

January 17, 2022

The Honorable Deanne Criswell  
Administrator  
Federal Emergency Management Agency  
500 C Street, S.W.  
Washington, D.C. 20024

**Re: Joint submission to Request for Information on the National Flood Insurance Program's Floodplain Management Standards for Land Management and Use, and an Assessment of the Program's Impact on Threatened and Endangered Species and Their Habitats**

DOCKET ID: FEMA-2021-0024

Dear Administrator Criswell,

We are writing today in response to the Federal Emergency Management Agency (FEMA) October 12, 2021, Federal Register notice to express our concerns with consideration being given to changing the FEMA minimum floodplain management (FPM) requirements adopted and enforced by National Flood Insurance Program (NFIP) participating communities that impact use of the floodplain or levee protected areas.

In the United States, where flood prone areas are home to more than 50 percent of both our population and gross domestic product, sound planning and investment are critical to not only combat uncontrolled flooding, but also to expand our people's options. The current Federal FPM requirements allow States and communities to determine the appropriate balance between increased regulation in their communities with the need for investment in infrastructure or property, or preservation. The information provided herein, including the Appendix with responses to the 18 questions posed by FEMA in the subject notice, support our position that the current NFIP FPM standards strike a functional balance between Federal and non-Federal decision-making consistent with law and help mitigate the effects of flooding under a reasonable and sustainable regulatory framework.

The signees on this letter represent non-Federal governments, levee and flood control districts, navigation, water supply, hydropower, and recreation entities from across the U.S., many of which who are non-Federal sponsors on U.S. Army Corps of Engineers Civil Works water infrastructure projects. Some are communities serving as the NFIP local floodplain administrator and others the owners and operators of water and waterways infrastructure in NFIP participating communities.

The important responsibility of managing floodplain development, frequently involving local land use regulation, flood insurance, building standards, and other nonstructural hazard mitigation

approaches, is guided by FEMA in partnership with land use regulation and zoning agencies at the local level. In most cases, those local regulatory agencies are not the same as the owner-operator of the flood control project. Nonetheless, the FPM requirements impact the ability of infrastructure owner-operators to perform their duties necessary to provide reliable flood protection, and their concerns with changes to the FPM requirements, including expansion of the Special Flood Hazard Area (SFHA), are valid.

Despite having been petitioned by advocacy groups seeking expansive new floodplain development standards and enhanced conservation of federally threatened and endangered species and critical habitat under the NFIP, we understand that FEMA is not obligated to take any further action in response to the rulemaking petition request. For several reasons, including introduction of the Risk Rating 2.0 methodology that has given rise to concerns about flood insurance affordability, property values, treatment of leveed areas, local revenue impacts, and long-term NFIP participation, we are convinced that changed floodplain management standards are neither well-supported nor advisable at this time. While certain elements of Risk Rating 2.0 may help the nation to achieve greater levels of NFIP solvency, FEMA has been roundly criticized for not doing enough to inform policyholders and State and local governments about the long-term trajectory of future premiums, the underlying methodology used to compute risk, the means by which policyholders may challenge their new premium levels or, more broadly, the expected long-term economic, social, and environmental impacts of the most significant NFIP rate-setting overhaul in the 50-year history of the program.

Until such time that this new risk rating methodology and its data underpinnings are fully disclosed and understood by policyholders, levee owners and operators, and NFIP participating communities and their floodplain managers, FEMA should not be seeking to revise the NFIP floodplain management requirements. There are important interrelationships between the risk determinations and setting of premiums under Risk Rating 2.0 and formulation of floodplain management standards for land management and use. FEMA proclaims in its April 1, 2021, Risk Rating 2.0 press release that the newly overhauled NFIP pricing methodology is intended to *“communicate flood risk more clearly, so policyholders can make more informed decisions on the purchase of adequate insurance and on mitigation actions to protect against the perils of flooding”* [emphasis added]. If FEMA were to transparently disclose the underlying data, configuration, and long-term outputs of Risk Rating 2.0 to assure the public that the new methodology is both reliable and fair, it stands to reason that Risk Rating 2.0 would help to optimize safer, economic floodplain occupancy. In this way, FEMA should be able to show how a reliable and fair Risk Rating 2.0 would lessen the need for increased regulation. Similarly, FEMA should be able to reveal how floodplain regulation contributes to lower NFIP premiums. Both Risk Rating 2.0 and the floodplain management Request for Information are presented absent this essential analysis of the underlying tradeoffs, thus rendering one or both fatally flawed public policy proposals. Local officials will be unable to identify or understand the implications of the contemplated floodplain management changes without a more complete understanding of Risk Rating 2.0.

## *Infrastructure*

Our success is built on a century of commitment to engineering and science-based planning and Federal, State, and local infrastructure investment that increases people's safety, improves efficiency, protects property values, and minimizes impact on the environment. Public safety is the most important responsibility of local people and local government. Local planning and investment to reduce flooding and improve regional and global mobility are our priorities and the foundation underlying the health and welfare of our residents, affordable housing, and job creation.

