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A Brief Comparison of the Original E.O. 11988 With the New Draft E.O.

1. Summary. In general, the new draft EO is far more detailed than the 1977 version, covers a much broader scope, would significantly increase the emphasis on environmental protection and restoration aims as opposed to human protection and would add administrative processes that would almost certainly delay and discourage activity in floodplains rather than simply striving to manage them as was the case in the original version. Overall, the new draft takes a much more rigorous approach to floodplain control and regulation than does the 1977 version and changes the fundamental emphasis of such control and regulation. Specifically, the new draft:

- Goes beyond the 1977 definition of the land that is flood prone and includes the water bodies, not just land adjacent to it.
- Establishes the dominant criterion for adverse impacts on floodplains to be impact on the natural resources of the floodplain (including all water). It must be remembered that most any structural alternative has *some* adverse impacts on the natural resources of the aquatic system, even if on balance the alternative is positive.
- Adverse impacts on the floodplain are prohibited if there are “practicable alternatives” to that adverse impact. Practicable alternatives are declared to include alternatives that accomplish the same purpose but are outside the floodplain or have no adverse impact on the floodplain (i.e., no adverse impact on the natural resources of the floodplain).
- Since water bodies would now be covered, navigation projects would be subject to the EO, and while they have adverse impacts on the floodplain (aquatic natural resources) there is no practicable alternative to the adverse impact in most cases. Thus, the new process requirements in the EO would kick in, including mitigation and restoration.
- Structural flood control projects would obviously be subject to the EO. There are nearly always alternatives that (some would claim would) accomplish the purposes of flood control projects that are outside the floodplain or have no adverse effects on the natural resources. There are a myriad of measures that may be combined: insurance, land use, relocation from the floodplain (accomplishes nearly all the flood control purposes), etc. Therefore the EO would prohibit adverse impacts in the form of structural flood control and direct solutions to those that don't adversely affect the floodplain.

2. Process Changes and “Practicable Alternatives.” The new draft establishes a more rigorous – and formal – process evaluation than was required under the 1977 version. While requiring that agencies seek to avoid causing or supporting actions that would

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adversely affect floodplains where a practicable alternative exists, it would also require a thorough alternatives analysis to determine what other steps might be taken instead. Analysis of a “no action” alternative is also required. These requirements raise several concerns:

- There is no requirement in the new draft for a practicable alternative to have net positive benefits. Given the absence of this basic analysis criterion, there would always be an alternative, especially for structural flood control projects. Therefore, it might be expected that, generally speaking, structural flood control projects would be eliminated from future consideration.
- As mentioned above, there may be no practicable alternative to navigation projects. However, the additional restoration and mitigation requirements that would be imposed to implement them would eliminate many of these projects. At a minimum, costs would be driven up.
- The draft order adds to already existing requirements for agencies to offer opportunities for public review and comment on proposed actions in floodplains. It is all but certain that this will have the effect of slowing decision-making further.
- Agencies may not, under the draft order, support so-called “critical actions” in 500-year floodplains unless no practicable alternative exists. This is a new requirement – greatly expanding effective Federal jurisdictional reach. Even slight flooding events are not to be risked. (One wonders what that means for much of Florida and coastal Louisiana; would officials in those areas be effectively prohibited from building, say, new fire stations without undergoing a long and expensive permitting process?) For instance, the draft EO has the following:
“Critical covered action means any covered action for which even a slight chance of flooding would be too great. The minimum floodplain of concern for critical actions or facilities is the 0.2 percent (500-year) annual chance of flood. This can include, but is not limited to, covered actions or facilities critical to the health and safety of the public such as hospitals and nursing homes, emergency operations centers (e.g., police, fire, and rescue), vital data storage centers, power generation and water and other utilities (including related infrastructure such as principal points of utility systems) and any that produce, use or store toxic pollutants or hazardous materials as defined under the Clean Water Act and other Federal statutes and regulations.”
- The new draft EO ties its requirements to NEPA compliance, thus integrating it with other environmental documentation requirements. In pertinent part, “*When preparing documents for compliance with the National Environmental Policy Act (NEPA), agencies can incorporate compliance with this order, when relevant to the proposed Federal action.*”
- The new draft also significantly increases requirements for processing permit applications, thus burdening and contorting the EPA and Corps regulatory program. It seems to nudge Federal agencies dangerously close to the zoning business – clearly a local jurisdiction. Consider the following: “Section 407.

