



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

May 30, 2023

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Submitted via www.regulations.gov

Re: Proposed Rule: 24 CFR Parts 50, 55, 58, and 200 Floodplain Management and Protection of Wetlands; Minimum Property Standards for Flood Hazard Exposure; Building to the Federal Flood Risk Management Standard [Docket No. FR–6272–P–01]

Dear Director Fontenot:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the above referenced proposed rule.

NAWM (formerly The Association of State Wetland Managers) is a national 501(c)(3) professional organization established in 1983, with a mission to build capacity for state and tribal members and foster collaboration among the wetland community of practice by encouraging the application of sound science to wetland management and policy, promoting the protection and restoration of wetlands and related aquatic resources, and providing training and education for members and the general public.

NAWM wishes to affirm that HUD’s regulations governing floodplain management and the protection of wetlands to implement the Federal Flood Risk Management Standard (FFRMS), in accordance with the Executive order, “Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input” (E.O.s 11988 and 13690) is an important regulatory action to protect communities and improve resiliency in response to the effects of climatic changes. The proposed rule also establishes a process for determining flood elevations based on current hydrologic information, identifying critical infrastructure, and providing flexibility to preserve floodways and natural infrastructure.

An important component of the rule is to reduce the risks posed by climate-influenced hazards on underserved communities, increase the resiliency of these communities, protect and promote natural infrastructure as a means to mitigate effects of flooding, inform communities on the risks posed by flooding, and to provide information critical to responding to flooding events.

NAWM supports the expansion of the regulatory identification of the floodway elevation, both horizontally and laterally, for federally funded and insured projects, especially in consideration of the potentially significant impacts from flooding to underserved communities and the significant cost in loss of life and damages as a result of these events. It is, however, important to recognize that these events are evolving and not static in nature. To that end, NAWM supports the use of current conditions and projected future condition models, rather than historic conditions, to inform the analysis for determining floodway elevations.

As noted in the introduction to the proposed rule, there have been over 1,100 direct flood-related fatalities in the past decade and damage costs exceeding \$2.195 trillion dollars since 1980. Since the severity, frequency, and intensity of climate influenced flooding events is increasing, it is imperative that HUD and other federal programs recognize the need to address this issue expediently to not only protect communities, but also to protect and enhance the natural infrastructure which helps to provide resiliency during these flooding events and minimize damages. As the loss of wetlands continues, particularly in our coastal and urban communities, the impacts from storm surge and flooding have increased. This, combined with the historic practice of constructing in flood zones, has placed more and more communities at risk. To minimize flood damage to public and private property and the loss of life, it has become clear that we must not only cease development in flood ways but also protect, enhance, and re-establish our natural infrastructure that has been lost.

The re-establishment of riparian areas and wetlands is a key step in the replacement of natural functioning systems, which have been lost, thereby impacting our inland and coastal waterways' ability to buffer themselves from storm events and flooding. These systems provide for channel stabilization, minimization of erosion, and provide flood storage capacity within our watersheds, not only at the point of flooding impacts but within the entire watershed complex. This systematic approach to flood resiliency and natural infrastructure enhancement is necessary in light of the inability to predict where and when intense storms will occur.

NAWM recommends that all federal agencies calculate the effects of wetland loss through funding and permitting programs in accordance with E.O.s 11988 and 13690. This analysis should provide a comprehensive assessment of past, present, and foreseeable losses to the watershed, and the effects that these losses have had and will have on a systems capacity to withstand flooding and the effects, which those losses have caused on downstream communities.

Step 5 in FEMA's "Guidelines for Implementing E.O. 11988 and E.O. 13690", published October 8, 2015, states that the concepts of "Minimize, Restore, Preserve... apply if a proposed action will result in harm to or within the floodplain" and defines "harm" to apply to both lives and property, and natural and beneficial floodplain functions. Therefore, it would seem logical that any unavoidable impacts to natural infrastructure within a floodplain, including wetlands, should be mitigated for within the sub-watershed effected and provide ecosystem services to the same locality where the impacts occurred.

Specific Comments on the Proposed Rule: 24 CFR Parts 50, 55, 58, and 200

Floodplain Management and Protection of Wetlands

III. This Proposed Rule

D. Notification of Floodplain Hazard:

NAWM recommends that in addition to notice of being located in a floodplain and that renters "be informed of the location of ingress and egress or evacuation routes, available emergency notification resources, and emergency procedures for residents in the event of flooding", information should also be provided to residences on emergency preparedness and that it be done in a method and language appropriate to the potentially impacted community.

