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## DEPARTMENT OF ENERGY

### 10 CFR Parts 1021 and 1022

RIN 1901-AA94

#### Compliance With Floodplain and Wetland Environmental Review Requirements

AGENCY: Department of Energy.

ACTION: Final rule.

**SUMMARY:** The Department of Energy (DOE) is revising its floodplain and wetland environmental review requirements to add flexibility and remove unnecessary procedural burdens by simplifying DOE public notification procedures for proposed floodplain and wetland actions, exempting additional actions from the floodplain and wetland assessment provisions of these regulations, providing for immediate action in an emergency, expanding the existing list of sources that may be used in determining the location of floodplains and wetlands, and allowing floodplain and wetland assessments for actions proposed to be taken under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to be coordinated with the CERCLA environmental review process rather than the National Environmental Policy Act (NEPA) process. DOE also is making a conforming change to its NEPA implementing regulations to allow for issuance of a floodplain statement of findings in a final environmental impact statement (EIS) or separately.

**EFFECTIVE DATE:** These rule changes will become effective September 26, 2003.

**FOR FURTHER INFORMATION CONTACT:** For information regarding DOE's regulations for compliance with floodplain and wetland environmental review requirements or this rulemaking, or for copies of the final rule, contact Carolyn M. Osborne, U.S. Department of Energy, Office of NEPA Policy and Compliance,

1000 Independence Avenue, SW., Washington, DC 20585-0119. Telephone (202) 586-4600 or leave a message at (800) 472-2756; facsimile to (202) 586-7031; e-mail to [carolyn.osborne@eh.doe.gov](mailto:carolyn.osborne@eh.doe.gov). The final rule also will be available after the effective date specified above on the DOE NEPA Web at <http://tis.eh.doe.gov/nepa>.

For information on DOE's NEPA process, contact Carol M. Borgstrom, Director, Office of NEPA Policy and Compliance, at the above address and telephone numbers.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

We published on November 18, 2002 (67 FR 69480), proposed revisions to our regulations entitled "Compliance with Floodplain/Wetlands Environmental Review Requirements" (10 CFR Part 1022), which were promulgated originally on March 7, 1979 (44 FR 12596), to implement the requirements of Executive Order (E.O.) 11988, "Floodplain Management" (42 FR 2951; May 24, 1977), and E.O. 11990, "Protection of Wetlands" (42 FR 26961; May 24, 1977). We also published in our November 18, 2002, **Federal Register** notice a proposed conforming change to our "National Environmental Policy Act Implementing Procedures" (10 CFR 1021.313).

Publication of the Notice of Proposed Rulemaking began a 60-day public comment period, ending January 17, 2003. Comments were received from three sources: A State, a county, and a member of the public. Copies of these comments are available for public inspection at the DOE Freedom of Information Office Reading Room, Room 1E-190, Forrestal Building, 1000 Independence Avenue, SW., Washington, DC 20585-0101, (202) 586-3142, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

This document adopts the revisions proposed on November 18, 2002, with certain changes discussed below, and codifies them at 10 CFR parts 1021 and 1022. In accordance with 40 CFR 1507.3, the Council on Environmental Quality (CEQ) reviewed this notice of final rulemaking and concluded that the proposed amendment to the DOE regulations implementing NEPA is in conformance with NEPA and the CEQ

regulations. The Secretary of Energy has approved this notice of final rulemaking for publication.

##### II. Statement of Purpose

We are revising 10 CFR part 1022 based on our experience implementing the existing requirements for over 20 years. We expect these changes to improve our ability to meet our goals for floodplain and wetland protection in a timely and cost-effective manner. We are revising 10 CFR 1021.313 to conform with 10 CFR 1022.14(c) by allowing floodplain statements of findings to be issued in a final EIS or separately.

The major revisions we are implementing will: (1) Simplify our public notification procedures for proposed floodplain and wetland actions by emphasizing local publication as opposed to publication in the **Federal Register**, (2) exempt additional actions from the floodplain and wetland assessment provisions of these regulations, (3) provide for immediate action in an emergency with documentation to follow, (4) expand the existing list of credible sources that may be used in determining the location of floodplains and wetlands, and (5) allow floodplain and wetland assessments for actions proposed to be taken under CERCLA to be coordinated with the CERCLA environmental review process rather than the NEPA process. The revisions also will make the rule easier to use by reordering sections to parallel the assessment process, clarifying requirements (such as the differences between floodplain and wetland actions and their respective assessment requirements), and simplifying the rule by deleting provisions that are no longer applicable. The revisions streamline existing procedures and add no new requirements.

##### III. Comments Received and DOE's Responses

We have considered and evaluated the comments received during the public comment period. A number of revisions suggested in these comments have been incorporated into the final rule. The following discussion describes the comments received, provides our response to the comments, and describes any resulting changes to the rule. We also have made editorial and stylistic revisions for clarity and consistency.

### A. General Comments

In addition to a comment supporting our intent to simplify and restructure the rule, we received one comment objecting to our streamlining effort on the ground that it would make it easier to sabotage environmental protection before the public could know about potential impacts. This comment is speculative. It does not provide any example to show a potentially adverse effect from any of the proposed amendments to the regulations in 10 CFR parts 1021 and 1022. We believe the revised rule will improve our ability to meet our goals for floodplain and wetland protection. We will be able to focus our resources, and those of the public, on the types of proposed actions that our experience demonstrates are most likely to benefit from an examination of alternatives and mitigating measures and increase the efficiency of our environmental reviews (thereby, for example, allowing earlier identification of mitigation actions).

