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January 30, 2017

HQ, U.S. Army Corps of Engineers
ATTN: EO13690/CECW-HS/3G68
441 G Street N.W.
Washington, DC 20314-1000

Re: Docket COE-2016-0018

Dear Sir or Madam:

Thank you for the opportunity to submit comments on the U.S. Army Corps of Engineers (USACE) notice of proposed updates to internal agency implementation guidance to incorporate new requirements of Executive Order 13690 and the Federal Flood Risk Management Standard (FFRMS) through Engineering Circular (EC) 1165-2-217.

From 1980 to 2013, flooding caused more than \$260 billion in damage in the U.S., making it the costliest and most common disaster threat in the nation.¹ Thoughtful application of the FFRMS will help to stop this costly cycle of flooding and rebuilding, protect people and property, and promote the conservation and restoration of resources that can act as natural defenses to flood-related disasters.

The Pew Charitable Trusts strongly supports the FFRMS² and USACE's commitment to implementation as a proactive strategy for investing taxpayer dollars that will pay long-term benefits. In that spirit, we offer the following comments:

Applicability and Use of this EC

The Corps proposes the EC will be applicable to “all Corps Headquarters elements, Major Subordinate Commands (MSC), District Commands, and Field Operating Activities (FOAs)

¹ See, for example, Atreya, Ajita; et.al. “Forgetting the Flood?: An Analysis of the Flood Risk Discount over Time.” Land Economics, Volume 89, Number 4, November 2013, pp. 577-596. Accessed at:

http://opim.wharton.upenn.edu/risk/library/J2013LandEcon_Atreya.pdf

² See comments submitted by The Pew Charitable Trusts, May 6, 2015, <https://www.regulations.gov/document?D=FEMA-2015-0006-0112>; October 21, 2016, <https://www.regulations.gov/document?D=FEMA-2015-0006-0442>; and December 26, 2016, <https://www.regulations.gov/document?D=HUD-2016-0124-0043>.

having Civil Works responsibility” (lines 31-4). We agree this captures the intent of broad applicability of the FFRMS. Further, while the proposal states the EC will not apply to “Emergency flood-related activities... exempt from the provisions of EO 11988” (line 221), we are extremely pleased to see the Corps’ encouragement that “these emergency actions shall consider and comply with the intent of the EO to the extent practicable” (line 223-5). We understand the need to exempt some emergency preparedness and response actions from the FFRMS in order to provide for the immediate protection of lives and property, but we urge the Corps to additionally elaborate and identify ways to enhance the performance and resilience of PL 84-99 actions related to rehabilitation. Federal spending on rehabilitation after major flooding can be a significant cost to taxpayers and it’s prudent to ensure these investments will be beneficial and long-lasting.

Depending on the nature of the action, the EC designates which floodplain must be used for the required analysis: either the FFRMS floodplain (which may be larger for cases involving a critical action) or the 1-percent-annual chance floodplain. The rationale behind each of the exceptions to use of the FFRMS floodplain is not clear (lines 165-204), and we believe that restricting a project analysis to the 1-percent annual chance floodplain may be inappropriate and yield little benefit in some instances. As you know, the Order itself allows agency heads to make exception to use of the FFRMS floodplain for emergency action, for reasons of national security, and other instances in which it is found to be clearly inappropriate, but it does not exempt these actions from flood risk review. Given this, whenever a flood risk review occurs, the preference should be for consideration of the FFRMS floodplain. For these categories of action, where determination of the FFRMS floodplain would cause critical delays, the 1-percent annual chance floodplain could be used. These cases, however, should operate on an exception basis, not on a blanket policy to disregard the FFRMS floodplain.

At line 206, the EC establishes a cutoff date for application of the FFRMS analysis requirement, making clear that the requirement applies to any action initiated on or after the date of issuance of the EC. We agree with this approach.

At line 218, we recommend additional language to clarify that review of operations and maintenance activities that lessen or impair floodplain functions and values is required. While the proposed language speaks to “changing” the floodplain, we do not believe it is sufficiently clear. Similar language might be added throughout the document to assure that those implementing the policy will consider, not just changes to the horizontal or vertical extent of the floodplain, but also the loss or degradation of floodplain functioning within the local ecosystems.

General Policy

We agree and strongly support the general policy to, “avoid or minimize adverse impacts associated with the use of the floodplain and avoid inducing development in the floodplain”

(lines 229-31). This is a critical policy that can help to lower flood risks to life and property and help to limit the need for future disaster response and recovery spending. In order to provide greater clarity, specific reference should be made to existing policy or guidance available to inform the evaluation of federal action impacts on development in the floodplain.

Additional language that clarifies what constitutes adverse impacts is needed and should explicitly reference changes to natural floodplain values and functions. We would not support a definition that simply considered changes to the vertical and horizontal extent of the base flood elevation. We recommend greater level of detail be provided within the final EC which will be particularly relevant for full evaluation of flood control and other Corps projects.

Line 247 specifically begins discussion of how the relevant floodplain and corresponding flood elevation will inform the evaluation of the federal action and formulation of alternatives. Stating, “it will be used in considering the appropriateness of additional flood resilience measures that may help ensure that the project functions during a flood event of that magnitude” (lines 250-3). We agree this is appropriate as many trade-offs must be evaluated and considered prior to recommending a final action. We do not support any horizontal infrastructure-specific exemptions within this EC and urge that level of detail, if needed, be included within program-specific guidance documents. We are concerned that lines 256-63 may be interpreted as exempting some actions from full analysis and should be revised to make clear that the EC will apply, unless explicitly stated under section 6 “Use of this EC” subsection c (begins line 211).

