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	<p><b>EXPIRES 30 SEPTEMBER 2002</b></p> <p>Planning</p> <p>IMPLEMENTATION PROCEDURES, MOA BETWEEN FEMA AND DEPARTMENT OF THE ARMY, HMGP AND FLOOD DAMAGE REDUCTION PROJECTS</p>	
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CECW-P

Circular  
No. EC 1105-2-218

1 October 2000

Expires 30 September 2002  
Planning

IMPLEMENTATION PROCEDURES, MOA BETWEEN FEMA AND DEPARTMENT OF  
THE ARMY, HMGP AND FLOOD DAMAGE REDUCTION PROJECTS

1. Purpose. The purpose of this guidance is to discuss the requirements and procedures for the implementation of the Memorandum of Agreement (MOA) entered into on 29 March 2000 by the Federal Emergency Management Agency (FEMA) and the Department of the Army (DA) regarding the Hazard Mitigation Grant Program (HMGP) and the Corps of Engineers flood damage reduction projects.

2. Applicability. This circular applies to all HQUSACE elements, major subordinate commands and districts having Civil Works responsibilities.

3. Distribution Statement. Approved for public release, distribution is unlimited.

4. References.

a. Memorandum of Agreement Between the Federal Emergency Management Agency and the Department of the Army Regarding the Hazard Mitigation Grant Program and Corps of Engineers Flood Damage Reduction Projects, 29 March 2000.

b. ER 405-1-12, Real Estate Handbook

c. ER 500-1-1, Natural Disaster Procedures

d. ER 1105-2-100, Planning Guidance Notebook

5. Background. The DA and FEMA share a Federal interest in reducing the loss of life and property damage from flooding. It is the policy of both agencies to encourage the wise and non-hazardous use of the flood plains, including recognition of natural and beneficial flood plain values. FEMA, through the HMGP, provides grants to States and local governments for property acquisition and relocation assistance. The purpose of the HMGP is to reduce the loss of life and property damage due to natural disasters and to enable flood damage mitigation measures to be implemented during the immediate recovery from a disaster. The use of lands acquired using HMGP funds is restricted to uses compatible with open space, limited recreation or wetlands management practices. (See 42 U.S.C. § 5170c.) The need to enter into a MOA with FEMA regarding the use of lands acquired under the HMGP surfaced during the review of various Corps flood control projects that recommended the construction of levees on these lands.

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The MOA reflects the agreement of both agencies for the resolution of this issue. A copy of the agreement is included as Appendix A of this EC.

6. Policy. It is the policy of the DA and FEMA to facilitate the use of non-structural approaches to reducing flood damages where practicable. It is also the policy of the DA and FEMA that the construction of flood damage reduction levees on lands or any interest therein acquired with HMGP funds is incompatible with open space uses and, therefore, will not be recommended for implementation. For purposes of this EC, levees include berms, floodwalls and dikes. The restriction on levee construction generally does not apply to structures designed specifically for ecosystem preservation or restoration. Structures for these purposes, designed to restore ecosystem structure, functions, values and processes, are deemed consistent with the open space uses requirement of the HMGP. These structures could provide incidental flood damage reduction benefits but shall be deemed consistent with FEMA's open space requirements if formulated for ecosystem restoration. Guidance on the applicability of the requirements of this EC to projects pursued under the authority of Section 212 of WRDA 99 is under development and will be provided separately.

7. Implementation Procedures.

a. General. The districts and FEMA regional offices will coordinate to ensure that the State, tribal or local government and non-Federal sponsors are fully aware of any potential land use conflicts that may result if both a flood damage reduction levee and an HMGP open space acquisition project are considered or pursued. Coordination requirements for on-going and future studies are discussed in the following paragraphs.

b. FEMA's Responsibilities. FEMA will require applicants developing acquisition projects to coordinate with the USACE regarding planned or potential USACE projects in the area of the acquisition. When FEMA receives an application from a State, on behalf of a local government, requesting an acquisition project, FEMA will inform the appropriate USACE district office of the parcels proposed for purchase to ensure that a USACE levee is not already under consideration on the project site. If a levee is under consideration, FEMA will notify the applicant and the District will notify the non-Federal sponsor (if different from the applicant). In this case, the District will hold an issue resolution conference with representatives from FEMA, the applicant and the non-Federal sponsor (if other than the applicant) to decide whether to continue to pursue the Corps project or FEMA's HMGP funding.

c. Corps' Responsibilities.