We received a comment pointing to DOE's obligation to comply with the Coastal Zone Management Act, NEPA, and applicable state laws and regulations. We recognize our legal responsibilities and note that it is the intent of the E.O.'s upon which this regulation is based, and the regulation itself, that implementation be coordinated, and when appropriate, integrated with procedures for implementing other requirements, such as those of NEPA. (See §§ 1022.1(b) and 1022.2(b).) We also note that this rulemaking is not a proposal to conduct any activity that would affect any coastal resource. We will comply with 10 CFR part 1022 and all other applicable requirements if we propose any such activity in the future.

### B. Comments on Definitions (§ 1022.4)

Two comments requested clarification of "effects of national concern" as used in determining whether we are required to publish in the **Federal Register** a notice of proposed action (§ 1022.12(b)) or a floodplain statement of findings (§ 1022.14(e)). In response, we have added a definition to state that effects of national concern are those effects that because of the high quality or function of the affected resource or because of the wide geographic range of effects could create concern beyond the locale or region of the proposed action. The lack of potential effects of national concern does not excuse us from our public notification and participation responsibilities (§§ 1022.3(e), 1022.12, and 1022.14).

### C. Comments on Exemptions (§ 1022.5)

One comment recommended that we define terms associated with the exemptions described in § 1022.5(d) to "ensure that the activities contemplated by the proposed rule changes will have only minimal and temporary adverse impacts on the aquatic environment." We do not believe it is practical or useful to attempt to define all the activities that might fall within the rule's three exemptions. We have, however, added examples for each exemption.

The rule now states that routine maintenance activities (§ 1022.5(d)(1)) are those, such as reroofing, plumbing repair, and door and window replacement, needed to maintain and preserve existing facilities and structures for their designated purpose. We believe that the restrictive conditions stated in § 1022.5(d)(2) and § 1022.5(d)(3) help describe the types of activities that could be exempted, but also have added examples in both sections. For site characterization, environmental monitoring, or environmental research activities (§ 1022.5(d)(2)), the rule now includes the examples of sampling and surveying water and air quality, flora and fauna abundance, and soil properties. For minor modification of an existing facility or structure to improve safety or environmental conditions (§ 1022.5(d)(3)), the rule now includes the examples of upgrading lighting, heating, ventilation, and air conditioning systems; installing or improving alarm and surveillance systems; and adding environmental monitoring or control systems.

### D. Comments on Public Notification and Information Dissemination (§§ 1022.12 and 1022.14)

We received one comment asking that, when providing public notification, consideration be given to the interest of state government, in addition to local interest, in a proposed action. This has been our practice and is our intent. For clarification, in this final rule, we have added the parenthetical phrase "(e.g., FEMA [Federal Emergency Management Agency, Department of Homeland Security] regional offices, host and affected states, and tribal and local governments)" after "government agencies" in §§ 1022.12(b) and 1022.14(d). Distribution to these parties, and to others as appropriate for a specific proposed action, facilitates public participation.

One comment questioned whether language in § 1022.14(f) would limit

distribution of floodplain statements of findings to only those state agencies identified in a particular list of state contacts maintained by the Office of Management and Budget. To clarify our intent to continue to distribute statements of findings to parties interested in or potentially affected by a proposed action, in § 1022.14(f) of the final rule, we have added the word "also." The rule now states that for actions subject to E.O. 12372, "Intergovernmental Review of Federal Programs," DOE "also" shall send the floodplain statement of findings to the state in accordance with 10 CFR part 1005 (DOE's regulations for implementing the E.O.).

With regard to a comment that DOE must establish contacts and maintain current information on them, DOE Order 451.1B, "National Environmental Policy Act Compliance Program," requires each DOE Program and Field Office with NEPA responsibilities to have a Public Participation Plan. With regard specifically to state contacts, we established ongoing relationships with State Clearinghouses in 1990 through contact with the Governors, and we update our State Clearinghouse contacts in the "Directory of Potential Stakeholders for Department of Energy Action under the National Environmental Policy Act," which is distributed broadly within the Department and made available on the DOE NEPA Web site (<http://tis.eh.doe.gov/nepa/guidance.html>, under "Public Participation").

One comment opposed our change to allow discretion in whether to include a floodplain statement of findings within a final EIS. We agree with the commenter that information relevant to potential floodplain and wetland impacts is integral to the evaluation of a proposed action and alternatives within an EIS. A final EIS would consider those impacts and mitigations. For example, both the final EIS and the floodplain assessment would evaluate mitigation measures to minimize harm to or within the floodplain. Nonetheless, a floodplain statement of findings may be issued separately as there may be times when it is not appropriate to incorporate the statement within the final EIS (e.g., when steps to be taken to minimize harm are not determined until after the final EIS is issued, or a phased decision involving sequential records of decision is being made and the findings would not be relevant to the initial record of decision). Moreover, E.O. 11988, upon which the floodplain management portions of this regulation are based, does not specify when in the NEPA process the statement of findings

should be published, and E.O. 11990, which addresses wetlands protection, does not require a statement of findings. The E.O.'s allow Federal agencies substantial latitude in implementing the requirements as deemed most appropriate for individual agencies.

