as natural undeveloped floodplains; and to prescribe procedures to implement the policies and procedures of this Executive Order.

A second executive order, Executive Order 11990 (E.O. 11990), entitled "Protection of Wetlands," dated May 24, 1977, (42 FR 26961) directs each agency to provide leadership and take action to minimize the destruction, loss, or degradation of wetlands. E.O. 11990 also directs each agency to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for: (1) acquiring, managing, and disposing of federal lands and facilities; (2) providing federally undertaken, financed, or assisted construction or improvements; and (3) conducting federal activities and programs affecting land use.

Although HUD had regulations on floodplain management at 24 CFR part 55, these regulations did not codify procedures for implementing E.O. 11990. Consistent with the intent of the executive orders HUD had relied on existing procedures established for floodplain management under 24 CFR part 55 to guide wetland protection considerations in planning, regulatory, and decision - making processes. This rule codifies in 24 CFR part 55 the procedures applicable to wetlands and authorized by E.O. 11990.

III. Regulatory Changes

A. Prohibition on Construction of New Structures and Facilities in Coastal High Hazard Areas (V Zones) (55.1(c))

The rule prohibits HUD funding or FHA mortgage insurance for the construction of new development in Coastal High Hazard Areas. This change would not affect existing structures. Existing structures would be eligible to receive funding, and disaster assistance would continue to be available for reconstruction of structures destroyed by a disaster. FHA mortgage insurance would continue to be available as long as the mortgage insurance does not finance new construction.

In V Zones, HUD now prohibits new construction of structures and infrastructure. Structures are defined by FEMA regulations at 44 CFR 9.4 to mean walled or roofed buildings, including mobile homes and gas or liquid storage tanks. Infrastructure is development that is not structures. Infrastructure includes roads, bridges, and utility lines. This change will prevent new development in Coastal High Hazard Areas, which will result in less development in areas of higher risk to lives and property. However, HUD receives few requests to fund new construction or provide FHA mortgage insurance for new construction in Coastal High Hazard Areas. The change will also further align HUD's development standards with those of FEMA grant programs.

Section 55.11(c) is also revised to make a corresponding change to a table describing the type of proposed actions allowed in various locations.

B. Use of Preliminary Flood Maps and Advisory Base Flood Elevations (55.2(b)(1))

The rule updates a provision in HUD's regulations to require the use of FEMA preliminary flood maps and advisory base flood elevations, where available. Prior to this rulemaking, HUD's regulations at 24 CFR 55.2(b)(1) indicated that effective Flood Insurance Rate Maps (FIRMs) are the only source of data for compliance with the 8 Step Process. In the wake of Hurricane Katrina and Hurricane Sandy, FEMA determined that the existing FIRMs may not reflect actual flood risk and issued Advisory Base Flood Elevations and Preliminary FIRMs. This change in map usage requirements will bring HUD's regulations into alignment with the intent of E.O. 11988 that agencies are to use the "best available information." In addition, this change will provide greater consistency with floodplain management activities across HUD and FEMA programs.

The rule clarifies that, when available, the latest interim FEMA information, such as an Advisory Base Flood Elevation or preliminary map or study, is the best available information for

the designation of flood hazard areas or equivalents. Unless the latest information has a lower Base Flood Elevation (BFE) than the effective FIRM, the latest FEMA information is then used for Part 55 purposes and throughout the decision making process. In instances where the latest information has a lower BFE than the effective FIRM, the higher BFE must be used to comply with the regulation and the National Flood Insurance Program requirements. If FEMA information is unavailable or insufficiently detailed, other Federal, state, or local data may be used as "best available information."

C. Broadened use of the 5 Step Process for selected actions (55.12(a))

The rule broadens the use of the 5 Step Process for repairs, rehabilitations, and improvements. The 5 Step Process is an abbreviated 8 Step Process that omits Steps 2, 3, and 7. Steps 2, 3, and 7 require the publication of two notices and the consideration of alternatives to locating the project in the floodplain. The 5 Step Process was used for a variety of activities specified in 24 CFR 55.12(a), such as disposition of HUD-owned properties and mortgage insurance for the purchase, refinancing, or rehabilitation of existing multifamily structures subject to certain additional conditions.

An 8 Step Process was required for financial assistance, other than mortgage insurance, for rehabilitation of nonresidential or residential structures with more than four housing units located in floodplains. Rehabilitations now subject to the 5 Step Process are any repair, weatherization, reconstruction, modernization, or improvement of a structure that is not a substantial improvement, does not significantly increase the footprint in a floodplain or wetland, does not result in a 20 percent increase in the number of dwelling units or in the average peak number of customers and employees, and does not convert a nonresidential to a residential land use.

The rule allows rehabilitations of residential properties and nonresidential properties,

including weatherization, to forego Steps 2, 3, and 7 of the 8 Step Process. As outlined above, Steps 2, 3, and 7 are the consideration of alternatives at Step 3 and the publication of the preliminary and final notice at Steps 2 and 7, respectively. This change will streamline project approvals and allow more resources to be devoted toward the analyses of projects with greater potential impacts on floodplains and wetlands.