H. Identifying Wetlands and Limitations on HUD Assistance in Wetlands:

NAWM agrees with broadening the screening of wetlands beyond the use of the National Wetlands Inventory (NWI) for a more accurate identification of potential wetland resources located at a proposed location. NWI is a tool which has varying degrees of accuracy and should not be used as a sole source for identifying resources but needs to be done in combination with other geospatial tools for soils and hydrology. NAWM recommends use of LiDAR and other high-resolution tools to provide increased accuracy for assessing future impacts. Ultimately, the accuracy of wetlands determination needs to be confirmed by an “on site” analysis including an assessment of functions of the ecosystem. The rule also suggests that should information be inconclusive, “consultation with the U.S. Fish and Wildlife Service (FWS), which maintains the NWI” is an appropriate first step. As discussed above, the NWI is part of a suite of tools used in wetlands identification but should not be relied upon solely. NAWM recommends additional consultation with the Army Corps of Engineers (Corps), the Environmental Protection Agency (EPA), and/or State or Tribal aquatic resource regulators.

K. Elevation, Floodproofing, Minimization and Restoration:

For structures which are non-residential in nature “HUD is proposing in § 55.20(e)(1)(ii) that projects may, as an alternative to being elevated above the FFRMS floodplain, be designed and constructed such that, below the FFRMS floodplain, the structure is floodproofed.” While this approach may provide for the structure itself to withstand a flooding event, it does not account for any impacts to the functioning of the floodplain and potential effects caused by the structure and attendant features. It is recommended that any effects an activity has on floodplains be analyzed and mitigated for to the benefit of the watershed effected, as part of a HUD sponsored project. This would comply with the intent of E.O 11988 and E.O 13690.

M. Other Changes to Part 55:

In this rule “HUD is proposing to remove § 55.28, which in concept provides relief from five of the eight steps in the wetlands decision making process when a permit has been secured from the United States Army Corps of Engineers (USACE) under Section 404 of the Clean Water Act for a proposed HUD-assisted construction activity in a jurisdictional wetland outside of the floodplain.” This change is based on the assertion that “the USACE (or any other agency) has already completed the 8-step process”; however, it is unclear that the Corps does, in fact, implement the 8-step process highlighted in the FEMA guidance in implementing E.O 11988. Confirmation should be made by HUD that agencies are using the 8-step process as part of their review of a proposal prior to allowing relief.

P. Permitting Online Posting:

While as a general matter, NAWM does not object to the proposal to “update §§ 50.23, 58.43, 58.45, and 58.59 to allow public notices to be posted on an appropriate government website as an alternative to publication in local news media if the website is accessible to individuals with disabilities and provides meaningful access to individuals with Limited English Proficiency”, it is worth noting that many underserved communities may lack access to the internet and so multiple efforts to inform communities should be investigated and multiple methods be undertaken in order to communicate awareness of the proposal.

PART 55—FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

§ 55.2 Terminology

(9) Impervious surface area:

HUD defines impervious surface area as “an improved surface that measurably reduces the rate of water infiltration below the rate that would otherwise be provided by the soil present in a location prior to improvement” for purposes of this proposed rule. It is worth noting that runoff coefficients vary greatly among surfaces including lawn and other surfaces not generally associated with “impervious surface”. It is recommended that when calculating the effects of projects on receiving waters, metrics be utilized to assess the pre- and post-project runoff calculations to determine appropriate mitigative efforts to minimize impacts to receiving waters and downstream communities by the project.

(13) *Wetlands:*

The rule defines wetlands as “those areas that are inundated or saturated 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, prairie potholes, wet meadows, river overflows, mud flats, and natural ponds.” This is similar to the definition used by the federal government which is the basis of EPA’s and the Corps’s three parameter methodology to identifying wetlands using the Corps 1987 manual.

The 1987 manual defines wetlands as “Those areas that are inundated or saturated by surface or ground water at a frequency *and duration* sufficient to support, and *that* under normal circumstances *do support*, a prevalence of vegetation *typically adapted for life in saturated soil conditions*. Wetlands generally include swamps, marshes, bogs, and similar areas.” While this definition is employed by the Clean Water Act (CWA) Section 404 regulatory program and the Natural Resource Conservation Service, it does not capture all areas performing wetland functions which benefit storm flow augmentation and enhance resiliency.

The rule then goes on to state that “This definition includes those wetland 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.” It is unclear why this distinction needs to be made since the wetland definition is based on “in-situ” information rather than geographic location or genesis, nor is it clear why the rule states that “This definition includes both wetlands subject to and those not subject to section 404 of the Clean Water Act as well as constructed wetlands.”