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Process Requirements for Planning and Issuance of Federal Licenses, Permits, Loans, and Grants. In addition, to the other requirements of this order, agencies must also take floodplain management into account by: Ensuring that, when developing or approving water or land use plans, the use of land and water resources is appropriate to the degree of hazard involved.” Further, when dealing with regulatory permitting, the EO requires the agency to “list in the document transferring the property those uses that are restricted and requirements under applicable Federal, State, tribal or local floodplain management regulations and procedures.” And to “make full use of available legal authorities to attach appropriate restrictions to the uses of properties by the grantee or purchaser and any successors.”

- A question is also raised relating to what would happen during Federal permitting for a ***non-Federal*** water resources project requiring a Section 404 or Section 10 permit. If a non-Federal entity needed to build, say, a water supply reservoir for a growing population, would the “practicable alternatives” test preclude that in favor of extreme conservation measures which would, in turn, limit economic growth – or make the permitting process unbearably long and arduous? It would seem so.
- How would the new EO affect agricultural processes and subsidies? Would such subsidies continue to be available? That’s unclear but it seems possible. The same goes for communities located in floodplains. Would they be prohibited from growing through limitations imposed via the EO? This also seems possible.

3. New Emphasis on Natural Resources and the Environment. In the introductory paragraph, the new draft EO introduces a new emphasis on protecting the natural environment - a concept only briefly mentioned in the 1977 version and then only the “natural and beneficial values” associated with controlling floods. The new EO reads “...and in recognition... that activity in the floodplain has caused significant damage to the natural environment.” The 1977 version was clearly aimed primarily at minimizing flood losses. Further, it contained appropriate references to Federal actions potentially affecting the “quality of the human environment [ref: Section 2(a)(1)].” The apparent emphasis on protecting or restoring the natural environment for its intrinsic value is a new direction in the new draft. Additional references are contained in Section 201, which contains the following references: “*Protect and restore the natural resources and functions of floodplains*” and “*consider the effect that climate change and anticipated future conditions might have on the extent and frequency of flooding.*” This new emphasis also appears in Section 301. It reads in part, “*as used in this order:*

(a) *Adverse effects means harm or detriment to the natural resources and functions of floodplains and increased risk of damage or loss of life or property from flooding.*

"Effects" include:

- (i) *Direct effects, which are caused by the Covered Action and occur at the same time and place.*
- (ii) *Indirect effects, which are caused by the covered action and are later in time or farther removed in distance, but are still reasonably foreseeable and likely.*

(iii) *Cumulative effects, which result from the incremental effect of the covered action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*

So, in the new EO, adverse effects can be seen to apply either to harm to natural resources **or** to increased risk from flooding. It can be concluded that any action which would put a structural element into a floodplain has an adverse effect, thus initiating the procedural requirements of the new Executive Order.

4. Emphasis on Non-Structural Approaches. The new draft also directly introduces and encourages the concept of non-structural approaches, which is not directly addressed in the original order. It's found in:

“PART 6 -- PROMOTE NONSTRUCTURAL APPROACHES

Part 601. When acting on proposals for planning, developing, constructing, managing, repairing, restoring, and evaluating flood risk reduction measures or systems, in addition to the requirements in Part 4, agencies shall:

(a) *Use, as much as practicable, nonstructural measures, design modifications, and enhancements... Protect, restore, or improve environmental conditions, including wetlands, riparian buffers, beach dune systems, fish and wildlife habitat, species diversity, and water quality.”*

No such reference to a preference to non-structural approaches is contained in the original EO. Here again, structural solutions, especially those for flood control and water supply, would be made much more difficult to plan and implement.

5. The New Federal “Sheriffs.” And finally, Section 902 subordinates Federal agencies to FEMA and CEQ. It reads, *“each agency shall consult with FEMA and CEQ before writing its regulations and procedures.”*