(1) Reconnaissance Phase. Upon initiation of a Reconnaissance study or a Section 905(b) Analysis, the District will consult with the appropriate FEMA Regional Office to ensure that property in the proposed study area was not previously acquired under the HMGP. If property was acquired under this program in the study area, the District will make a preliminary determination whether potential solutions are available that would not require or impact the use of those lands. The District will notify the non-Federal sponsor and the FEMA Regional office of the results of this preliminary determination and document it in the Section 905(b) Analysis or Reconnaissance Report. If it is determined that plans avoiding the use of FEMA acquired

properties are not feasible, the District, in consultation with the sponsor, the MSC and HQUSACE, will determine the future of the study.

(2) On-going Feasibility Studies, General Reevaluation Studies, Continuing Authority Program (CAP) Studies – District offices conducting studies in the feasibility phase, general reevaluation phase or under the CAP authorities and considering the construction of levees shall immediately contact the FEMA regional office to determine if lands were acquired in the study area under the HMGP. If the study is in the initial stages of the planning process, lands acquired with HMGP funds will be a constraint for plan formulation and evaluation, except in the case of ecosystem restoration studies. No plans will be formulated that will require the use of lands acquired using HMGP funds for the construction of levees for flood damage reduction. The constraint is applicable to lands within the footprint of the levee and lands required for operation and maintenance. The NED Plan will be the plan that maximizes net economic development benefits without the use of lands acquired using HMGP funds. If the study is in the final stages of the planning process, (i.e., a recommended plan has been selected, an Alternative Formulation Briefing has been conducted and the draft report has been approved for release to the public) and the recommended plan includes a levee on lands acquired with HMGP funds, the District will immediately determine the impact of the requirements of this EC on the planning process, the scope, schedule and cost of the study. If the Corps is currently conducting a study that might involve the construction of levees for purposes other than ecosystem restoration and FEMA coordinates with the Corps an application for acquisition of lands under the HMGP from an entity which is not the sponsor for the study, the Corps will notify the non-Federal sponsor of the potential action and discuss the impacts on the study. The non-Federal sponsor is responsible for resolving the conflicts, if any, between the Corps study and the application for the FEMA grant and notifying the Corps of the final resolution.

(3) Reporting Requirements. In all instances where the requirements of this EC impact the planning process, the scope, schedule, or cost of a study, the nature and extent of the impact should be documented in the study report. As part of this requirement, the Real Estate Plan included in a report pursuant to ER 405-1-12 should separately identify any lands, or interests therein, acquired with HMGP funds that are required for the construction, operation, or maintenance of the proposed project; describe what project feature, if any, will be constructed on such lands; and clearly indicate that the non-Federal sponsor will not be afforded credit for the value of such lands or for incidental costs of acquiring lands provided for the project that were paid with HMGP funds.

8. Ecosystem Restoration Projects. Ecosystem restoration projects are designed to restore degraded ecosystem structure, function and dynamic processes to a less degraded, more natural condition. Structures recommended to achieve this goal are compatible with the open space requirements under the HMGP. The restriction on levee construction stated in this EC and the MOA generally does not apply to structures designed for this purpose. Some of these structures might also provide incidental flood control benefits but will not be subject to the constraints stated herein as long as they are formulated for ecosystem restoration and are justified on the basis of ecosystem restoration outputs. Recreational facilities associated with ecosystem restoration projects that meet the Corps requirements stated in ER 1105-2-100 and Section 404 of the Stafford Act (42 U.S.C. Section 5170c) are also consistent with open space use.

9. Real Estate Crediting Considerations. No land, or any interest therein, acquired with HMGP funds will be used for a Corps project unless the use thereof is consistent with the policies and procedures contained in this EC. Where use of lands acquired with HMGP funds for a Corps project is consistent with such policies and procedures, and such lands are provided by the non-Federal sponsor for the Corps project, the non-Federal sponsor shall not receive credit toward its required contribution for the value of such lands or any interest therein. The non-Federal sponsor also shall not receive credit for incidental costs of acquiring lands provided for the Corps project that were paid with HMGP funds. Similarly, the value of such lands, including incidental costs, shall not be included as part of total project costs for cost sharing or NED plan determination purposes.