#### *E. Comments on Variances (§ 1022.16)*

One comment sought clarification of the conditions under which we could waive time limits between various steps in the floodplain or wetland environmental review process and requested a definition of emergency actions and emergency situations. The rule allows us to alter the floodplain or wetland assessment process in response to emergencies and in some non-emergency situations.

Section 1022.16(a) allows us to take immediate action in the event of an emergency, forgoing the assessment process required by this rule until after the emergency has been addressed. We will continue to determine what constitutes an emergency (an emergency action or emergency situation) on a case-by-case basis, as is consistent with the manner in which an emergency has been declared in the past in regard to compliance with these and other requirements (e.g., NEPA). We have declared only three emergency exceptions to our NEPA procedures in the past 25 years.

Section 1022.16(b) allows shortening the review process in non-emergency situations in response to "statutory deadlines or overriding considerations of program or project expense or effectiveness." This section does not allow any exception from completing a required floodplain or wetland assessment nor from following any other provision of this rule or any other applicable requirement before taking action. This provision has been in place since we first promulgated our floodplain and wetland environmental review requirements in 1979, and in practice, we have not experienced difficulty in its implementation.

The comment also asked who determines whether a variance is to be granted. The cognizant DOE official responsible for NEPA or CERCLA implementation, as applicable, normally would consult with the Office of NEPA Policy and Compliance pursuant to § 1022.16(c) before determining whether to grant a variance.

#### *F. Other Revisions*

Notable among the editorial and stylistic revisions we made are changes to the definitions of "floodplain and wetland values" and "critical action floodplain" in §1022.4. We reorganized

the examples of floodplain and wetland values to improve readability.

We have added to the definition of critical action floodplain a clarification that was included in the preamble to this proposed rule in November 2002. This clarification regards when we will consider a flood with an expected frequency of less than once in a 500-year period, and thus a larger floodplain, in evaluating potential impacts associated with a critical action (i.e., any DOE action for which even a slight chance of flooding would be too great). In this final rule, and as proposed, we define a critical action floodplain as "at a minimum, the 500-year floodplain, that is, a floodplain with a 0.2 percent chance of flooding in any given year." To this, we have added the clarification that when another requirement applicable to the proposed action requires evaluation of a less frequent flood (i.e., a more severe flood that would inundate a larger floodplain), then we may use the less frequent flood to determine the floodplain for purposes of this rule. For example, where the safety basis documentation under 10 CFR part 830 for a proposed action requires consideration of a 100,000-year flood, then the 100,000-year floodplain could be the critical action floodplain for the proposed action for purposes of this rule.

#### **IV. Procedural Review Requirements**

##### *A. Review Under Executive Order 12866*

This rule has been determined not to be a "significant regulatory action" under E.O. 12866, "Regulatory Planning and Review" (58 FR 51735; October 4, 1993), as amended by E.O. 13258 (67 FR 9385; February 28, 2002). Accordingly, today's final regulatory action was not subject to review under that E.O. by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

##### *B. Review Under Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of E.O. 12988, "Civil Justice Reform" (61 FR 4779; February 7, 1996) imposes on Federal agencies the general duty to adhere to the following requirements: Eliminate drafting errors and needless ambiguity, write regulations to minimize litigation, provide a clear legal standard for affected conduct rather than a general standard, and promote simplification and burden reduction. Section 3(b) requires Federal agencies to make every reasonable effort to ensure that a regulation, among other things:

Clearly specifies the preemptive effect, if any, adequately defines key terms, and addresses other important issues affecting the clarity and general draftsmanship under guidelines issued by the Attorney General. Section 3(c) of E.O. 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of E.O. 12988.

##### *C. Review Under Executive Order 13132*

Today's regulatory action has been determined not to be a "policy that has federalism implications," that is, it does not have substantial direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibility among the various levels of government under E.O. 13132. "Federalism" (64 FR 43255; August 10, 1999). Accordingly, no "federalism summary impact statement" was prepared or subjected to review under the E.O. by the Director of the Office of Management and Budget.

##### *D. Review Under Executive Order 13175*

Under E.O. 13175 (65 FR 67249; November 9, 2000) on "Consultation and Coordination with Indian Tribal Governments," DOE may not issue a discretionary rule that has "tribal implications" and imposes substantial direct compliance costs on Indian tribal governments. DOE has determined that this rule would not have such effects and concluded that E.O. 13175 does not apply to this rule.

##### *E. Review Under the Regulatory Flexibility Act*

The revisions to the existing regulations have been reviewed under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and related provisions of E.O. 13272, "Proper Consideration of Small Entities in Agency Rulemaking" (67 FR 53461; August 16, 2002) and DOE's procedures and policies (68 FR 7990; February 19, 2003). The Act requires preparation of an initial regulatory flexibility analysis for any regulation that is likely to have a significant economic impact on a substantial number of small entities. Today's revisions to 10 CFR parts 1021 and 1022 amend DOE policies and streamline existing procedures for environmental review of actions proposed in a floodplain or wetland under two E.O.s. The actions would

neither increase the incidence of floodplain and wetland assessments nor increase burdens associated with carrying out such an assessment. Therefore, DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities, and therefore, no regulatory flexibility analysis has been prepared. We received no comments on our decision not to prepare a regulatory flexibility analysis.