## *Flood Protection Systems*

Our levee systems include both federally and locally funded projects in different regions.

To be recognized by FEMA under the NFIP as providing protection from the 100-year flood on Flood Insurance Rate Maps, levee systems must meet minimum design, operation, and maintenance requirements. Our levees and other related flood control works have been engineered and constructed to some of the highest national and local standards. The overwhelming majority of our systems exceed Federal accreditation standards to achieve protection against the 100-year regulatory flood, thereby removing our levee protected areas from the SFHA and the applicable NFIP floodplain management requirements. This is of utmost importance, in part, because it avoids unnecessary delay or prohibition in the operation and maintenance of the levee infrastructure protecting our communities. Some of our flood control system designs like the Mississippi River and Tributaries project are based on a combination of maximum probable weather events generated by data from the National Weather Service.

We are resolute in our commitment and determined to protect residents, industry, natural resources, and the value of investment in our coastal regions and a heartland river system that is envied around the world.

## *FEMA RFI on Floodplain Management Standards*

This Request for Information (RFI) initiates a multistep process by which FEMA will consider changing minimum development standards to facilitate improved local protection for people, property, and natural resources. In so doing, we urge that care be taken to avoid onerous and unsupported requirements for communities, industry, and development. Scrupulous adherence to the longstanding, bipartisan administrative requirements in place under the Administrative Procedure Act will help to ensure open and transparent consideration of consequential regulatory actions, including critical analyses to demonstrate the net costs, benefits, and regulatory and environmental impacts of any proposed actions. We further expect that this process will fully comply with existing law and administrative guidelines promulgated by the Office of Management and Budget (OMB) to protect the quality, objectivity, utility, and integrity of information disseminated and used by Federal agencies. Finally, we would note that petitions

such as the one filed in this case are often used as the precursor of litigation. Federal agencies frequently engage in settlement agreements with litigators, with results that impact stakeholders (e.g., permittees, lessees, NFIP communities) whom the Federal agency will not allow at the settlement table. If the petitioners in this case ultimately sue FEMA, we expect the agency will solicit and carefully consider input from local officials during any settlement process.

We appreciate this opportunity to provide issue identification, information, and our concerns, which are further explained in the enclosed Appendix. Thank you for your consideration of this joint submission from the undersigned representing impacted stakeholders in more than a dozen states, including NFIP participating communities and numerous Districts charged with reducing flood risk for their communities.

If you would like more information or to discuss please contact Stephen Gambrell, [mvfca1922@gmail.com](mailto:mvfca1922@gmail.com), Dan Delich, [dan.delich@sbcglobal.net](mailto:dan.delich@sbcglobal.net), or Karin Jacoby, [karin.jacoby@huschblackwell.com](mailto:karin.jacoby@huschblackwell.com).

Sincerely,

Atchison County Levee District No. 1, Rock Port, MO  
Big Island River Conservancy District, Milan, IL  
City of Chesterfield, MO  
City of Sugar Land, TX  
Cotton Belt Levee District, Helena, AR  
Dyer County Levee and Drainage District, Dyersburg, TN  
Fabius River Drainage District, MO  
Fairfax Drainage District, Kansas City, KS  
Fifth Louisiana Levee District, Tallulah, LA  
Fort Bend County Levee Improvement District No. 2, Sugar Land, TX  
Fulton County Levee Board, Hickman, KY  
Hickman-Fulton County Riverport Authority, Hickman, KY  
Jefferson County Drainage District No. 7, Port Arthur, TX  
Kaw Valley Drainage District, Kansas City, KS  
Matagorda County Conservation and Reclamation District, Bay City, TX  
Mississippi Levee Board, Greenville, MS  
Monarch-Chesterfield Levee District, MO  
North Lafourche Conservation, Levee and Drainage District, Thibodaux, LA  
Pappio-Missouri River Natural Resources District, NE  
Pike-Scott Farm Bureau, Pittsfield, IL  
Responsible River Management, Sidney, IA  
Riverside-Quindaro Bend Levee District, Riverside, MO  
Sny Island Levee and Drainage District, New Canton, IL

(Continued on next page)

(continued)

St. Francis Levee District, West Memphis, AR  
Tensas Basin Levee District, Rayville, LA  
Unified Government of Wyandotte County and Kansas City, KS  
Velasco Drainage District, Clute, TX  
Yazoo-Mississippi Delta Levee Board, Clarksdale, MS

Arkansas Waterways Commission  
Floodplain Alliance for Insurance Reform (FAIR)  
Mississippi Valley Flood Control Association  
Missouri and Associated Rivers Coalition (MOARC)  
Missouri Levee and Drainage District Association  
National Waterways Conference  
Red River Valley Association  
Red River Waterway Commission  
Upper Mississippi Illinois Missouri River Association (UMIMRA)

Enclosure: Response to FEMA on 18 questions

DOCKET ID: FEMA-2021-0024

- (1) FEMA has addressed risk to existing or non-conforming construction (buildings not constructed to current minimum floodplain management standards) in the regulations through the "substantial improvement/substantial damage" requirements. These requirements have largely been tied to the definitions of "substantial improvement" and "substantial damage." Is "substantial improvement/substantial damage" the best way to address risk for non-conforming buildings? If so, should FEMA consider the use of cumulative "substantial improvement" and/or "substantial damage" requirements over a given time period as a requirement? Should "substantial improvement" and/or "substantial damage" use an assessment cost value or a replacement cost value, or are there other valuation methods that may be more appropriate? Should the regulations provide more detail on how the "substantial improvement" and/or "substantial damage" determinations should be made?