10. Limited Exceptions. The Corps has identified some projects in advanced planning stages for which the NED Plan or recommended plan includes a levee to be built on lands previously acquired under the HMGP. The exception and procedures stated in the following sub-paragraphs will apply exclusively to these projects. In these cases, the FEMA regional office, and the District will conduct an expeditious joint review to determine if the identified levee may proceed. This joint determination will be based on the following requirements and criteria:

a. The Federal interest in allowing construction of the flood damage reduction levee on lands acquired with HMGP funds must be demonstrated by documenting that no practicable, feasible alternative exists or by showing that undue hardship to the community, such as significant residual flooding and incremental costs, will result if lands other than those acquired with HMGP funds are used. The District must document that, based on applicable regulations and procedures, it has given proper consideration to other options for protecting the area behind the proposed flood damage reduction levee and found them to be impracticable. The District shall also document its determination, in consultation with FEMA, that there reasonably is no land, other than the proposed project's alignment, on which levee construction is technically feasible, economically justified, and environmentally acceptable.

b. The proposed flood damage reduction levee must comply with Federal, state and local floodplain management requirements, including FEMA and USACE regulations implementing Executive Order 11988 and Section 404 of the Clean Water Act.

If FEMA and the Corps determine that the proposed flood damage reduction levee meet these criteria, FEMA will provide an appropriate legal instrument that will amend the open space restrictions to allow the construction of the flood damage reduction levee on the affected land. This amendment will apply only to land directly under the footprint of the Corps flood damage reduction levee and other land needed for the operation and maintenance of the project.

11. Applicability to Public Law (PL) 84-99 Activities.

a. Advance Measures. This EC is not applicable to any temporary levees or other temporary projects constructed as Advance Measures projects under authority of PL 84-99.

b. Rehabilitation of Damaged Flood Control Works. Engineer Regulation 500-1-1

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requires that the non-Federal sponsor of a flood control work eligible for rehabilitation assistance provide to the Corps the lands, easements, and rights of way necessary to effect the rehabilitation. Acquisition of lands and properties in the floodplain using HMGP funds is an alternative to the levee rehabilitation work. It is the responsibility of both the District and FEMA representatives to discuss the options and their requirements with the non-Federal sponsor. If the non-Federal sponsor decides to acquire lands or any interest therein using HMGP funds within the footprint of the levee, then rehabilitation of the levee will not be considered.

12. Future Departures from Policy. Once joint FEMA and Corps coordination and review has been completed on the limited cases defined in paragraph 10, future departures from this policy shall only be approved by the Assistant Secretary of the Army for Civil Works and the Associate Director for Mitigation, FEMA. Sufficient and early coordination, as identified in the MOA, will ensure that potential conflicts are identified and resolved, to the extent possible, prior to the acquisition of property under the HMGP, or prior to the planning of an USACE flood damage reduction project.

13. Resolution of disagreements. The Assistant Secretary of the Army for Civil Works and the Associate Director for Mitigation of FEMA will resolve disagreements between the FEMA Regional offices, the Corps districts offices, non-Federal sponsors and HMGP applicants that can not be resolved by the districts in consultation with the MSC and HQUSACE.

14. Implementation. This guidance is effective immediately. Districts and MSCs should inform CECW-PG of any problems with the implementation of this guidance.

FOR THE COMMANDER:

1 Appendix  
APP A - MOA

  
ALFRED H. FOXX  
Colonel, Corps of Engineers  
Executive Director of Civil Works

**APPENDIX A****Federal Emergency  
Management Agency****Department of the Army  
Office of the Assistant Secretary**

**MEMORANDUM OF AGREEMENT  
BETWEEN  
THE FEDERAL EMERGENCY MANAGEMENT AGENCY  
AND  
THE DEPARTMENT OF THE ARMY  
REGARDING  
THE HAZARD MITIGATION GRANT PROGRAM  
AND  
CORPS OF ENGINEERS FLOOD DAMAGE REDUCTION PROJECTS**

**I. BACKGROUND**

The Department of the Army (DA) and the Federal Emergency Management Agency (FEMA) share a Federal interest in reducing the loss of life and property damage from flooding. It is the policy of both agencies to encourage the wise and non-hazardous use of the flood plains, including recognition of natural and beneficial flood plain values. The

U. S. Army Corps of Engineers (USACE), in partnership with States, Native American Nations (tribes) and local governments, plans, designs, and constructs projects that reduce future flood damages and preserve and enhance natural and beneficial flood plain values. The FEMA Hazard Mitigation Grant Program (HMGP) provides grants to States and local governments for property acquisition and relocation assistance. The purpose of the HMGP is to reduce the loss of life and property damage due to natural disasters and to enable flood damage mitigation measures to be implemented during the immediate recovery from a disaster. The use of lands acquired using HMGP funds is restricted to open space, including those activities designed for ecosystem preservation, restoration, or enhancement.

**II. POLICY**

It is the policy of the DA and FEMA to facilitate the use of non-structural approaches to reducing flood damages where practicable. It is also the policy of the DA and FEMA that the construction of flood damage reduction levees<sup>1</sup> on HMGP lands is incompatible with open space uses and, therefore, will not be recommended for implementation.

