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May 5, 2015

Mr. Roy Wright  
Deputy Associate Administrator for Mitigation  
Federal Emergency Management Agency  
8 NE, 500 C Street SW  
Washington, DC 20472-3100

**RE: FEMA-2015-0006**

Dear Mr. Wright:

On behalf of the over 1 million members of the National Association of REALTORS® (NAR), I respectfully submit these comments on the “Revised Guidelines for Implementing Executive Order 11988, Floodplain Management” (Revised Guidelines), as published in the Federal Register on February 5, 2015.

Executive Order 13690, “Establishing a Federal Flood Risk Management Standard (Standard) and a Process for Further Soliciting and Considering Stakeholder Input,” was issued by President Obama on January 30, 2015 and amends Executive Order 11988, “Floodplain Management,” signed May 24, 1977, in an effort to improve the Nation’s resilience to current and future flood risk.

According to Executive Order 13690, the Standard will apply to all federal actions in or affecting a floodplain, including:

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

The Standard also requires agencies to use one of three approaches to determine whether a “federal action”, such as new construction of a building or a bridge, is in the floodplain:

- Climate-informed Science Approach – Utilize the best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding based on climate science.
- Freeboard Value Approach – An additional two feet shall be added to the BFE. For Critical Actions, which are defined as any activities for which even a slight chance of flooding is too great; an additional three feet shall be added to the BFE.
- 500-year Flood Elevation Approach – Using the area subject to flooding by the 0.2%-annual-chance flood.

Agencies are directed to determine which of these three options best suits their missions, authorities, policies and programs. Exceptions can be made for national security and emergency actions.



## Written Clarification Requested

The Revised Guidelines are lengthy, complex, and raise critical legal, policy, economic, and administrative issues. In particular, the Guidelines could trigger an update of regulations which currently exempt both a) the FHA assisted mortgage loan program<sup>1</sup> and b) the National Flood insurance Program<sup>2</sup> from the Executive Order. On conference calls and at the recent Listening Sessions, FEMA officials have offered verbal assurances that this will not change, but given potentially significant implications of the Executive Order, the Standard and the Guidelines and subsequent federal regulatory changes could have on the economy, it is imperative that FEMA issue a written clarification and legal rationale that this Standard will not change these regulatory exemptions or otherwise indirectly impact the rates and premiums of the NFIP or affect in any way federally-assisted mortgages provided by Fannie Mae and Freddie Mac or mortgages provided by the Federal Housing Administration.

## NAR and Resilient Communities

NAR values safe and resilient communities and has led efforts to encourage development in a way that protects people, property, and future generations. While encouraging greater risk management standards for projects funded with federal funding sounds like a worthy goal, these standards represent a fundamental shift away from flood control and protection to a risk management strategy that directly and indirectly discourages development in coastal and riverine floodplains. This shift in priorities is simply not realistic for many coastal and riverine areas across the country. Because the new standards are intended for all federal agencies in all actions, and apply to any federally funded or approved projects, we have serious concerns with how these standards were developed and will be implemented.

These standards appear to be a one size fits all approach to flood risk reduction. It is unclear how state and local government development plans and standards affecting floodplains across the nation will be incorporated into the decision making process by the agencies. This is concerning for all who live in, or adjacent to, a floodplain. For example, in many Gulf Coast communities, topography results in the area potentially impacted by a major flood event extending many miles inland. In the case of Louisiana, there are additional and unique topographical features that increase the potential impact of flooding. Of course, this would not only impact coastal areas. Other river deltas, estuaries, the Great Lakes and riverine floodplains would also be subject to this overly broad flood risk reduction regime. Our rivers and coasts are the economic engine and the life blood for America's economy - people must live and work in these areas in order to provide resources and economic goods to the rest of the country and the world. These standards put our economy and these longstanding communities at risk.

