

**Lesson Overview**

This lesson describes different laws and Executive orders (EOs) concerning wetlands, waterways, and water bodies, and how each affects FEMA's actions.

**Lesson Objectives**

At the end of this lesson, you will be able to:

- Describe the key components of the following laws and EOs:
    - Clean Water Act
    - EO 11988: Floodplain Management
    - EO 11990: Protection of Wetlands
    - Fish and Wildlife Coordination Act
  
  - Describe the responsibilities of FEMA and the applicant under these acts and EOs.
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**Laws and Executive Orders: Water**

This lesson will introduce the key laws and EOs designed to protect the Nation's waterways.

**Key Points**

- In addition to NEPA, Federal agencies must comply with laws and Executive orders designed to protect the Nation's waterways.
  
  - The Clean Water Act addresses water quality by regulating the discharge of pollution into waterways.
  
  - EO 11988 for Floodplain Management requires Federal agencies to evaluate their actions in a floodplain.
  
  - EO 11990 for Protection of Wetlands requires Federal agencies to avoid, to the extent possible, adverse impact to wetlands.
  
  - The Fish and Wildlife Coordination Act requires Federal agencies to consider the effects of their projects on fish and wildlife resources.
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**Clean Water Act**

Passed by Congress in 1972, the Clean Water Act is intended to restore and maintain the quality of the Nation's water resources by limiting pollution.

Under the Clean Water Act:

- Major industries must meet pollution control standards.
  - States must set water quality criteria and develop water pollution control programs to meet those criteria.
  - States receive money to help them reduce water pollution, such as funding for water treatment plants.
  - Wetlands and other aquatic habitats are protected.
  - The Corps of Engineers grants permits for dredging and filling in the "waters of the United States."
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**"Waters of the United States"**

The phrase "waters of the United States" is used to describe the jurisdiction of the Clean Water Act. This includes:

- Rivers and streams
  - Lakes and ponds
  - Coastlines
  - Wetlands
  - Estuaries
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**Permits and the Clean Water Act**

The Clean Water Act established a permitting process to regulate the discharge of dredged or fill materials and pollutants into the waters of the United States.

Applicants must comply with both State and Federal permitting requirements.

Whether or not Federal funding is involved, an applicant must receive permits for work within the waters of the United States.

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**Section 401: State Certification**

Under Section 401 of the Clean Water Act, States have the authority to issue their own water quality certifications, which may be stricter than Federal regulations. Before a project can be implemented, the applicant must coordinate with the State for certification that the proposed activity will not violate applicable State water quality standards.

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**Section 404: Federal Certification**

Under Section 404 of the Clean Water Act, the U.S. Army Corps of Engineers is responsible for issuing Federal permits for the discharge of dredged or fill materials into the waters of the United States.

FEMA's disaster recovery efforts often take place around the Nation's waters and may involve dredging and filling. This type of work will likely require the applicant to obtain an appropriate Section 404 permit.

Two types of Section 404 permits, general and individual, will be discussed on the following screens.

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**Section 404: General Permits**

General permits:

- Are issued on a nationwide, regional, or State level for activities that are predetermined to have minimal impact.
- Require substantially less review than an individual permit would require.
- Require varying levels of U.S. Army Corps of Engineers (USACE) review.

Local USACE districts should be contacted for applicability.

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**General Permits and FEMA**

Some of the categories of general permits most relevant to FEMA's actions in disaster response, recovery, and mitigation include:

- Maintenance of existing structures.
  - Debris removal.
  - Bank stabilization.
  - Minor dredging.
  - Headwaters and isolated waters discharges.
  - Maintenance of existing flood control projects.
  - Temporary construction, access, and dewatering.
  - Emergency watershed protection.
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**Section 404: Individual Permits**

Individual permits are:

- Issued to a single entity (individuals, companies, or governments) to authorize specific activities.
  - Required in cases where a proposed project does not meet the terms and/or conditions of either a regional or nationwide general permit due to:
    - The type of activity,
    - The size of the project, or
    - The scale of impact to the aquatic environment.
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### Responsibilities Under the Clean Water Act

The following table summarizes the responsibilities of FEMA and the applicant under the Clean Water Act.