#### *F. Review Under the Paperwork Reduction Act*

No additional information or recordkeeping requirements are imposed by this rulemaking. The changes would actually reduce paperwork requirements by eliminating a requirement that public notices always be published in the **Federal Register** and by increasing the number of exemptions from requirements for preparing a floodplain or wetland assessment. Accordingly, no clearance by the Office of Management and Budget was required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### *G. Review Under the National Environmental Policy Act*

DOE has concluded that promulgation of these revisions to existing regulations falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, the revisions to 10 CFR parts 1021 and 1022 would amend DOE's policies to streamline and simplify existing procedures for environmental review of actions proposed in a floodplain or wetland under two E.O.s. The proposed regulations are covered under the categorical exclusion in paragraph A6, "Rulemakings, Procedural" (rulemakings that are strictly procedural) to Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an EIS is required.

#### *H. Review Under the Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency regulation that may result in the expenditure by state, tribal, or local governments, on the aggregate, or by the private sector, of \$100 million in any one year. The Act also requires a

Federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed "significant intergovernmental mandate," and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments. DOE has determined that the revisions to 10 CFR parts 1021 and 1022 published today do not contain any Federal mandates affecting small governments, so these requirements do not apply.

#### *I. Review Under Executive Order 13211*

E.O. 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355; May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs in the Office of Management and Budget a Statement of Energy Effects for any significant energy action. Today's rule is not a significant energy action, as that term is defined in the E.O. Accordingly, DOE has not prepared a Statement of Energy Effects.

#### *J. Review Under the Treasury and General Government Appropriations Act*

Section 654 of the Treasury and General Government Appropriations Act of 1999 (Pub. L. 105-277) requires Federal agencies to issue a "Family Policymaking Assessment" for any proposed rule that may affect family well-being. This rule has no impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

#### *K. Review Under the Treasury and General Government Appropriations Act, 2001*

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most dissemination of information to the public under guidelines established by each agency pursuant to general guidelines issued by the Office of Management and Budget. The Office of Management and Budget guidelines were published at 67 FR 8452 (February 22, 2002), and DOE's guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed today's notice under the Office of Management and Budget and DOE guidelines, and has concluded that it is consistent with applicable policies in those guidelines.

#### *L. Congressional Notification*

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

#### **List of Subjects in 10 CFR Parts 1021 and 1022**

Floodplains, Wetlands.

Issued in Washington, DC, August 19, 2003.

**Beverly A. Cook,**

*Assistant Secretary, Environment, Safety and Health.*

■ For the reasons set forth in the preamble, parts 1021 and 1022 of chapter III of title 10, Code of Federal Regulations, are amended as follows:

#### **PART 1021—NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES**

■ 1. The authority citation for part 1021 is revised to read as follows:

**Authority:** 42 U.S.C. 7101 *et seq.*; 42 U.S.C. 4321 *et seq.*; 50 U.S.C. 2401 *et seq.*

#### **§ 1021.313 [Amended]**

■ 2. In § 1021.313, paragraph (c), the last sentence is amended as follows:

■ a. Remove the word "shall" and add in its place the word "may".

■ b. Remove the phrase "Floodplain/Wetlands" and add in its place "Floodplain and Wetland".

■ c. Remove the period and add the words ", or a Statement of Findings may be issued separately." at the end of the sentence.

#### **PART 1022—COMPLIANCE WITH FLOODPLAIN/WETLANDS ENVIRONMENTAL REVIEW REQUIREMENTS**

■ 3. Part 1022 is revised to read as follows:

#### **PART 1022—COMPLIANCE WITH FLOODPLAIN AND WETLAND ENVIRONMENTAL REVIEW REQUIREMENTS**

##### **Subpart A—General**

Sec.

1022.1 Background.

1022.2 Purpose and scope.

1022.3 Policy.

1022.4 Definitions.

1022.5 Applicability.

1022.6 Public inquiries.

**Subpart B—Procedures for Floodplain and Wetland Reviews**

- 1022.11 Floodplain or wetland determination.
- 1022.12 Notice of proposed action.
- 1022.13 Floodplain or wetland assessment.
- 1022.14 Findings.
- 1022.15 Timing.
- 1022.16 Variances.
- 1022.17 Follow-up.

**Subpart C—Other Requirements**

- 1022.21 Property management.
- 1022.22 Requests for authorizations or appropriations.
- 1022.23 Applicant responsibilities.
- 1022.24 Interagency cooperation.

**Authority:** 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*; E.O. 11988, 42 FR 26951, 3 CFR, 1977 Comp., p. 117; E.O. 11990, 42 FR 26961, 3 CFR, 1977 Comp., p. 121; E.O. 12372, 47 FR 30959, 3 CFR, 1982 Comp., p. 197.