## General Concerns Related to the Federal Flood Risk Management Standard

Lack of transparency: The Standard was issued without an opportunity for transparent and meaningful public input to consider whether the Standard provides an effective basis by which to achieve the stated goals of improving the Nation's preparedness and resilience against flooding. Assertions of flexibility offered in the implementation of the Standard do not provide for an in-depth analysis of the Standard itself.

No cost-benefit analysis provided to the public for review: The Standard was issued without any type of cost-benefit analysis, which is standard procedure for any new major government action. Either the analysis was done but not made public, or the analysis was not conducted. The absence of any kind accounting of the economic costs and benefits to municipalities and neighborhoods for review by the public is a dangerous precedent to set, especially when those who will be most impacted by the changes will not have a complete understanding of the changes.

Uncertainty and inconsistency: The draft Guidelines describe a process by which agencies will develop a plan for how they intend to implement the Standard, as required by the Executive Order. Federal agencies will be provided "flexibility" in how they implement the standard and will choose one of three ways to implement the Standard (described above). The Guidelines also state that it is impossible to predict all the different ways this Standard could impact various agency actions, policies and programs.

This is a recipe for disaster and will create uncertainty, confusion and regulatory ambiguity across the various agencies that are required to implement this Standard. In addition, there is no mention of how implementation of this Standard will be

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<sup>1</sup> 24 CFR 55.12(b)

<sup>2</sup> 44 CFR 9.5(f).

overseen – what if an agency oversteps their authority and applies this Standard to a program under their purview incorrectly? Who will inform the agency that they are applying the Standard inappropriately and that they should revise their implementation? This is a real concern when agencies are provided flexibility to implement something that is so ill-defined. The uncertainty and confusion in the approach provided in the Guidelines, left unchanged, will likely result in some agency decisions being disputed, resulting in costly and time-consuming lawsuits.

No scientific assessment provided to the public for review: Similar to the lack of a cost-benefit analysis, no scientific assessment was provided for the public to review and comment. Developing the new Standard was a highly technical undertaking which required the cooperation and collaboration of numerous scientific disciplines. Again, either the scientific assessment was conducted and not shared with the public, or a thorough scientific assessment was not conducted. Either option is equally disturbing. Agencies are required to develop a robust scientific justification for any regulatory action they take. Considering the potential scope of impacts from this Standard, it would seem critical that a comprehensive scientific assessment would have been conducted and made available for public review and comment.

Potential scope of regulatory coverage and impacts is ambiguous: Due to the ambiguity of some of the language in some parts of the Executive Order, the Standards and the Guidelines, NAR has significant concerns about the scope of this action. We are concerned that, however well-intentioned this Executive Order may be, an individual agency may decide to interpret the language creatively and “push the envelope” to apply this action in areas that it should not. NAR is concerned that the Standard could be applied to a broad range of federal activities beyond the stated purpose of facilities construction or improvements. For example, while current regulations at 24 CFR 55.12(b) would exempt the existing homes with FHA mortgage insurance, it is not clear from the language of the Executive Order whether this is also true of those properties which are substantially improved or newly constructed. This could have a substantial effect on the program which has not been accounted for in a cost benefit analysis or other information in support of these Guidelines.

The broad area of transportation planning, design and construction, implementation of the Standard and Guidelines, as written, will result in substantial transportation project cost and impact increases. The cost to design, comply with regulatory requirements (permit provisions) and acquisition of right-of-ways will increase. Critical transportation and infrastructure projects could be delayed or cancelled. Additionally, implementation of the Standard and Guidelines will increase impacts to adjoining properties and existing land use.

The Climate-Informed Science Approach lacks regulatory certainty with no specificity: Of the three approaches suggested by FEMA to determine whether a “federal action”, such as new construction of a building or a bridge, is in the floodplain, the “preferred” option is the Climate-informed Science Approach “when actionable climate science is available”. However, the Implementing Guidance offers no guidance as to what constitutes “actionable,” nor any idea as to methodology, limits of error, time frames or other standards of data quality to which this science must comply. In addition, the issues of downscaling global climate data to the site level, uncertainty, variability in results and other knowledge gaps will make the approach problematic.