The Substantial Improvement/Substantial Damage (SI/SD) calculations are a reasonable means by which to address non-confirming buildings, but clarification is needed in several areas covered by the SI/SD Desk Reference. Specifically, items covered under an NFIP or private contents policy should be excluded from the SI/SD calculations.

Participating communities at present can choose to use a cumulative period SI/SD through adoption of provisions in their ordinances, this is as it should be.

Property owners should be given the opportunity to use the basis of their assessed value as determined by the local jurisdiction, or to provide an appraisal for the building that used either the current value or its replacement value.

Foundation repairs (not including new foundation for new structure), HVAC, water heater, and roof replacement are necessary for a home or office space, and for some industrial facilities. As such, they should not be included in the SI/SD calculations, since doing results in safety issues for inhabitants or occupants.

- (2) The elevation of structures above expected base flood levels, called "freeboard," is an important precept of floodplain management. "Freeboard" is usually expressed in feet above a base flood elevation for purposes of floodplain management. NFIP communities must require new, "substantially improved," or "substantially damaged" structures in the SFHA to be elevated to the height of the one percent annual chance flood level, also referred to as the Base Flood Elevation or BFE. Some States and communities require newly constructed buildings to be built higher than the base flood elevation to further reduce the risk of flood damage with freeboard requirements set to a specific height to provide the additional margin of risk reduction above the BFE. The NFIP has strongly encouraged but not required higher elevation standards, such as those included in the I-Codes and ASCE 24. Should FEMA update flood elevation requirements for SFHAs by setting higher freeboard levels? If so, what should FEMA consider for the higher

DOCKET ID: FEMA-2021-0024

elevation levels for freeboard? What data exists to support higher elevation levels for freeboard or methods that provide a more consistent level of protection? Will freeboard elevation generally raise the market value of properties in SFHAs and if so how would the increase in market value compare to the cost of elevation? Are there other technology advancements or building standards in design and construction that should be considered beyond freeboard levels? If so, do they address other floodplain management criteria (e.g., reasonably safe from flooding; adequately anchored; methods and practices that minimize or are resistant to flood damage; water load values; wind load values; substantially impermeable)?

FEMA should not set higher freeboard levels. Accurate and understandable information provided by FEMA to States and communities for their use in determining freeboard requirements would be useful. Freeboard above the BFE can be a reasonable means by which to further mitigate flooding in some areas, but in others a different approach may be warranted. Communities or States are best suited to consider and determine freeboard requirements. Because flood challenges differ so must the mitigation measures to best protect communities. The current international building codes and references therein (i.e., ASCE 24) allow for States and communities to make those determinations, which is as it should be. Increasing requirements in the 0.2 percent annual chance (500-year) flood areas, or 0.1 percent annual chance (1,000-year) flood areas is likely to be counter-productive as there will likely be yet unidentified unintended consequences with associated costs to the public and NFIP communities. The regulated public and the participating communities called upon to enforce new requirements in those areas may view the changes as arbitrary rather than as effective measures to manage flood risk.

- (3) FEMA has not developed higher minimum floodplain management standards for structures and facilities that perform critical actions as defined in [44 CFR 9.4](#). These structures and facilities must currently comply with the same minimum requirements as non-critical structures and facilities except for structures and facilities that are covered by Executive Order (E.O.) 11988, Floodplain Management.<sup>[16]</sup> Should FEMA develop higher standards for these structures and facilities? If so, why? Should FEMA consider differences between certain structures and facilities, such as use, occupancy, operational size, or public and private operators in developing higher standards? Should FEMA consider differences such as use, occupancy, operational size, or public and private operators in developing higher standards for structures and facilities performing critical actions?

FEMA should not develop higher standards for structures and facilities that perform critical actions for several reasons. First, already critical facilities have been considered and it's been determined how those are to be addressed through the Federal Flood Risk Management

DOCKET ID: FEMA-2021-0024

Standard (as it amends EO 11988). Second, and more importantly, the continued use of structures or facilities that are in the floodplain should be allowed, since forcing relocation could limit access to critical care in some communities. Furthermore, some utility infrastructure (e.g., solar panels, power generation, water plants, etc.) cannot be removed from the floodplain, and those owner/operators should determine how to optimize flood protection to provide reliable service to their communities. Finally, relocating facilities that produce or store dangerous materials poses additional risk to the environment.