**Subpart A—General****§ 1022.1 Background.**

(a) Executive Order (E.O.) 11988—Floodplain Management (May 24, 1977) directs each Federal agency to issue or amend existing regulations and procedures to ensure that the potential effects of any action it may take in a floodplain are evaluated and that its planning programs and budget requests reflect consideration of flood hazards and floodplain management. Guidance for implementation of the E.O. is provided in the floodplain management guidelines of the U.S. Water Resources Council (40 FR 6030; February 10, 1978) and in “A Unified National Program for Floodplain Management” prepared by the Federal Interagency Floodplain Management Taskforce (Federal Emergency Management Agency, FEMA 248, June 1994). E.O. 11990—Protection of Wetlands (May 24, 1977) directs all Federal agencies to issue or amend existing procedures to ensure consideration of wetlands protection in decisionmaking and to ensure the evaluation of the potential impacts of any new construction proposed in a wetland.

(b) It is the intent of the E.O.s that Federal agencies implement both the floodplain and the wetland provisions through existing procedures such as those established to implement the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). In those instances where the impacts of the proposed action are not significant enough to require the preparation of an EIS under section 102(2)(C) of NEPA, alternative floodplain or wetland evaluation procedures are to be established. As stated in the E.O.s, Federal agencies are to avoid direct or indirect support of development in a floodplain or new construction in a

wetland wherever there is a practicable alternative.

**§ 1022.2 Purpose and scope.**

(a) This part establishes policy and procedures for discharging the Department of Energy’s (DOE’s) responsibilities under E.O. 11988 and E.O. 11990, including:

(1) DOE policy regarding the consideration of floodplain and wetland factors in DOE planning and decisionmaking; and

(2) DOE procedures for identifying proposed actions located in a floodplain or wetland, providing opportunity for early public review of such proposed actions, preparing floodplain or wetland assessments, and issuing statements of findings for actions in a floodplain.

(b) To the extent possible, DOE shall accommodate the requirements of E.O. 11988 and E.O. 11990 through applicable DOE NEPA procedures or, when appropriate, the environmental review process under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. 9601 *et seq.*).

**§ 1022.3 Policy.**

DOE shall exercise leadership and take action to:

(a) Incorporate floodplain management goals and wetland protection considerations into its planning, regulatory, and decisionmaking processes, and shall to the extent practicable:

- (1) Reduce the risk of flood loss;
- (2) Minimize the impact of floods on human safety, health, and welfare;
- (3) Restore and preserve natural and beneficial values served by floodplains;
- (4) Require the construction of DOE structures and facilities to be, at a minimum, in accordance with FEMA National Flood Insurance Program building standards;
- (5) Promote public awareness of flood hazards by providing conspicuous delineations of past and probable flood heights on DOE property that has suffered flood damage or is in an identified floodplain and that is used by the general public;
- (6) Inform parties during transactions guaranteed, approved, regulated, or insured by DOE of the hazards associated with locating facilities and structures in a floodplain;
- (7) Minimize the destruction, loss, or degradation of wetlands; and
- (8) Preserve and enhance the natural and beneficial values of wetlands.

(b) Undertake a careful evaluation of the potential effects of any proposed floodplain or wetland action.

(c) Avoid to the extent possible the long- and short-term adverse impacts

associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of development in a floodplain or new construction in a wetland wherever there is a practicable alternative.

(d) Identify, evaluate, and as appropriate, implement alternative actions that may avoid or mitigate adverse floodplain or wetland impacts.

(e) Provide opportunity for early public review of any plans or proposals for floodplain or wetland actions.

**§ 1022.4 Definitions.**

The following definitions apply to this part:

**Action** means any DOE activity necessary to carry out its responsibilities for:

- (1) Acquiring, managing, and disposing of Federal lands and facilities;
- (2) Providing DOE-undertaken, -financed, or -assisted construction and improvements; and
- (3) Conducting activities and programs affecting land use, including but not limited to water- and related land-resources planning, regulating, and licensing activities.

**Base floodplain** means the 100-year floodplain, that is, a floodplain with a 1.0 percent chance of flooding in any given year.

**Critical action** means any DOE action for which even a slight chance of flooding would be too great. Such actions may include, but are not limited to, the storage of highly volatile, toxic, or water reactive materials.

**Critical action floodplain** means, at a minimum, the 500-year floodplain, that is, a floodplain with a 0.2 percent chance of flooding in any given year. When another requirement directing evaluation of a less frequent flood event also is applicable to the proposed action, a flood less frequent than the 500-year flood may be appropriate for determining the floodplain for purposes of this part.

**Effects of national concern** means those effects that because of the high quality or function of the affected resource or because of the wide geographic range of effects could create concern beyond the locale or region of the proposed action.

**Environmental assessment (EA)** means a document prepared in accordance with the requirements of 40 CFR 1501.4(b), 40 CFR 1508.9, 10 CFR 1021.320, and 10 CFR 1021.321.

**Environmental impact statement (EIS)** means a document prepared in accordance with the requirements of section 102(2)(C) of NEPA and its

implementing regulations at 40 CFR Parts 1500–1508 and 10 CFR Part 1021.

*Facility* means any human-made or -placed item other than a structure.

*FEMA* means the Federal Emergency Management Agency, Department of Homeland Security.

*Finding of no significant impact* means a document prepared in accordance with the requirements of 40 CFR 1508.13 and 10 CFR 1021.322.