While local models may be updated to reflect more recent historical rainfall patterns and the new built environment and thus provide improved near-term projections, it is unclear how this differs significantly from FEMA’s current practice of updates of Flood Insurance Rate Maps, or indeed how this represents a “climate-informed science approach” as opposed to standard engineering best practice. It is overly optimistic to expect that climate science will provide clear answers to these practical regulatory questions and were a permit or license issued based on such science, it would likely be made more vulnerable to dispute by the new floodplain definition in the Implementing Guidance.

Without clear guidelines as to what constitutes sufficiency, there is a real risk that an agency could interpret a handful of data-points of sea-level trending over the past several years as enough to extrapolate to a significantly larger floodplain. Unsupported climate assumptions or speculation offers the opportunity for arbitrary and capricious applications of ambiguous language and should not form the basis of an expanded floodplain definition.

## Specific Concerns Related to the Revised Guidelines

Glossary: The terms and the words used in the definitions need to be clear and the meaning commonly understood. At first glance, the terms, particularly on pages 3 and 4, raise questions. For example, the term “preserve” includes the words “prevent modifications to the natural floodplain environment” and what is meant by “its natural state?” The term “restore” also raises similar questions as to what the “natural functions” are to be restored and the time period to be considered when determining the “functions” to restore. It would help to know whether the functions are those existing today or those of some prior time period. This is particularly important when looking at all the landscapes across the nations, particularly those in urban areas. It would not help to have the definitions interpreted differently by the federal agencies. The terms used in the Guidelines should be clarified and then used by the various agencies without interpretation.

Introduction – Paragraph 6: The statement “These Guidelines recognize (1) the impossibility of anticipating the full range of individual program situations affected by the Order; and (2) the responsibility of individual agencies to tailor their procedures.....” encompasses everything troubling about the Standard. It recognizes that there may be unintended impacts resulting from the implementation of this Standard that cannot be predicted or quantified. The statement also provides “*carte blanche*” to agencies to implement this Standard however they see fit, which will result in inconsistent, ambiguous and disparate interpretation across industry sectors and agencies.

Section 2(c): Sec. 2(c) states that “In the operation of a license, permit, loan, or grant-in-aid program, each agency must make adequate provision for the evaluation and consideration of flood hazards.” The Executive Order appears to apply the Standard not only to federal activities using federal resources, but also to private businesses seeking a permit to conduct an activity in the floodplain as expanded by the Order. From the perspective of the real estate and development communities, a short and incomplete listing of the kinds of activities that could be touched by this section could include Clean Water Act permits, Clean Air permits, Endangered Species Act permits, and disaster recovery loans and grants made by FEMA under the Stafford Act.

Even more chilling is the following statement in the description of Sec. 2(c): “...as a precondition for an agency’s approval of an application for a license, permit, loan or grant-in-aid, the agency must assure that the requirements of Section 2(a) have been met. To the extent that an agency deems the requirements of Section 2(a) not to constitute adequate provision for evaluation and consideration of the flood hazard, ***the agency shall impose additional requirements.***” (Emphasis added). The imposition of additional requirements is not included in the Executive Order, and what those additional requirements might be or how they might be imposed is not spelled out in the Guidelines. Again, agencies would appear to have maximum flexibility to make any determination within their interpretation of their statutory authorities about whether or not a request for a permit meets the Standard and, if the permit application does not meet the Standard, the agency is free to impose any additional requirements it sees fit. There does not seem to be any limit on these additional requirements, no mechanism for appeal, or any end to the process. As a result, real estate activity could grind to a halt as agencies determine that permits, loans and grants do not meet the requirements of Section 2(a) and impose onerous and burdensome “additional requirements” on private companies conducting business in the (now expanded) floodplain.