#### 44 CFR 9.4

(5) *Critical Action* means an action for which even a slight chance of flooding is too great. The minimum floodplain of concern for critical actions is the 500-year floodplain, i.e., critical action floodplain. Critical actions include, but are not limited to, those which create or extend the useful life of structures or facilities:

(a) Such as those which produce, use or store highly volatile, flammable, explosive, toxic or water-reactive materials;

(b) Such as hospitals and nursing homes, and housing for the elderly, which are likely to contain occupants who may not be sufficiently mobile to avoid the loss of life or injury during flood and storm events;

(c) Such as emergency operation centers, or data storage centers which contain records or services that may become lost or inoperative during flood and storm events; and

(d) Such as generating plants, and other principal points of utility lines.

(4) Recurring flooding events provide evidence that areas adjacent to the SFHA experience significant flooding and unacceptable levels of disaster suffering, yet the NFIP minimum floodplain management standards do not extend to these locations. How can the NFIP take a more risk-informed approach to defining flood hazard? Is there a need for FEMA's NFIP minimum floodplain management standards to be extended by establishing specific requirements for the areas immediately adjacent to the SFHA? If so, what specific floodplain management standards could be successful to reduce losses and hardship? What approaches would be effective for identifying these areas for communities to regulate? Would new zones or overlays depicted with the SFHA via the National Flood Hazard Layer (NFHL)<sup>[17]</sup> serve this need or are there other tools that could be more effective? Should FEMA expand the SFHA generally from the 1 percent annual chance flood area to a 0.2 percent or a 0.1 percent area, and what decision rule should FEMA use to choose the appropriate area? Should the SFHA be expanded



Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

from a certain percent annual chance area to the flood of record (or whichever is higher)?

Similarly, what standards or restrictions should be considered for high risk flood areas that are within the SFHA (*e.g.*, flash flood, mudslide, erosion prone, high velocity)? Alternatively, should FEMA be aware of and/or use a different metric to identify flood risk?

No, there should not be federal requirements for areas adjacent to the 100-year regulatory floodplain. FEMA should provide accurate and understandable flood risk identification for State and local decision making. Also, FEMA should continue to incentivize increased flood risk mitigation by NFIP participating communities through its Community Rating System (CRS).

Absent new and clear direction from Congress, floodplain management beyond the SFHA is a decision that must be made at a non-federal level. FEMA should not expand the SFHA beyond the 100-year regulated floodplain for that and several other reasons. Doing so will unfairly impose new requirements on SFHA adjacent levee protected areas, even though those properties may have significantly less flood risk than properties further removed from the flooding source and mandated purchase of flood insurance on these areas will affect property value and unfairly impact low to moderate income residents.

FEMA should not identify new zones for leveed or SFHA adjacent areas as that would not enhance flood risk reduction efforts. Flood risk in SFHA adjacent areas can be made known to communities through sharing better information from Risk Rating 2.0 rather than establishment of new zones which would be but the first step in federal overreach through expansion of jurisdiction.

Flood maps showing the 100-year base flood regulatory floodplain, that also depict incremental events (*i.e.*, 200-year flood boundary, perhaps Advisory BFE, etc.) is information FEMA could provide to support and incentivize enhanced flood risk management (*i.e.*, mitigation, emergency response, etc.) for State and local communities.

(5) In the past 30 years, 1 of every 6 dollars paid out in NFIP claims has gone to a building with a history of multiple floods.<sup>[18]</sup> What steps should FEMA take to reduce the disproportionate financial impact the multiple loss properties have on the NFIP? Should FEMA consider regulatory changes for properties that have repetitive losses?<sup>[19]</sup> If so, what should the minimum NFIP floodplain management standards be for those properties? Should these properties be targeted for managed retreat? How should the NFIP consider issues of equity when deciding how to address these properties?

FEMA should offer a variety of tools and ideas for communities to consider and determine how to better deal with repetitive loss properties and incentivize the use of those.

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

FEMA should not consider regulatory changes for properties with repetitive loss, but should provide better means for communities to address those properties.

Communities must have the ability to keep existing neighborhoods intact by providing improved flood protection, and FEMA should support such an approach. Whether repetitive loss properties in a neighborhood can be eliminated through better flood protection, building improvements, or buy out must continue to be a local decision, and FEMA should support that local choice.

While managed retreat may be the most appropriate tool in some instances, in many cases it is not. FEMA must also consider that dealing with repetitive loss properties will disproportionately impact low to moderate income property owners and tenants. FEMA should support through incentives and grants making structures in flood-prone areas more resilient to flooding.