| Party     | Responsibilities  |
|-----------|---|
| FEMA      | <ul style="list-style-type: none"> <li>▪ Ensure that Tribal, State, and local governments understand and comply with requirements of the law.</li> </ul>  |
| Applicant | <ul style="list-style-type: none"> <li>▪ Determine if waters of the U.S. (including wetlands) may be affected.</li> <li>▪ Contact the local U.S. Army Corps of Engineers District Regulatory Office.</li> <li>▪ Obtain and comply with a Section 404 permit if dredging or filling in waters of the United States is planned.</li> <li>▪ Obtain and comply with State 401 certification.</li> <li>▪ Keep FEMA informed of project and permitting progress.</li> </ul> |

### EOs: Floodplain Management and Wetland Protection

Wetlands and floodplains play an important role in wildlife habitat, pollution control, and flood control.

Because of the critical nature of wetlands and floodplains, these resources have been granted further protection under two Executive orders. (EOs are issued by the President and apply only to Federal agencies.)

The following screens will discuss these orders.

### Executive Order for Floodplain Management

EO 11988, Floodplain Management, requires Federal agencies to:

- Maintain the natural and beneficial values of floodplains.
- Avoid development or new construction in floodplains.
- Evaluate the potential effects of actions that are in or may affect a floodplain.
- Avoid, to the extent possible, actions within or affecting a floodplain, particularly those that increase the base flood elevation.

**Identifying Floodplains**

For most projects, the regulations established in this EO apply to 100-year floodplains.

However, for projects that involve critical facilities, the regulations include 500-year floodplains. A "critical facility" is defined as any facility for which even a slight chance of flooding would cause an unacceptable level of loss, such as an emergency center, school, or hospital.

Flood insurance rate maps (FIRMs) produced by FEMA's National Flood Insurance Program (NFIP) should be consulted to determine if a project is located in either a 100-year or 500-year floodplain.

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**Executive Order for Protection of Wetlands**

EO 11990, Protection of Wetlands, requires Federal agencies to:

- Avoid, to the extent possible, adverse impact of wetlands.
  - Avoid direct or indirect support of actions that affect wetlands if practicable alternatives exist.
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**Identifying Wetlands**

A large array of natural environments can be classified as wetlands, including swamps, marshes, bogs, potholes, river overflows, mudflats, and natural ponds.

On the basis of vegetation, soil, and hydrology, specialists can identify wetlands.

Sources of information on wetlands include the Corps of Engineers, State or Federal natural resource agencies, and the Fish and Wildlife Service and its National Wetlands Inventory (NWI).

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**Compliance Process for EO 11988 and EO 11990**

Implementing regulations (44 CFR Part 9) for EO 11988 and EO 11990 require FEMA to conduct an eight-step decisionmaking process for all projects that may be in or affect floodplains and/or wetlands.

This decisionmaking process parallels the NEPA process, and compliance with both regulations can be streamlined. Where NEPA review is required, analysis and reporting can be performed for both NEPA and these requirements at the same time.

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**Eight-Step Process**

Roll your mouse over each of the eight steps to learn more about the decisionmaking process for projects affecting wetlands or floodplains.

**Step 1: Determine Project Location**

Determine whether the project is located in or may affect a wetland or floodplain. If not, the process is complete.

**Step 2: Encourage Public Involvement**

If a proposed project is located in a wetland or a floodplain, notify the public at the earliest possible time to involve interested parties.

**Step 3: Evaluate Alternatives**

Determine if there are reasonable alternatives to locating a project in a floodplain or wetland. If reasonable alternatives exist, FEMA cannot locate the project in the floodplain or wetland.

**Step 4: Assess Impact**

If the project must be located in or may affect the wetland or floodplain, then identify the full range of effects associated with the action.

**Step 5: Minimize Impact**

After potential effects have been identified, develop feasible ways to avoid, minimize, or compensate for all potential adverse impacts.

**Step 6: Determine Practicability**

Reevaluate the project to determine if it is still practicable given exposure to flood hazards, increased hazards to others, and damage to wetland or floodplain values.

**Step 7: Provide Public Explanation**

Prepare and publicize an explanation of why affecting a wetland or floodplain is the only practicable alternative.

**Step 8: Comply With Executive Orders**

Review project implementation to ensure that the EO requirements are fully met.