Section 3(a): This section appears to be FEMA’s attempt to define the impact nexus between the Standard and the NFIP. However, the language in this section is confusing, legalistic and woefully inadequate to the task of describing the interaction between the Standard and the NFIP and providing comfort to the 5.5 million flood insurance policy holders that their rates and premiums will not be affected by this far-reaching Executive Order. We reiterate our request that FEMA more fully explain the interaction between the NFIP and the Standard and clarify their intent as it relates to non-Federal policy holders.

## Recommendations and Conclusions

To address our concerns, NAR recommends that FEMA and the related Mitigation Framework Leadership Group (“MitFLG”): 1) analyze and submit for public comment a thorough evaluation of the potential regulatory implications of the change in floodplain definitions and associated costs; and 2) clarify points of uncertainty, which include: a) the scope encompassing only federal activities; b) provide data to support FEMA’s claims this initiative will not impact National Flood Insurance Rates; c) specify sources for the floodplain; d) the importance of applying the FEMA guidance only prospectively only once it has been finalized; and e) the need for agencies to use notice and comment rulemaking to adjust their definitions of floodplains.

**1. A thorough evaluation of the potential regulatory implications of the change in floodplain definitions and potential associated costs should be conducted.**

MitFLG should undertake and seek public comment of an analysis of potential regulatory implications of the change in floodplain definition and costs to determine how the floodplain definition will be developed through Agency rules and regulations; and to develop a comparison of the economic costs of this additional regulation and potential opportunity costs in unrealized economic activity vs. the potential benefits of decreased flood risk over the United States. If such analysis has already been done, it should be submitted in full for public notice and comment.

**2. MitFLG should consider and recommend further revisions to E.O.11988**

Necessary clarifications should include, but are not limited to the following:

- a. ***The scope should apply to federal investment activities, rather than any commercial land use activity.***  
Recognizing the possibility of cascading effects through layers of regulations overseen by different agencies, MitFLAG should clarify that the interpretation of the EO and accompanying FEMA guidance should not be expanded from federally-funded investment activities to any type of land use.
- b. ***Reaffirm the current regulatory exemptions for the National Flood Insurance and HUD Mortgage Programs.***  
Given actuarial reliance on federal floodplain definitions and accompanying regulatory requirements, the full extent of the impacts is not clear from the new “choose-your-own” floodplain definition being ordered. FEMA’s broad statements need to be properly substantiated for the stakeholder community.
- c. ***Sources for the floodplain determination should be specified.*** The conduct of Federal planning, regulatory and licensing activities affecting land and water use shall employ the 1-percent-flood-chance floodplain, as determined by FIRM or FHBM maps and FIS reports, or in remote areas not covered by these maps, the services of an experienced consulting engineer.
- d. ***The FEMA Guidance should only be applied prospectively once it is finalized.*** The guidance should apply only prospectively, once it is issued in its final format. Projects currently in the permitting process should not experience delays because the contents and scope of this developing adjustment is currently unclear.
- e. ***Any agency considering revising its own definition of floodplain should do so under proper notice and comment rulemaking.*** The floodplain definitions apply to agency regulations, and therefore should only be adjusted through notice and comment rulemaking.

Following these recommendations will strike the appropriate balance of risk and limitations between the real estate development and the U.S. economy, and the necessary protections from flood damage.

NAR appreciates the efforts on behalf of the Administration to build resiliently, while also understanding the economic importance of existing development and infrastructure in coastal and riverine floodplains.

The Association urges you to halt implementation of this one-size-fits-all approach until the Administration seeks input from Congress, state and local governments, the private sector and other regulated stakeholders. We look forward to a response to our questions on development and implementation of the standards and urge each agency to release its assessment of the standards and implementation plans as soon as possible.

Sincerely,



Chris Polychron  
2015 President, National Association of REALTORS®