*Flood or flooding* means a temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland or tidal waters, or the unusual and rapid accumulation or runoff of surface waters from any source.

*Floodplain* means the lowlands adjoining inland and coastal waters and relatively flat areas and floodprone areas of offshore islands.

*Floodplain action* means any DOE action that takes place in a floodplain, including any DOE action in a wetland that is also within the floodplain, subject to the exclusions specified at § 1022.5(c) and (d) of this part.

*Floodplain and wetland values* means the qualities of or functions served by floodplains and wetlands that can include, but are not limited to, living values (e.g., conservation of existing flora and fauna including their long-term productivity, preservation of diversity and stability of species and habitats), cultural resource values (e.g., archeological and historic sites), cultivated resource values (e.g., agriculture, aquaculture, forestry), aesthetic values (e.g., natural beauty), and other values related to uses in the public interest (e.g., open space, scientific study, outdoor education, recreation).

*Floodplain or wetland assessment* means an evaluation consisting of a description of a proposed action, a discussion of its potential effects on the floodplain or wetland, and consideration of alternatives.

*Floodplain statement of findings* means a brief document issued pursuant to § 1022.14 of this part that describes the results of a floodplain assessment.

*High-hazard areas* means those portions of riverine and coastal floodplains nearest the source of flooding that are frequently flooded and where the likelihood of flood losses and adverse impacts on the natural and beneficial values served by floodplains is greatest.

*Minimize* means to reduce to the smallest degree practicable.

*New construction*, for the purpose of compliance with E.O. 11990 and this part, means the building of any structures or facilities, draining,

dredging, channelizing, filling, diking, impounding, and related activities.

*Notice of proposed floodplain action and notice of proposed wetland action* mean a brief notice that describes a proposed floodplain or wetland action, respectively, and its location and that affords the opportunity for public review.

*Practicable* means capable of being accomplished within existing constraints, depending on the situation and including consideration of many factors, such as the existing environment, cost, technology, and implementation time.

*Preserve* means to prevent modification to the natural floodplain or wetland environment or to maintain it as closely as possible to its natural state.

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

*Structure* means a walled or roofed building, including mobile homes and gas or liquid storage tanks.

*Wetland* means an area that is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances does support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas.

*Wetland action* means any DOE action related to new construction that takes place in a wetland not located in a floodplain, subject to the exclusions specified at § 1022.5(c) and (d) of this part.

#### § 1022.5 Applicability.

(a) This part applies to all organizational units of DOE, including the National Nuclear Security Administration, except that it shall not apply to the Federal Energy Regulatory Commission.

(b) This part applies to all proposed floodplain or wetland actions, including those sponsored jointly with other agencies.

(c) This part does not apply to the issuance by DOE of permits, licenses, or allocations to private parties for activities involving a wetland that are located on non-Federal property.

(d) Subject to paragraph (e) of this section, subpart B of this part does not apply to:

(1) Routine maintenance of existing facilities and structures on DOE property in a floodplain or wetland. Maintenance is routine when it is needed to maintain and preserve the facility or structure for its designated purpose (e.g., activities such as

reroofing, plumbing repair, door and window replacement);

(2) Site characterization, environmental monitoring, or environmental research activities (e.g., sampling and surveying water and air quality, flora and fauna abundance, and soil properties) in a floodplain or wetland, unless these activities would involve building any structure; involve draining, dredging, channelizing, filling, diking, impounding, or related activities; or result in long-term change to the ecosystem; and

(3) Minor modification (e.g., upgrading lighting, heating, ventilation, and air conditioning systems; installing or improving alarm and surveillance systems; and adding environmental monitoring or control systems) of an existing facility or structure in a floodplain or wetland to improve safety or environmental conditions unless the modification would result in a significant change in the expected useful life of the facility or structure, or involve building any structure or involve draining, dredging, channelizing, filling, diking, impounding, or related activities.

(e) Although the actions listed in paragraphs (d)(1), (d)(2), and (d)(3) of this section normally have very small or no adverse impact on a floodplain or wetland, where unusual circumstances indicate the possibility of adverse impact on a floodplain or wetland, DOE shall determine the need for a floodplain or wetland assessment.

#### § 1022.6 Public inquiries.

Inquiries regarding DOE's floodplain and wetland environmental review requirements may be directed to the Office of NEPA Policy and Compliance, U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585–0119, 202–586–4600, or a message may be left at 1–800–472–2756, toll free.

#### Subpart B—Procedures for Floodplain and Wetland Reviews

##### § 1022.11 Floodplain or wetland determination.

(a) Concurrent with its review of a proposed action to determine appropriate NEPA or CERCLA process requirements, DOE shall determine the applicability of the floodplain management and wetland protection requirements of this part.

(b) DOE shall determine whether a proposed action would be located within a base or critical action floodplain consistent with the most authoritative information available relative to site conditions from the following sources, as appropriate:



(1) Flood Insurance Rate Maps or Flood Hazard Boundary Maps prepared by FEMA;

(2) Information from a land-administering agency (e.g., Bureau of Land Management) or from other government agencies with floodplain-determination expertise (e.g., U.S. Army Corps of Engineers, Natural Resources Conservation Service);

(3) Information contained in safety basis documents as defined at 10 CFR part 830; and

(4) DOE environmental documents, e.g., NEPA and CERCLA documents.