Broadscale "managed retreat" from flood vulnerability should be considered as a last resort policy approach when justified by transparent cost benefit analysis. Very few, if any, regions in the United States are free from the potential of some form of major natural disaster that triggers eligibility for Federal disaster assistance. Mass relocation of communities from flood-prone areas to different areas having alternative disaster risks may not a viable or affordable option and likely would result in increasing the number of residents affected by alternative disaster types. Relocation may also increase the environmental and cultural impacts on those other areas. Instead, we should rely on proven approaches that incentivize and increase affordable flood protection not just for individual homes, but for entire communities and their critical infrastructure.

(6) FEMA must ensure that the implementation of the NFIP does not jeopardize T&E species and does not result in the destruction or adverse modification of their designated critical habitats. FEMA must also ensure the NFIP is effective in meeting its goals of providing flood insurance, mitigating flood loss, reducing flood risk, and encouraging responsible development. What additional considerations should FEMA incorporate into the NFIP minimum floodplain management standards to promote the protection and conservation of T&E species and their designated habitat? In what ways could the NFIP minimum floodplain management standards be amended to more explicitly or comprehensively protect the natural and beneficial functions of floodplains to recognize their intrinsic value and benefits to floodplain management, T&E species, and the environment generally? How do current Federal environmental requirements and standards work within NFIP participating State, local, Tribal, and territories to identify and address impacts to T&E species and their habitats? If there are State-specific environmental requirements and/or standards, how could changes to the NFIP support or interfere with the current State regulatory environment?

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

No additional floodplain management requirements are needed for FEMA to comply with the Endangered Species Act (ESA). FEMA determined that it is currently in compliance with the ESA while recognizing the need to better demonstrate ESA compliance to the public. FEMA identified means by which to demonstrate ESA compliance in the Record of Decision (ROD) for the NFIP programmatic assessment. The ROD requires, in part, that FEMA clarify that pursuant to 44 CFR 60.3(a)(2), a community must obtain and maintain documentation of compliance with the appropriate Federal or State laws, including the ESA, as a condition of issuing floodplain development permits, and clarify that the issuing of certain LOMC requests (i.e., map revisions) is contingent on the community, or the project proponent on the community's behalf, submitting documentation of compliance with the ESA.

Additionally, Federal (EPA/USACE) or State permitting for work in vicinity of most flood sources necessitates having complied with ESA. FEMA should not seek to be a duplicative regulatory entity in this area.

(7) How could one or more of the following specific changes to the NFIP minimum floodplain management standards benefit T&E species and their habitats while furthering the goal of improving resilience to flooding? What would the potential impact be on the NFIP participating communities?:

There are NFIP communities that do not have Threatened and Endangered (T&E) species or designated critical habitat for them. Imposing changes to the NFIP minimum floodplain management standards in those communities would not benefit T&E species but would create an unnecessary hardship on those communities. FEMA should not seek a "one size fits all" approach.

(a) Limiting construction in any identified riparian buffer zone;  
Riparian buffer zones can be useful tool along some, but likely not most flooding sources. The appropriateness and usefulness of this tool must be evaluated at the local level. FEMA can incentivize use of this measure through its CRS.

(b) Requiring compensatory storage to have no net increase in projected flooding levels for all development in the SFHA;  
This decision should be left to the States or locals regulating land use.

(c) Requiring a more restrictive regulatory floodway standard; [20]

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

Floodway regulation restricts most development or changes in the floodway, and when not that would in almost every instance be covered by Federal (USACE/EPA) or State permitting. There would be no discernable benefit, just new hardship.

(d) Requiring compensatory conservation credits/areas for all development in portions of the SFHA that provide natural and beneficial functions;

This should be addressed only through ESA compliance, and not through additional regulatory requirements in the NFIP.

(e) Requiring low impact development standards and/or permeable surfaces that may benefit T&E species and habitat; and/or

FEMA can incentivize, but should not require, and must not usurp local or State decision making.

(f) Prohibiting or limiting construction in any portion of the SFHA.

The SFHA designation cannot be used as a proxy for critical habitat, doing so is an unnecessary and unjust taking of property.

How should the suggested changes listed above be prioritized to best benefit T&E species while also furthering the goals of the NFIP? Are there additional changes that should be considered and if so, what are they and what is their prioritization in comparison to the changes listed?

Suggested changes to the local floodplain management standards could be considered by NFIP communities where they could benefit T&E species, which FEMA could choose to support, but not regulate.

(8) NFIP participating communities can also improve protection of T&E species and their critical habitats through their floodplain management activities. In what ways can NFIP participating communities demonstrate to FEMA that permitted floodplain development does not adversely impact T&E species and their habitats? What changes are required to existing NFIP minimum floodplain management standards to allow NFIP participating communities to better demonstrate no adverse impact? What ways, such as technical assistance or other means, could FEMA assist NFIP participating communities to help protect T&E species and their habitats?

FEMA needs to consider and respect that Federal, and State environmental regulatory processes are already in place to address T&E species and should consult affected communities on the NFIP's effect on floodplain development in their specific area. No two communities are the same—in some there is negligible nexus between the NFIP and impacts to T&E species.