In addition, consideration of nature-based approaches when identifying the array of alternatives, as discussed in lines 265-72 is critical to meet the requirements of the FFRMS. This section is generally in keeping with the requirement laid out in the Order for consideration of nature-based alternatives wherever possible, but we are concerned that the language opens a broad exception. As you know, the Order and the guidelines for implementation called on each federal agency to identify the regulations and policies that should be changed in order to implement this new, more protective standard. Such changes, of course, cannot be contrary to law, but to the extent that law allows, the agencies were directed to make changes to regulations and policies. Therefore, we believe that the language should read: “Where possible and in keeping with federal law” (lines 265-6).

For section 7, subsection f, we recommend adding language after line 293 to make it clear that potential harm caused by an action includes increasing the risk of flood damages to other areas.

At several points within the EC (for example, lines 358-359 and lines 459-460), the Corps rightfully addresses concerns with actions that directly or indirectly support development within the floodplain. We agree the Corps has an obligation to consider the potential for this “induced risk,” and would urge the agency to examine how it might more specifically guard against perverse incentives that drive new development into areas “protected” by structures that have the potential for catastrophic failure over time. As part of the alternatives evaluated, the Corps

should consider institutional arrangements for managing this residual risk, through public disclosure and education, deed restrictions, or other appropriate means for both projects to be managed by the Corps and those maintained by non-federal partners. Related to this concern, we recommend a specific change to line 496 to read: "...the Corps shall withhold such properties from outgrant or conveyance, to the extent allowed by law."

General Procedures

Incorporating the eight-step decision-making process outlined in sections 8a through 8h and the National Environmental Policy Act (NEPA) process will ensure that flood risk management considerations and tradeoffs are evaluated at the same time.

In Step 1, we strongly concur with the statement that all Corps actions subject to the FFRMS will use the CISA approach (lines 320-323). Given the sizeable cost to the public of Corps actions, the planned longevity of Corps projects, and their impacts on the nature of flood risk within communities across the country, it is essential that these actions be planned with future risks in mind. Corps engineers and analysts understand well the dynamic nature of flood risks and have developed solid working relationships with other federal agencies, such as FEMA and NOAA, working on flood management. These capabilities should be brought to bear to assure that Corps actions will be carried out in ways that offer lasting and cost-beneficial flood and floodplain projects that protect people, property, and the environment.

Throughout the general procedures, the process focuses a great deal on the physical location of the proposed action and several steps reference evaluating alternatives outside of the floodplain which is appropriate. However, most Corps projects will be located within the floodplain and are often place-based, so greater emphasis on the development of meaningful alternatives throughout each of the steps is needed and would assist with comprehensive reviews and forward-looking projects and project designs. For example, Step 3 (begins line 384) requires identifying "alternative actions, which include other means that accomplish the same purpose as the proposed action." This is critical and greater emphasis on this approach to developing alternatives should be added throughout. The inherent place-based nature of Corps actions will require meaningful development and consideration of project alternatives, including incorporation of nature-based solutions into traditional "grey" flood control structures, in order to result in compliance with the FFRMS.

Further, in Step 3, we believe that the language misstates the requirements of the amended EO 11988. At line 384, the current language calls for identification and evaluation of "practicable" alternatives, while the EO itself calls for consideration of nature-based alternatives whenever "possible." While the construct of the paragraph appears to refer only to alternatives to location of the project and not alternatives to the project itself, we are concerned that it may undercut what we read as the EO's strong call for innovation and wider use of nature-based solutions. We

understand that a consideration of what might be deemed “practicable” will ultimately come into play in the final selection of alternatives, but we are concerned that pre-supposed notions of what is “practicable” not unduly limit the early discussion of alternatives. (See line 455, where we believe the term “practicable” does belong.) We urge the Corps to change the first sentence of Step 3 (begins line 384) to read: “Identify and evaluate multiple alternatives, including alternatives relying exclusively or in part on natural systems or nature-based designs.”

We look forward to the opportunity to comment on additional guidance on the use of natural and nature-based approaches, which the draft EC references on line 271-2 and elsewhere. Additionally, we encourage the development of specific programmatic guidance to ensure proposed actions conduct meaningful due diligence on the role of natural and nature-based approaches. Meeting the requirements and objectives set forth within the FFRMS and EC statement of general policy will require more robust action proposals and thoughtfully developed alternatives that both preserve and protect natural floodplain values and functions and utilize those functions in ways that lessen the likelihood for property damage and loss of life.

Conclusion

We commend the Corps for its initiative and believe that implementation of this long-overdue FFRMS offers an investment strategy for taxpayer dollars that will pay long-term benefits, especially as the population grows and concentrates near riverine and coastal flood hazard areas.

The concepts contained within the proposed EC are not new. In fact, the Engineering Regulation (ER) 1165-2-26 which the proposed EC will replace simply aims to better protect taxpayer investments from future flood risk. We appreciate the opportunity to comment and look forward to the Corps’ final issuance of the EC and subsequent program guidance.

Sincerely,



Diane Hoskins
Officer, Government Relations
The Pew Charitable Trusts