(c) DOE shall determine whether a proposed action would be located within a wetland consistent with the most authoritative information available relative to site conditions from the following sources, as appropriate:

(1) U.S. Army Corps of Engineers "Wetlands Delineation Manual," Wetlands Research Program Technical Report Y-87-1, January 1987, or successor document;

(2) U.S. Fish and Wildlife Service National Wetlands Inventory or other government-sponsored wetland or land-use inventories;

(3) U.S. Department of Agriculture Natural Resources Conservation Service Local Identification Maps;

(4) U.S. Geological Survey Topographic Maps; and

(5) DOE environmental documents, e.g., NEPA and CERCLA documents.

(d) Pursuant to § 1022.5 of this part and paragraphs (b) and (c) of this section, DOE shall prepare:

(1) A floodplain assessment for any proposed floodplain action in the base floodplain or for any proposed floodplain action that is a critical action located in the critical action floodplain; or

(2) A wetland assessment for any proposed wetland action.

#### § 1022.12 Notice of proposed action.

(a) For a proposed floodplain or wetland action for which an EIS is required, DOE shall use applicable NEPA procedures to provide the opportunity for early public review of the proposed action. A notice of intent to prepare the EIS may be used to satisfy the requirement for DOE to publish a notice of proposed floodplain or wetland action.

(b) For a proposed floodplain or wetland action for which no EIS is required, DOE shall take appropriate steps to send a notice of proposed floodplain or wetland action to appropriate government agencies (e.g., FEMA regional offices, host and affected States, and tribal and local governments) and to persons or groups

known to be interested in or potentially affected by the proposed floodplain or wetland action. DOE also shall distribute the notice in the area where the proposed action is to be located (e.g., by publication in local newspapers, through public service announcements, by posting on- and off-site). In addition, for a proposed floodplain or wetland action that may result in effects of national concern to the floodplain or wetland or both, DOE shall publish the notice in the **Federal Register**.

#### § 1022.13 Floodplain or wetland assessment.

(a) A floodplain or wetland assessment shall contain the following information:

(1) *Project Description*. This section shall describe the proposed action and shall include a map showing its location with respect to the floodplain and/or wetland. For actions located in a floodplain, the nature and extent of the flood hazard shall be described, including the nature and extent of hazards associated with any high-hazard areas.

(2) *Floodplain or Wetland Impacts*. This section shall discuss the positive and negative, direct and indirect, and long- and short-term effects of the proposed action on the floodplain and/or wetland. This section shall include impacts on the natural and beneficial floodplain and wetland values (§ 1022.4) appropriate to the location under evaluation. In addition, the effects of a proposed floodplain action on lives and property shall be evaluated. For an action proposed in a wetland, the effects on the survival, quality, and function of the wetland shall be evaluated.

(3) *Alternatives*. DOE shall consider alternatives to the proposed action that avoid adverse impacts and incompatible development in the floodplain and/or wetland, including alternate sites, alternate actions, and no action. DOE shall evaluate measures that mitigate the adverse effects of actions in a floodplain and/or wetland including, but not limited to, minimum grading requirements, runoff controls, design and construction constraints, and protection of ecologically-sensitive areas.

(b) For proposed floodplain or wetland actions for which an EA or EIS is required, DOE shall prepare the floodplain or wetland assessment concurrent with and included in the appropriate NEPA document.

(c) For floodplain or wetland actions for which neither an EA nor an EIS is prepared, DOE shall prepare the

floodplain or wetland assessment separately or incorporate it when appropriate into another environmental review process (e.g., CERCLA).

#### § 1022.14 Findings.

(a) If DOE finds that no practicable alternative to locating or conducting the action in the floodplain or wetland is available, then before taking action DOE shall design or modify its action in order to minimize potential harm to or within the floodplain or wetland, consistent with the policies set forth in E.O. 11988 and E.O. 11990.

(b) For actions that will be located in a floodplain, DOE shall issue a floodplain statement of findings, normally not to exceed three pages, that contains:

(1) A brief description of the proposed action, including a location map;

(2) An explanation indicating why the action is proposed to be located in the floodplain;

(3) A list of alternatives considered;

(4) A statement indicating whether the action conforms to applicable floodplain protection standards; and

(5) A brief description of steps to be taken to minimize potential harm to or within the floodplain.

(c) For floodplain actions that require preparation of an EA or EIS, DOE may incorporate the floodplain statement of findings into the finding of no significant impact or final EIS, as appropriate, or issue such statement separately.

(d) DOE shall send copies of the floodplain statement of findings to appropriate government agencies (e.g., FEMA regional offices, host and affected states, and tribal and local governments) and to others who submitted comments on the proposed floodplain action.

(e) For proposed floodplain actions that may result in effects of national concern, DOE shall publish the floodplain statement of findings in the **Federal Register**, describing the location of the action and stating where a map is available.

(f) For floodplain actions subject to E.O. 12372—Intergovernmental Review of Federal Programs (July 14, 1982), DOE also shall send the floodplain statement of findings to the State in accordance with 10 CFR part 1005—Intergovernmental Review of Department of Energy Programs and Activities.