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<sup>1</sup> Flood damage reduction levees include berms, floodwalls and dikes.

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The restriction on levee construction generally does not apply to structures designed specifically for ecosystem preservation, restoration, or enhancement. Structures for these purposes are deemed consistent with the open space uses requirement of the HMGP.

### **III. COORDINATION OF HMGP APPLICATIONS AND USACE PROJECTS**

FEMA Regional Offices and USACE district offices will work together on an ongoing basis to ensure that local governments fully understand that accepting HMGP funds to acquire land will preclude later construction of flood damage reduction levees on that property.

FEMA will require applicants developing acquisition projects to coordinate with the USACE regarding planned or potential USACE projects in the area of the acquisition. When FEMA receives an application from a State, on behalf of a local government, requesting an acquisition project, FEMA will inform the appropriate USACE district office of the parcels proposed for purchase to ensure that a USACE levee is not already under consideration on the project site. When USACE begins to develop a flood damage reduction project, the appropriate USACE District Office will consult with the appropriate FEMA Regional Office to ensure that property in the proposed project area was not previously acquired under the HMGP.

The USACE district and FEMA regional offices will coordinate to ensure that the State, tribal or local government and non-Federal sponsor are fully aware of any potential land use conflicts that may result if both a USACE flood damage reduction levee and an HMGP open space acquisition project are considered or pursued. However, there may be situations where the State, tribal, or local government and non-Federal sponsor may be able to pursue both the open space acquisition project and flood damage reduction project, consistent with the overall policy objective of facilitating the use of non-structural approaches.

### **IV. COORDINATION OF LIMITED EXCEPTIONS**

In a limited number of cases where local governments are currently pursuing the construction of USACE flood damage reduction levees on lands previously acquired under the HMGP, FEMA regional, and USACE district offices will conduct an expeditious joint review on a case-by-case basis to determine if any of the identified levees may proceed. If concurrence cannot be achieved, the issues must be raised through appropriate channels, to ultimately be resolved through consultation between the Assistant Secretary of the Army for Civil Works and the Associate Director for Mitigation, FEMA. This joint determination will be based on the following requirements:

1. The Federal interest in allowing construction of the flood damage reduction levee on HMGP open space land must be demonstrated by documenting that no practicable alternative exists or by showing undue hardship to the community will result if non-HMGP lands are used, as follows:
  - a. Based on applicable regulations and procedures, USACE has given proper consideration to other options for protecting the area behind the proposed flood damage reduction levee and found them to be impracticable; and

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- b. USACE, in consultation with FEMA, has determined that there reasonably is no land, other than the proposed project's alignment, on which levee construction is technically feasible, economically justified, and environmentally acceptable.
2. The proposed flood damage reduction levee must comply with Federal, State and local floodplain management requirements, including FEMA and USACE regulations implementing Executive Order (EO) 11988 and Section 404 of the Clean Water Act.

If FEMA and USACE determine that any of the proposed flood damage reduction levees currently under joint review meet these criteria, FEMA will provide an appropriate legal instrument that will amend the open space restrictions to allow the construction of flood damage reduction levees on the affected land. This amendment will apply only to land directly under the footprint of the USACE flood damage reduction levee and other land needed for the operation and maintenance of the project

Once joint FEMA and USACE coordination and review has been completed on these limited requests for an exceptional amendment to deed-restrictions to allow for the construction of an USACE flood damage reduction levee on these properties, future departures from this policy can only be approved by the Assistant Secretary of the Army for Civil Works and the Associate Director for Mitigation, FEMA. Sufficient and early coordination, as identified in this Memorandum of Agreement (MOA), will ensure that potential conflicts are identified and resolved prior to the acquisition of property under the HMGP, or prior to the planning of an USACE flood damage reduction project.

## V. CREDIT FOR LANDS

A non-Federal sponsor of a USACE project will not receive credit toward its required contribution for the value of lands, easements, and rights-of-way provided for the USACE project that were acquired through the HMGP. It also will not receive credit for incidental costs of acquiring lands provided for the USACE project that were paid with HMGP funds.

## VI. AMENDMENTS AND TERMINATION

This MOA may be modified or amended by written agreement between FEMA and DA and may be terminated by either party after giving 60 days written notice.

Federal Emergency Management Agency

U.S. Department of the Army

/s/

Michael J. Armstrong  
Associate Director for Mitigation  
FEMA

/s/

Joseph W. Westphal  
Assistant Secretary of the Army  
(Civil Works)

Date: March 29, 2000

Date: March 29, 2000