NAWM suggests that any inferred linkage of wetlands defined under this rule and Section 404 of the CWA, or the Food Securities Act (FSA), be removed and that a functional analysis methodology be employed for aquatic resources proposed to be impacted by HUD actions. This method would comport more closely with the intent of E.O. 11988 and E.O. 13690 to protect communities and natural infrastructure from the effects of climate change and better preserve those resources functioning to the benefit of the watershed. While there are resource areas which may “overlap” with other Federal, State, and Tribal regulatory programs, it is worth noting that the intent should be the broad protections of floodplains and their function to ameliorate the effects of climate induced flooding and not merely to replicate federal program standards.

Based on the above, it is recommended that HUD undertake an analysis, in conjunction with academia and the Academy of Science, and in consultation with Tribal and State Programs, to identify a functional methodology which can be employed by HUD and its representatives to inform the effects of HUD proposals on existing watersheds and their resources and to identify methods to enhance, improve and mitigate for those impacts.

Subpart B—Application of Executive Orders on Floodplain Management and Protection of Wetlands

§ 55.9 Identifying wetlands.

As indicated above in response to § 55.2 Terminology, (13) Wetlands, NWI should not be a primary presence/absence indicator of wetlands but rather used as part of a suite of remote tools and “on the ground” analysis including a functional analysis method to determine the role which the resource is playing in flood resiliency and abatement. Federal, State, and Tribal aquatic resource regulators can assist in wetlands identification and regulatory requirements. NAWM concurs with assessing “biological” rather than regulatory wetlands for purposes of compliance with E.O.s 11988 and 13690 and avoidance and mitigation criteria for HUD structures.

Subpart C—Procedures for Making Determinations on Floodplain Management and Protection of Wetlands

§ 55.20 Decision-making process.

(b) Step 2

During the public notice process every effort should be made to communicate project proposals to the affected community. This notice should be done in as many forms and methods as necessary to reach the community at large in order to inform and receive information from them. This may entail methods beyond a government website or a newspaper of general circulation.

(d) Step 4

NAWM agrees that it is important to “Identify and evaluate the potential direct and indirect impacts associated with the occupancy or modification of the FFRMS floodplain or the wetland and the potential direct and indirect support of floodplain and wetland development that could result from the proposed action, including impacts related to future climate-related flood levels, sea level rise, and the related increased value of beneficial floodplain and wetland functions”. As part of the evaluation process, it is important to not only assess impacts resulting from development but also to mitigate the loss of functions where avoidance is not feasible. Mitigation should be performed within the impacted watershed to assure that downstream communities and resources are not adversely affected by the development.

(e) Step 5, (3) Restoration and preservation (ii)

NAWM does not agree that wetlands mitigation should be limited to impacts greater than 1 acre. Wetlands loss has been significant in the conterminous United States and all impacts, regardless of size, should be mitigated for, to the benefit of the effected aquatic resource and receiving waters. The loss of wetlands and floodplains impacts communities and water quality by impairing the ability of watersheds to provide resiliency and flood storage capacity during storm events. The lack of mitigation for impacts is directly contradictory to the purpose of the Executive Orders and will cumulatively lead to further impairment and storm damage. Furthermore, we do not agree that mitigation should be translocated to an in-lieu-fee or banking instrument which is not providing direct benefits to the impacted reach of the waterway and associated floodplain.

In conclusion, this proposed rulemaking by HUD is an important step in responding to, and helping to minimize, the effects of climate change and storm frequency. As indicated in the introduction and purpose to the rule proposal, flooding has significant effects on life, water quality, and communities. Responding to floods and the restoration and repair of flood damage is costly and is stretching the resources of all levels of government. Protecting floodplains by avoiding projects within these areas is a significant step toward responding to flooding events and intensity. Combined with the preservation, enhancement, and creation of natural

infrastructure, watershed resiliency can be improved and effects to communities minimized, outweighing any potential cost increases as a result of this rulemaking.

NAWM appreciates the opportunity to comment on this matter. While these comments have been prepared with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all our members. Please contact me should you wish to further discuss these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Marla J. Stelk". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marla J. Stelk, Executive Director

Cc: NAWM Board of Directors

²⁵ *Ibid.* p. ES-3

²⁶ *Ibid.* p. 6-23. (*Note:* this income figure excludes subsistence activities.)

²⁷ *Ibid.* p. 3-51 (2019 data)