D. Activities excepted from the 8 Step Process (55.12(c))

The rule exempts certain activities from the 8 Step Process for floodplain management compliance. Exempted activities include leasing structures insured with the National Flood Insurance Program (NFIP) and not located in a floodway or Coastal High Hazard Area. The exemption for leased structures also requires that: (1) the leased structure is an existing structure; and (2) the structure is insured for its total value or up to the NFIP maximum as of the commencement of the lease term. Critical actions (e.g., hospitals, nursing homes, and emergency services) in a 100- or 500-year floodplain are not covered by this exemption.

Other exempt activities include special projects to increase access for those with special needs, activities involving ships or water-borne vessels, and activities that restore and preserve natural and beneficial functions of floodplains and wetlands. The exception for access for those with special needs includes wheelchair ramps, lifts, and elevators designed for access. While the 8 Step process is not required for these activities to enhance access for those with special needs, the requirement to obtain flood insurance for the project cost applies to the activity.

Activities that are designed for floodplain restoration must: clear all structures and improvements from the site; dedicate the site's use to flood control, wetland protection, park land or open space; and place a permanent covenant or comparable restriction on the site to preserve the floodplain or wetland from future development. These changes will reduce unnecessary delays.

E. Codification of Wetland Policy and Expanded Floodplain Guidance (24 CFR 55.20)

1. *Codification of Wetlands Policy*

This rule codifies procedures authorized by E.O. 11990. Through this rule, HUD adopts in regulation the procedures of E.O. 11990. These procedures will aid in the consistent application of policy and increase compliance by making the policy readily available.

The wetlands definition from E.O. 11990 has been added at 24 CFR 55.2(b)(11). In addition to incorporating the E.O. 11990 definition, the 24 CFR part 55 definition clarifies that the term includes constructed or man-made wetlands and wetlands that have been separated from a natural water supply by construction actions. The definition also explicitly states that wetlands subject to Section 404 of the Clean Water Act (CWA), as well as those wetlands that are not subject to Section 404 of the CWA, are subject to E.O. 11990 and 24 CFR part 55.

The definition also outlines a process for evaluating wetlands resources and the use of Fish and Wildlife Service- National Wetlands Inventory (NWI) staff. The rule states that NWI maps are the primary source of data, but NWI staff, if available, should be consulted for delineations of the wetland or if the maps are thought to be inaccurate. If NWI staff is unavailable, a wetland professional may be consulted. HUD also encourages the use of secondary sources such as Natural Resource Conservation Service's National Soil Surveys and any state and local information concerning wetlands that may be impacted by site activities.

If wetlands are found to be subject to E.O. 11990, the rule requires the completion of an eight-step process, referred to below as the "8 Step Process." The 8 Step Process is administered by HUD or responsible entities under 24 CFR part 58. Step 1 requires a determination of whether or not the proposed project to be developed with HUD financial assistance will be in a wetland. If so, Step 2 requires that a public notice be issued to inform interested parties that a proposal to consider

an action in a wetland has been made. Following this notice, Step 3 requires the identification and evaluation of practicable alternatives to avoid locating the project in a wetland. Such an evaluation of alternatives shall include, for example, alternative locations outside the wetland, feasible technological alternatives, and social values such as aesthetics, historic and cultural values, and land use patterns. Step 4 requires the identification and evaluation of the potential direct and indirect impacts associated with the occupancy or modification of wetlands. Step 4 also requires the identification of the potential direct and indirect support of wetlands development that could result from the proposed action. Relevant factors include the proposal's effect on the survival and quality of the wetland and other factors listed in the regulation. Direct support consists of projects located in the wetland such as housing, public service structures, or office buildings that require additional investment such as food service or parking. Indirect support for wetland development can be caused by infrastructure that can induce further development due to proximity to the wetland. Examples of indirect support include water and waste water systems, power supplies, roads, airports, and mass transit systems. Step 5 requires an analysis of practicable modifications and changes to the proposal to minimize adverse impacts to the wetlands and to the project as a result of its proposed location in wetlands. Under Step 6, the alternatives and the proposed wetland site are then reevaluated. If it is determined that there is no practicable alternative to the proposed wetland development, Step 7 requires a second notice to be issued to the public stating that the decision has been made and providing details associated with the decision. After this second notice, Step 8 implements the action, including any mitigating measures that were established during the decision making process. This evaluation process requires the same eight steps as E.O. 11988, Floodplain Management.