#### § 1022.15 Timing.

(a) For a proposed floodplain action, DOE shall allow 15 days for public comment following issuance of a notice of proposed floodplain action. After the close of the public comment period and

before issuing a floodplain statement of findings, DOE shall reevaluate the practicability of alternatives to the proposed floodplain action and the mitigating measures, taking into account all substantive comments received. After issuing a floodplain statement of findings, DOE shall endeavor to allow at least 15 days of public review before implementing a proposed floodplain action. If a **Federal Register** notice is required, the 15-day period begins on the date of publication in the **Federal Register**.

(b) For a proposed wetland action, DOE shall allow 15 days for public comment following issuance of a notice of proposed wetland action. After the close of the public comment period, DOE shall reevaluate the practicability of alternatives to the proposed wetland action and the mitigating measures, taking into account all substantive comments received, before implementing a proposed wetland action. If a **Federal Register** notice is required, the 15-day period begins on the date of publication in the **Federal Register**.

#### § 1022.16 Variances.

(a) *Emergency actions.* DOE may take actions without observing all provisions of this part in emergency situations that demand immediate action. To the extent practicable prior to taking an emergency action (or as soon as possible after taking such an action) DOE shall document the emergency actions in accordance with NEPA procedures at 10 CFR 1021.343(a) or CERCLA procedures in order to identify any adverse impacts from the actions taken and any further necessary mitigation.

(b) *Timing.* If statutory deadlines or overriding considerations of program or project expense or effectiveness exist, DOE may waive the minimum time periods in § 1022.15 of this subpart.

(c) *Consultation.* To the extent practicable prior to taking an action pursuant to paragraphs (a) or (b) of this section (or as soon as possible after taking such an action) the cognizant DOE program or project manager shall consult with the Office of NEPA Policy and Compliance.

#### § 1022.17 Follow-up.

For those DOE actions taken in a floodplain or wetland, DOE shall verify that the implementation of the selected alternative, particularly with regard to any adopted mitigation measures, is proceeding as described in the floodplain or wetland assessment and the floodplain statement of findings.

### Subpart C—Other Requirements

#### § 1022.21 Property management.

(a) If property in a floodplain or wetland is proposed for license, easement, lease, transfer, or disposal to non-Federal public or private parties, DOE shall:

(1) Identify those uses that are restricted under applicable floodplain or wetland regulations and attach other appropriate restrictions to the uses of the property; or

(2) Withhold the property from conveyance.

(b) Before completing any transaction that DOE guarantees, approves, regulates, or insures that is related to an area located in a floodplain, DOE shall inform any private party participating in the transaction of the hazards associated with locating facilities or structures in the floodplain.

#### § 1022.22 Requests for authorizations or appropriations.

It is DOE policy to indicate in any requests for new authorizations or appropriations transmitted to the Office of Management and Budget, if a proposed action is located in a floodplain or wetland and whether the proposed action is in accord with the requirements of E.O. 11988 and E.O. 11990 and this part.

#### § 1022.23 Applicant responsibilities.

DOE may require applicants for any use of real property (e.g., license, easement, lease, transfer, or disposal), permits, certificates, loans, grants, contract awards, allocations, or other forms of assistance or other entitlement related to activities in a floodplain or wetland to provide information necessary for DOE to comply with this part.

#### § 1022.24 Interagency cooperation.

If DOE and one or more agencies are directly involved in a proposed floodplain or wetland action, in accordance with DOE's NEPA or CERCLA procedures, DOE shall consult with such other agencies to determine if a floodplain or wetland assessment is required by subpart B of this part, identify the appropriate lead or joint agency responsibilities, identify the applicable regulations, and establish procedures for interagency coordination during the environmental review process.

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### DEPARTMENT OF TRANSPORTATION

#### Federal Aviation Administration

#### 14 CFR Part 25

[Docket No. NM262; Special Conditions No. 25-244-SC]

#### Special Conditions: Avions Marcel Dassault-Breguet Aviation Model Falcon 10 Series Airplanes; High-Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

**SUMMARY:** These special conditions are issued for Avions Marcel Dassault-Breguet Aviation (AMD/BA) Model Falcon 10 series airplanes modified by Elliott Aviation Technical Products Development, Inc. These modified airplanes will have a novel or unusual design feature when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The modification incorporates the installation of dual Innovative Solutions & Support (IS&S) Air Data Display Units (ADDU) with the IS&S Air Data Sensor and an analog interface unit (AIU) that perform critical functions. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of high-intensity-radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

**DATES:** The effective date of these special conditions is August 19, 2003.

Comments must be received on or before September 26, 2003.

**ADDRESSES:** Comments on these special conditions may be mailed in duplicate to: Federal Aviation Administration, Transport Airplane Directorate, Attn: Rules Docket (ANM-113), Docket No. NM262, 1601 Lind Avenue SW., Renton Washington, 98055-4056; or delivered in duplicate to the Transport Directorate at the above address. All comments must be marked: Docket No. NM262.

**FOR FURTHER INFORMATION CONTACT:** Greg Dunn, FAA, Airplane and Flight Crew Interface Branch, ANM-111, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98055-4056; telephone (425) 227-2799; facsimile (425) 227-1149.

**SUPPLEMENTARY INFORMATION:**