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

When considering Waters of the United States and the EPA's proposed expansion of these waters, activities in SFHAs with T&E species are already subject to Federal regulatory processes that are required to consider impacts to T&E species and consult the Federal fish and wildlife agencies. Many States impose additional environmental regulation to address protection of T&E species. Also, many SFHAs in many NFIP communities are in urbanized areas, which do not have T&E species issues. Therefore, FEMA should not require NFIP communities to demonstrate anything regarding T&E species or make changes to existing NFIP requirements for the protection of T&E species.

(9) Local floodplain managers are often tasked with enforcement of NFIP minimum floodplain management standards. In what ways can FEMA strengthen the NFIP participation and increase enforcement of NFIP minimum floodplain management standards to build community resilience? How can FEMA better assist communities to mitigate flood loss and reduce risk? In what ways could FEMA better support local floodplain managers to effectively enforce the NFIP minimum floodplain management standards?

FEMA can continue to strengthen NFIP participation through programs such as the BRIC, and should provide more opportunities for outreach and education for communities to deliver to property owners, particularly developers and realtors. Property owners and prospective property owners should be made aware of the special considerations for properties located in the floodplain. FEMA should develop and provide clear and concise written material for use and distribution by local floodplain managers (e.g., websites or handouts) and could offer CRS credit to communities that choose to do so, or perhaps even require dissemination of that material as a condition of NFIP participation.

Realtors should be allowed more access to flood risk information and allowed to provide that to prospective buyers. Beyond being informed whether a property is in a regulatory floodplain where mandatory purchase of flood insurance is required for any federally backed loan, prospective buyers should be made aware of the property's flood risk as determined by FEMA under Risk Rating 2.0 (not just the price of NFIP flood insurance) and provided information on building restrictions (i.e., Substantial Improvement/Substantial Damage requirements, etc.), which should be included in the materials developed by FEMA for use and distribution by local floodplain managers.

Communicating the limitations of developing, improving, or using properties in the regulated floodplain should be made known up front, and not be a mission of discovery at the permitting stage of a project.

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

(10) While the NFIP minimum floodplain management standards are broadly applicable nationwide and provide a sound basis from which communities can improve their floodplain management programs, there may be floodplain uses, occupancies, and flooding characteristics that call for more specific regulatory initiatives. Are there any NFIP minimum floodplain management standards that currently cause hardship, conflict, confusion or create an economic or financial burden? If so, what are they and how can they be modified to reduce the burdens while still meeting the objectives of mitigating flood loss and reducing risk? Some structures in a community may be exempted from the NFIP minimum floodplain management standards through a variance. Are there changes that can be made to variance requirements to help reduce the burdens while still meeting the objectives of mitigating flood loss and reducing risk? Are there specific types of development or uses that should be considered for exemption from NFIP minimum floodplain management standards or should different standards apply? If so, what are they, why should specific types of development or uses be considered for exemption, and what different standards should be applicable?

The current "substantial improvement" and/or "substantial damage" (SI/SD) amount that triggers the requirement to make the entire building NFIP compliant is 50% of the pre-work value of the structure. This imposes significant and unexpected additional costs, especially if the structure must be elevated. Owners of modest-valued structures reach this trigger much faster than the owners of high-value structures. This important to note, because there are numerous efforts to get property owners to enhance the resiliency of their buildings for numerous forms of disaster and climate change. FEMA should consider exempting from SI/SD calculations: improvements for disaster (non-flood as well as flood) and climate change resiliency; basic life/building safety work such as foundations, HVAC, roof repair, etc., as well as upgrades related to resiliency for disasters (non-flood in addition to flood) and climate change.

(11) There have been recent proposals regarding disclosure of flood risk,<sup>[21]</sup> recommending development of an affirmative obligation on the part of sellers or lessors of residential properties to disclose information about flood risk to prospective buyers or lessees. These proposals would require States and communities to establish flood risk reporting requirements for sellers and lessors as a condition of participation in the NFIP. Should States and/or local governments be required to establish minimum flood risk reporting requirements for sellers and lessors as a condition for participation in the NFIP? Should there be an affirmative obligation on the part of sellers and/or lessors of residential properties to disclose information about flood risk to prospective buyers or lessees? If so, what is the most effective way to require this disclosure? Should the process be modeled on requirements for sellers to disclose details on environmental hazards, such as lead-based paint hazards? What details should be included in the disclosure,

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

such as knowledge of past floods and/or flood damage, a requirement to maintain flood insurance, knowledge the property is located in a SFHA at the time of offering, and the cost of existing flood insurance?

The Federal Privacy Act, or FEMA's interpretation of the Act, makes it very difficult for prospective buyers to find out if a property for sale is a Repetitive Loss Property or one that obtained a FEMA grant that requires perpetual flood insurance coverage. The Federal Privacy Act, or FEMA's interpretation of the Act, should be amended to allow State or local entities to require such disclosure to prospective buyers during escrow.