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**Similarities**

Both NEPA and the wetlands/floodplain eight-step process require:

- Public involvement.
- Evaluation of alternatives.
- Assessment of impact.

**Differences**

The eight-step process requires the selection of an alternative outside of wetlands or floodplains if practicable, or the minimization of impact. NEPA is only a procedural law and cannot require any specific outcome. The NEPA process must conform to the eight-step process in selection of alternatives.

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### Responsibilities in the Eight-Step Process

The following table summarizes the responsibilities of FEMA and the applicant under the eight-step process for complying with the Executive orders on wetlands and floodplains.

| Party     | Responsibilities   |
|-----------|--|
| FEMA      | <ul style="list-style-type: none"> <li>▪ Must use the eight-step process to assess the likely impacts of the proposed action and alternatives on floodplains and wetlands.</li> <li>▪ Must comply with the determination of that process.</li> </ul>   |
| Applicant | <ul style="list-style-type: none"> <li>▪ Must comply with FEMA's findings of the eight-step process.</li> <li>▪ Must notify FEMA of any changes in the proposed action so that the revised action can be assessed using the eight-step process.</li> <li>▪ Must comply with State and local floodplain management and wetlands regulations.</li> </ul> |

### Fish and Wildlife Coordination Act

While the Clean Water Act was passed to improve and protect the quality of water in the United States, the Fish and Wildlife Coordination Act (FWCA) was enacted to protect fish and wildlife affected by Federal actions that control or modify natural streams or water bodies.

The statute requires Federal agencies to:

- Take into consideration the effect that water-related projects would have on fish and wildlife resources.
- Take action to prevent loss or damage to these resources.
- Provide for the development and improvement of these resources.

### Actions Regulated Under the FWCA

To comply with the requirements specified in the law, Federal agencies must first determine whether a proposed activity will control or modify a natural stream or water body.

Typical actions that would fall under the jurisdiction of the act include:

- Channelization or bank stabilization of streams.
- Construction, modification, or operation of dams, levees, impoundments, or water-diversion structures.

### Exemptions From the FWCA

Two general types of activities exempt from review under the act are:

- Water impoundments, such as dams, dikes, or floodgates, with a water surface area of less than 10 acres.
- Programs for land management and use carried out by Federal agencies on land under their jurisdiction.

In addition, the provisions of the act do not apply to the Tennessee Valley Authority.

### Complying With the FWCA

Under the Fish and Wildlife Coordination Act, if a project involves modifying a natural stream or body of water, or its hydrology, then a Federal agency such as FEMA must consider mitigating project-related losses of fish and wildlife resources.

### Consultation Under the FWCA

Mitigation measures must be developed in consultation with the Fish and Wildlife Service (FWS) and/or National Marine Fisheries Service (NMFS), as appropriate, and the State fish and wildlife agency.

This consultation includes addressing concerns about general plant and wildlife species and should be coordinated with other FWS/NMFS consultations addressing wetlands and endangered species.

### Responsibilities Under the FWCA

The following table summarizes the responsibilities of FEMA and the applicant under the Fish and Wildlife Coordination Act.

| Party     | Responsibilities   |
|-----------|--|
| FEMA      | <ul style="list-style-type: none"> <li>▪ Review proposed activities for projects affecting natural streams or water bodies.</li> <li>▪ Consult with the FWS, NMFS, and State wildlife agency regarding potential effects of FEMA action to fulfill official Federal role under FWCA.</li> <li>▪ Ensure project integrates reasonable measures for mitigating impacts, taking into consideration FWS, NMFS, and State agency comments.</li> </ul> |
| Applicant | <ul style="list-style-type: none"> <li>▪ Consult with FWS, NMFS, and State wildlife agency regarding impact during project planning.</li> <li>▪ Incorporate prescribed measures to avoid, minimize, or otherwise mitigate adverse impact to water bodies and wildlife.</li> </ul>  |



**Lesson Summary**

You have now completed the fourth lesson in the Environmental Review section of this course. You should be able to:

- Describe the key components of the following laws and EOs:
    - Clean Water Act
    - EO 11988: Floodplain Management
    - EO 11990: Protection of Wetlands
    - Fish and Wildlife Coordination Act
  
  - Describe the responsibilities of FEMA and the applicant under these acts and EOs.
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