The rule recommends appropriate and practicable compensatory mitigation for adverse

impacts to more than one acre of wetlands. Compensatory mitigation resulting from other federal, state, or local governmental requirements can be used to fulfill this requirement. Compensatory mitigation approaches include permittee-responsible mitigation, mitigation banking, in-lieu fee mitigation, the use of preservation easements or protective covenants, and any form promoted and approved by the authority of the state governments or the Federal government. In certain situations, compensatory mitigation may not be practicable or appropriate due to the cost of compensatory mitigation in a state or watershed, a lack of funds within the project, or other reasons that make compensatory mitigation impossible. One example would be an Alaska Native village that is mainly in a wetland and is surrounded by federal and state land. The cost in this situation could make compensatory mitigation inappropriate or impracticable.

2. *Expanded Floodplain Guidance*

The rule expands upon guidance in the existing floodplain regulation. The new guidance results in additional factors that should be considered when identifying site and project alternatives at Step 3, evaluating impacts at Step 4, minimizing impacts at Step 5, and reevaluating alternatives at Step 6. These additions include concepts from various resources and better inform reviewers on what factors to consider when conducting these steps.

F. Adoption of executive order reviews performed by HUD or another responsible entity (55.26)

The rule amends 24 CFR 55.26 to make clear that under the executive orders, HUD or a responsible entity may adopt previous review processes that were performed by another responsible entity or HUD. This change will prevent duplicative processing in cases where a project may have multiple recipients contributing funding or has funding that may not allow the responsible entity to perform the review. Nothing in the rule or part is binding or applicable to the USACE or USACE

processes. USACE has its own regulations, policies, and procedures, which are not impacted by this part.

G. Use of Individual 404 Permits for Wetlands (24 CFR 55.28)

This rule allows HUD and HUD's recipients of assistance to use individual permits issued under section 404 of the Clean Water Act (33 U.S.C. 1344) (Section 404) in lieu of performing the first five steps of the 8 Step Process. This streamlined option will reduce costs and the processing time for complying with parts of the 8 Step Process for which the adhering to the standard process affords minimal substantive benefit. The Clean Water Act establishes the basic structure for regulating discharges of pollutants into the waters of the United States and regulating water quality standards for surface waters. Section 404 of the Clean Water Act requires a applicant to obtain a permit from the U.S. Army Corps of Engineers (USACE) prior to beginning any nonexempt activity involving the placement of dredged or fill material in waters of the United States, including wetlands.

If the applicant has obtained an individual USACE Section 404 permit and submits the individual permit with its application for a HUD program, then HUD or the responsible entity will be required to complete only the last three steps of the 8 Step Process, and thus will be able to avoid § 55.20(a) through (e). The last three steps include the publication of a single public notice and thereby avoid the requirement under the usual 8 Step Process for the publication of two notices. If HUD or the responsible entity determines that a reevaluation or repeat of any of the steps is necessary to comply with E.O. 11990, HUD or the responsible entity will reevaluate and complete the necessary steps of the 8 Step Process. None of the 8 steps or any provisions of this rule should be interpreted as being requirements of the USACE's regulatory program. USACE has its own regulations, policies, and procedures, none of which are impacted by this rulemaking.

The issuance of an individual Section 404 permit may not substitute for processing under the 8 Step Process and compliance with E.O. 11988 where the property is also located in a floodplain. Section 404 of the Clean Water Act also allows states to administer an individual and general permit program in lieu of the USACE permit program. Individual Section 404 permits issued by state agencies may be used in lieu of the first five steps of the E.O. 11990 process under this regulation. General or Nationwide permits issued under Section 404 may not be used under this provision, and new construction in the wetland subject to these permits must undergo full processing under 24 CFR 55.20 unless excepted under 55.12.

All wetlands subject to Section 404 of the Clean Water Act are wetlands for the purposes of E.O. 11990. However, the combined process in this rule will not apply in all instances, because wetlands not considered waters of the United States under Section 404 of the Clean Water Act are typically wetlands for the purposes of E.O. 11990. Isolated or non-jurisdictional wetlands not subject to Section 404 of the Clean Water Act must be processed under the 8 Step Process.

H. Modifying the Categorical Exclusion for Minor Rehabilitations of Single Family Homes (58.35)

Finally, the rule amends 24 CFR 58.35(a)(3)(i) by modifying the categorical exclusion from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321) for minor rehabilitation of one- to four-unit residential properties, by removing the qualification that the footprint of the structure may not be increased in a floodplain or wetland. Prior to this rulemaking, four units could be constructed in a floodplain or wetland as an individual action under the categorical exclusion in § 58.35(a)(4)(i), but rehabilitated structures with an increased footprint in a floodplain or wetland required a full environmental assessment. It is logically inconsistent to require a greater review for minor rehabilitations than for new construction. The rule resolves this

inconsistency but will still require part 55 processing for construction in floodplains and wetlands unless excluded under § 55.12(b) or (c). HUD believes that this change will eliminate needless assessments without contributing to environmental degradation. HUD is basing its conclusion on a recent survey of its environmental experts.

IV. Contact Information

For further information, contact Jerimiah Sanders, Environmental Review Division, Office of Environment and Energy, Office of Community Planning and Development, at 202-402-4571 or via email at Jerimiah.J.Sanders@hud.gov.