(12) The United States is experiencing increased flooding and flood risk from climate change.<sup>[22]</sup> Climate change may exacerbate the risk of flooding to homeowners. Should FEMA base any NFIP minimum floodplain management standard changes on future risk and specifically on projections of climate change and associated impacts, such as sea level rise? What equity considerations should be factored into such decisions if climate change disproportionately harms underserved and vulnerable areas? What other considerations should be factored into an analysis involving climate change? Should the NFIP better distinguish NFIP minimum floodplain management standards between riverine and coastal communities? Should the NFIP minimum floodplain management standards incorporate pluvial (surface/urban) flooding concerns? Are there specific measures and standards that should be taken to ensure structures can withstand the greater intensity, duration, frequency and geographic distribution of flooding events? If so, what are they and how can those measures and standards ensure structures and communities can readily adapt and increase resilience to the impacts of climate change?

NFIP minimum floodplain management standard should be based on the current, not future projected flood risk. To do the latter is the equivalent of basing real estate taxes on the future projected value of a property, which by law is not allowed.

Flood hazard mapping must be based on existing conditions. If these conditions are changing, the maps should be updated frequently to reflect changes.

Moreover, FEMA should consider that climate change modeling has been very dynamic during the last 10 years. There is the potential that the climate change models used at the beginning of FEMA's multiyear process to update flood maps may be obsolete by the time the revised FIRMs become effective. This would result in multiple challenges to maps and create an unsustainable regulatory framework for NFIP participating communities.

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

FEMA should make widely available its flood risk determinations made under Risk Rating 2.0 (not just the resultant flood insurance premium) so that current and prospective property owners can better understand their property's flood risk.

Realtors could be required to disclose the RR 2.0 flood risk determination, which could lead to a better understanding of the requirements associated with a property in the floodplain through use of the suggested FEMA developed materials discussed in response to Question 9.

As other disclosures would not necessarily reflect a property's current flood risk, they should not be required, but could be allowed if warranted and as determined by State or local entities.

(13) The current NFIP minimum floodplain management standards can be found at [44 CFR part 60](#) subpart A—Requirements for Floodplain Management Regulations. As part of this Request for Information seeking input on new and even transformative reforms to the NFIP minimum floodplain management standards, FEMA also is exploring potential revisions to current regulatory provisions that are unnecessarily complicated, create unintended inequities or could be streamlined. Are there current regulatory provisions that create duplication, overlap, complexity, or inconsistent requirements or unintended inequities with other FEMA or other Federal programs? Are there current regulatory provisions that present recurring difficulties for local and State officials implementing NFIP minimum floodplain management standards and if so, what improvements should be made?

FEMA's CLOMR process needs improvement. It is unworkable for developing areas or where floodplain boundaries are being revised. FEMA should consider providing a time for which a CLOMR remains approved (e.g., 5 years) rather than changing flood boundaries while a project by a property owner or a community is midstream, and should revisit the practice of not mapping a project that is under construction. For projects that have grading completed, or are otherwise 50% complete, FEMA should map the proposed project during preparation of the preliminary maps. Not doing so presents a loss of investment backed expectations by the property owner or the community and can frustrate the objectives of a project which met all regulatory requirements when it was proposed and permitted.

FEMA should revise the Substantial Improvement/Substantial Damage calculations to exclude life/public safety improvements: foundation and roof repair, HVAC, etc. as well as improvements for disaster (non-flood as well as flood) and climate change resiliency; and improvements/work to comply with all code upgrades related to resiliency for disasters (non-flood in addition to flood) and climate change.



Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

(14) Are there technological advances, building standards, or standards of practice that could help FEMA to modify, streamline, or improve existing NFIP minimum floodplain management standards? If so, what are they and how can FEMA leverage those technologies and standards to achieve the agency's statutory and regulatory objectives?

There should not be any modification of NFIP standards that result in CRS communities losing their CRS credits for adopting higher standards as that would reduce or eliminate earned flood insurance discounts. This is especially important now with Risk Rating 2.0 extending the eligibility for discounts to all residents in the community. If FEMA increases the NFIP requirements, then FEMA should allow the CRS communities that already adopted the higher requirements to keep their CRS credits in perpetuity.

Software and computing power are evolving continuously, which can provide more accuracy in hydrologic and hydraulic modeling when the assumptions and inputs are based on supported proven data and trusted values from events. FEMA has typically relied on HEC to provide acceptable software. FEMA should ensure they are staying on top of software advances and identify those acceptable for use by those scientist and engineers working in flood management and seeking to comply with the NFIP floodplain management requirements.

(15) FEMA recognizes the vital role that State, local, Tribal, and territorial governments play in floodplain management and that they may have innovative solutions to complex floodplain management challenges. What successful mitigation policies, building design standards, building construction standards, T&E species protections, and/or other floodplain management approaches to mitigate flood loss and reduce risk have been taken by State, local, Tribal, and territorial governments? In what ways do the current NFIP minimum floodplain management standards present barriers or opportunities to the successful implementation of those approaches? What capabilities and capacity impacts should FEMA address as it considers changes to the NFIP minimum floodplain management standards and to strengthen NFIP protection of T&E species and their habitats?

