



President's Executive Order Expands Regulated Floodplain to Account for Climate Change

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On January 30, 2015, President Obama amended [Executive Order 13690](#), regarding federal agencies' consideration of floodplains, to redefine the regulated floodplain and establish the Federal Flood Risk Management Standard (FFRMS) aimed at protecting federal projects, approvals, and investments from increased flood risk associated with climate change.

Originally approved by President Carter in 1977, Executive Order 11988, required federal agencies to avoid, to the extent possible, the adverse impacts inherent in occupying the floodplain. President Obama's amendment significantly expands that original vision to a broader geographic area and applies more restrictive development standards with the goal of insuring that federally funded, permitted, or owned projects "last as long as intended by considering risks, changes in climate, and vulnerability." FFRMS, p. 5. Implementation of this Executive Order as currently written would dramatically impact a wide-range of projects, from levee construction and certification, to oil and gas pipelines, to wetland fill permits.

Concurrent with the Executive Order and FFRMS, FEMA issued "Revised Guidelines for Implementing Executive Order 11988, Floodplain Management," which further explain how federal agencies are to consider floodplains under the Executive Order. *Those Guidelines are currently in draft form and [FEMA seeks public input/comments through May 6, 2015](#).*

The Executive Order does three important things:

1. It expands the boundary of floodplains for purposes of all federal actions;
2. It requires a multi-step "practicable alternatives analysis" for any federal action that is proposed within or may affect the newly defined floodplain; and
3. It requires greater public notice and opportunity to weigh in on federal actions located within or that may affect the floodplain.

Details regarding implementation remain to be determined based on input during the public review period ongoing now.

The Executive Order's re-definition of the "floodplain" significantly expands both the horizontal and vertical boundaries of the floodplain applicable to all federal actions. While previously many agencies relied on the 100 year floodplain (1% chance in any year) as mapped on FEMA's Flood Insurance Rate Maps, Obama's amendment and FFRMS direct federal agencies to use one of three new methods to define it:

- i. Climate-informed science approach using best available actionable hydrologic and hydraulic data methods that integrate current and future changes in flooding based on climate science;
- ii. The freeboard approach, which is determined by adding two or three feet to the base flood elevation depending on the type of action; or
- iii. The "500-year" flood.

E.O. 11988, Sec.2(i), amending Section 6(c). Where actionable climate science is available the climate-informed science approach is preferred, highlighting the Obama Administration's underlying purpose of the amendment: to weave climate change considerations into floodplain management.

The new floodplain definition and associated new standards apply to all "federal actions." While the CEQ Fact Sheet issued with the Order may lead readers to believe that the new floodplain definition applies only to federal projects and properties, on its face the Order expressly applies more broadly, defining federal action as "any Federal activity" including:

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

E.O. 11988, Sec.1. This definition captures all federal permits and approvals, not just federally-sponsored projects or projects on federal lands. The Implementing Guidance provides:

The basic concepts . . . of the Order are (1) all agencies are covered; (2) all actions are covered; (3) all agencies are to affirmatively carry out efforts to, and provide a good example of, sound floodplain management practices; and (4) all agencies are required to act, not merely consider, reducing risk, minimizing adverse impacts, and restoring and preserving floodplain values.

Implementing Guidelines, p. 10. The E.O. also defines "critical actions" as "activities for which even a slight chance of flooding would be too great," and sets higher elevation requirements for such activities."

The Implementing Guidelines set forth an eight-step "practical alternatives analysis" process for evaluating federal actions that may occur within or affect the floodplain. If a federal agency "has determined to, proposes to, conducts, supports, or allows an action within a floodplain," the Order requires the agencies, wherever practicable, to consider alternatives to avoid the floodplain, and development alternatives that will avoid adverse effects. Such alternatives must, where possible, utilize natural systems, ecosystem process, and "nature-based" approaches. Further, the agency must minimize harm within the floodplain, and must circulate notice to the public and affected agencies that siting within the floodplain is the only practicable alternative.

The Order allows federal agencies to exempt "particular department or agency activities" from the FFRMS "where it is in the interest of national security, where the agency action is an emergency action, where application to a Federal facility or structure is demonstrably inappropriate, or where the agency action is a mission-critical requirement related to a national security interest or emergency action." FFRMS, p. 4. The FFRMS also calls for development of "an altered or shortened decision-making process for actions with insignificant impacts or actions of a short duration," and for certain repetitive actions. FFRMS, p. 4. The FFRMS provides that details regarding these exceptions will be included in the Implementing Guidelines, but are not included in the draft Implementing Guidance issued to date.

Finally, the Order mandates that agencies seek public involvement earlier in the federal process for each type of federal action. The Order requires the agency to notify the public upon its determination that the most practicable alternative is to locate the proposed or intended action within the floodplain. Early notice is intended to invite public comment much earlier in the process of a federal project than is now required. The Order requires the opportunity for early public review not only for significant actions, but procedures for public review of plans even where the potential impacts of the action do not rise to the level requiring preparation of an environmental impact statement under the National Environmental Policy Act (NEPA). Order, Section 2(b).

The Order mandates that all federal agencies must update their regulations in short order to implement the Order and FFRMS. The Order provides, however, that no action shall be taken until additional input

is solicited from stakeholders. Executive Order, Section 3. Accordingly, FEMA began a 60-day comment period on February 5, 2015, which it extended to May 6, 2015, to solicit public input on the Implementing Guidelines.

Based on input it receives from stakeholders during the comment period, the Water Resources Council will issue amended Implementing Guidelines. Thereafter, federal agencies have 30-days to submit an implementation plan containing milestones and a timeline implementing the Order and FFRMS. Interestingly, the CEQ Fact Sheet issued concurrent with the Order states that “[i]t will not affect the standards or rates of the National Flood Insurance Program.” In light of the language of the Order and FFRMS, the scope of this alleged exemption is ill-defined.

The proposed Guidelines are available at:

<http://www.fema.gov/media-library-data/1422653213069-9af488f43e1cf4a0a76ae870b2dcedeg/DRAFT-FFRMS-Implementating-Guidelines-1-29-2015r2.pdf>.

The FFRMS is available at:

http://www.fema.gov/media-library-data/1422649643416-coff9e51d11442790ab18bae8dc5df4b/Federal_Flood_Risk_Management_Standard.pdf.

For more information

If you are interested in learning more about the Executive Order or FFRMS or commenting on the Implementing Guidelines, please contact [Molly Lawrence](mailto:mol@vnf.com) at mol@vnf.com. Otherwise, you may provide comments to FEMA via email at FEMA-FFRMS@fema.dhs.gov.

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