There are already environmental document and permit processes in addition to existing Federal environmental regulatory requirements to address impacts and protection of T&E species. The current minimum floodplain management standards do not present barriers to successful flood hazard mitigation. States and local NFIP communities already have opportunities to adopt higher building and environmental standards if their local conditions warrant them, and the NFIP's CRS Program already provides them incentives to do so. This is an effective regulatory framework that should be retained without change.

DOCKET ID: FEMA-2021-0024

(16) As FEMA undertakes an analysis of potential effects of the NFIP on T&E species, the agency must consider the NFIP's effect on floodplain development and the extent to which NFIP actions influence land development decisions. "Development" means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures; mining; dredging; filling; grading; paving; excavation, or drilling operations; or storage of equipment or materials.<sup>[23]</sup> Is information available on the NFIP's influence on floodplain development? If so, provide or identify any data or materials identifying the NFIP's influence. How can FEMA measure the NFIP's effect on floodplain development? Are there specific NFIP regulations, policies and/or development standards that currently influence State, local, Tribal, and/or territorial governments in their development decisions that may have a positive or negative impact on T&E species and their habitats? If so, what are they and how do they influence development decisions that impact T&E species and their habitats? Are there changes to those regulations, policies and/or standards that, if made, would have a positive impact on T&E species and their habitats? If so, what are those changes?

FEMA should consider Federal and State environmental regulatory processes already in place to address T&E species and consult the local NFIP communities on the NFIP's effect on floodplain development in their specific area. No two communities are the same. In some communities there is negligible nexus between the NFIP and impacts to T&E species. FEMA needs to solicit input from the affected NFIP communities during possible T&E litigation settlement negotiations and any development of T&E requirements for implementing the NFIP in those communities.

FEMA's broad definition of development includes habitat restoration projects, which should continue to be held to the same standard as any other development project. EO 11988 requires Federal agencies undertaking projects or undertaking regulatory actions that may change flood hazards to comply with FEMA's NFIP regulations. NFIP regulations require a CLOMR to be issued prior to project implementation (if the project increases flood levels) and application for a final LOMR within six months of project completion (if the project makes any change in SFHAs). A CLOMR and LOMR Application Package, with their hydraulic analyses, maps, and notification to the property owners who would be affected by the changes in the extent of a SFHA, should be required for any type of project with impacts to flood levels or the extent of the SFHA.

(17) FEMA is developing a national programmatic framework for nationwide compliance with the ESA and is re-examining the extent to which NFIP actions may have adverse effects on T&E species and their habitats. Should FEMA reconsider its mapping practices, including the issuance of Letters of Map Revision based on Fill (LOMR-Fs)? Should the placement of fill material, defined as material used to raise a portion of a property to or above the Base Flood Elevation

Responses to the 18 questions contained in FEMA's Request for Information on the National Flood Insurance Program's (NFIP) minimum floodplain management standards for land management and use, and an assessment of the NFIP's impact on threatened and endangered species and their habitats

DOCKET ID: FEMA-2021-0024

within the SFHA, be prohibited by NFIP minimum floodplain management standards? What would the impact of this change be on T&E species and NFIP participating communities?

No, FEMA should not consider changes to issuance of Letters of Map Revision based on Fill (LOMR-F). These are an appropriate and useful tool for property owners and communities.

FEMA should not prohibit the placement of fill because fill ensures life safety should a flood event occur. Persons must have a place of safe retreat during a significant flood event, especially when in proximity to high velocity flood waters. Placement of fill is crucial to human life safety in the event of high velocity flood waters and should always be an option.

There are Federal and, in many regions, State environmental regulatory processes already in place to address project impacts to T&E species. It should be noted even habitat restoration, forest, or park projects may find the need to obtain Letters of Map Revisions based on Fill (LOMR-Fs). An outright prohibition of LOMR-Fs would be counter-productive.

(18) Hazard mitigation planning reduces loss of life and property by minimizing the impact of disasters, including floods. It begins with State, local, and Tribal governments identifying natural disaster risks and vulnerabilities that are common in the area and then developing long-term strategies for protecting people and property from similar events. Mitigation plans are key to breaking the cycle of disaster damage and reconstruction. How should FEMA consider integrating mitigation planning with other Federal, State, or local mitigation planning such as community planning, economic planning, coastal zone planning, and other types of planning activities to improve the overall effectiveness of mitigation planning and floodplain management activities? Are there planning best practices, processes, or data that could better inform planning decision-making and the development and implementation of floodplain management standards?

FEMA already requires communities to develop hazard mitigation plans as a prerequisite to being eligible for Federal disaster relief and hazard mitigation grants. FEMA could further incentivize use of those plans through the integration of those into a community's Comprehensive Plan for floodplain management and provide CRS credit for that action.