



Submitted via Federal eRulemaking Portal (<https://www.regulations.gov>) to:
Docket ID FEMA-2023-0026, FEMA Proposed Policy: Federal Flood Risk Management Standard

December 1, 2023

Ms. Deanne Criswell
Administrator
Office of the Administrator
Federal Emergency Management Agency
500 C St., SW
Washington, DC 20472

RE: NWC Comments on FEMA Notice of Proposed Rulemaking: Updates to Floodplain Management and Protection of Wetlands Regulations to Implement the Federal Flood Risk Management Standard (FFRMS)

Dear Administrator Criswell:

On behalf of the National Waterways Conference (NWC), we are providing comments on the proposal of the Federal Emergency Management Agency (FEMA) to amend its Floodplain Management and Protection of Wetlands Regulations to implement the FFRMS, published in the Federal Register on October 2, 2023, at 88 Fed. Reg. 67870. FEMA's proposal would change the methods and ways that floodplains are evaluated and would apply to Federally funded actions involving new construction, substantial improvement, or repairs to substantial damage. We thank FEMA for the opportunity to share our views on how the proposal may impact water and waterways resource infrastructure nationally.

A. ABOUT THE NATIONAL WATERWAYS CONFERENCE.

NWC was established in 1960 and is dedicated to a greater understanding of the wider public benefits of our Nation's water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation's water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation.

NWC's membership is diverse and includes the full spectrum of non-Federal water resources stakeholders, including flood control associations, levee boards, waterways shippers and carriers, agricultural interests, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments.

Many of these members are non-Federal sponsors (NFS) of U.S. Army Corps of Engineers (USACE) civil works projects, and own and maintain a wide variety of water resources infrastructure. Non-Federal sponsors are non-Federal entities, including state, county, local, or tribal governments, flood control districts, port authorities, or other agencies, who are interested in joining with the USACE to participate in civil works projects, including cost sharing and execution of work in those projects. These non-Federal entities provide assurances or execute a binding agreement with the USACE for the provision of items of local cooperation for the USACE water resources projects, including, as applicable, resources for investigations, construction, and operation and maintenance of the projects. See 33 CFR § 203.15 for a definition of "Non-Federal Sponsor."

Our members and the communities they serve are deeply interested in this proposed rulemaking because its implementation, through higher vertical elevation or floodproofing, or other mitigation mandates, may significantly alter and raise the cost of water resource projects and ongoing operations and maintenance for these systems, which are paid for by the local taxpayers. Additionally, our members are concerned about how the proposed rule may interface with the NFS existing responsibilities.

B. COMMENTS ON FEMA's PROPOSED FFRMS RULE.

1) General Comments.

As owners and operators of ports, flood control and levee systems, water supply, hydropower and other water and waterways resource infrastructure, our members have several concerns with the proposed rule, as discussed further below.

The proposal's policy statement seems one-sided, primarily focusing on limiting how people can use and live in flood-prone areas. It lacks any clear goal to support economic growth or sensible development within reasonable limits. It is difficult to believe that Congress would endorse a flood risk strategy that does not consider using flood-prone areas optimally for the Nation's benefit.

Given the proposal's heavy emphasis on constraints and rules, it is unclear how the rule will be beneficial. The proposal talks about resilience, but it appears FEMA's view does not consider economic development as part of resilience, which does not make sense.

Recommendations: The policy should be adjusted to aim for efficient and smart use of flood-prone areas while acknowledging the limitations on development mentioned in the policy.

2) Need for Precision and Clarity in Terms Used in the Proposal.

The need for clearer definitions is paramount to avoiding ambiguity and ensuring a shared understanding of key terms. For example, the Climate Informed Science Approach (CISA), as

described in the proposed changes under Section 9.6, lacks specific definition. It is outlined as utilizing the “best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding based on climate science.” However, crucial aspects such as the procedural framework and the technologies categorized as ‘best available’ remain unspecified. This ambiguity raises concerns regarding project implementation and the absence of a standard for these practices, leading to uncertainty.

In addition, the term “nature-based solutions” under section 9.9, Analysis and Reevaluation of Practicable Alternatives, contains vague language. While emphasizing the use of natural systems and approaches, the addition of “where possible” introduces ambiguity regarding factors like cost, environmental impact, technological feasibility, and Federal financial responsibilities. Nor does it take into account NFSs and their constraints.

Further, the distinction between critical and non-critical actions within the proposed policy changes for FFRMS lacks specific procedures or criteria. Although referencing a “Critical Action” as one for which even a slight chance of flooding is too great, the document fails to delineate the determinants or processes defining these categories throughout the policy.

Clarifying these definitions is crucial to establish clear guidelines and procedures, ensuring a consistent understanding and application across projects. Without precise definitions, ambiguity prevails, leading to potential inconsistencies, difficulties in compliance, and uncertainties about project implementation, responsibilities, and associated impacts.

Recommendations: *FEMA needs to provide more specificity and clarity within their definitions, and make sure that there is no ambiguity within different terms and definitions. Definitions that have similar or compounded meanings should be reviewed to make sure that they will not confuse different stakeholders. FEMA's efforts to provide greater specificity and clarity should include:*

- > *A comprehensive definition review by conducting a thorough review of definitions within the proposed policy to ensure specificity, and eliminating ambiguity across all terms. This should include a focus on terms such as “Climate Informed Science Approach” (CISA), “nature-based solutions,” and “Critical Action” to provide a precise framework that leaves no room for misinterpretation.*
- > *Stakeholder collaboration by engaging stakeholders from a range of relevant backgrounds in the review process to gather varied perspectives and ensure that definitions are clear and universally understood. This collaborative effort will help in refining definitions to accommodate different viewpoints and avoid compounded meanings that might lead to confusion.*
- > *Procedural framework enhancement by developing a clear procedural framework within the policy to accompany key definitions. This framework should elucidate how these definitions are practically applied, ensuring their appropriateness and consistency across different projects.*

> *An iterative clarification process by establishing an iterative process for definition refinement, allowing for ongoing feedback loops to continuously improve and clarify definitions. Regular reviews can prevent inconsistencies, improve compliance, and ensure that definitions remain relevant and usable.*

> *Training and guidance by providing guidance and training materials to stakeholders on the updated definitions, ensuring a comprehensive understanding and consistent application. This effort will help prevent misunderstandings and ensure that the refined definitions are effectively utilized across the board.*

3) Lack of Flexibility in a National One-Size-Fits-All Approach.

The proposal for a national, one-size-fits-all approach to address flood-related challenges raises significant concerns due to its inherent limitations and lack of flexibility to address regional and local circumstances and needs. A uniform strategy across diverse regions fails to adequately address the nuanced and varied nature of flood dynamics.

The lack of specificity across regions for different types of projects, notably concerning sea-level rise scenarios and the absence of minimum standards for applying grants, renders this approach ineffective. Without tailored considerations for regional variations, the proposal overlooks critical factors, risking inconsistency and inefficiency in flood management efforts.

Additionally, the omission of comprehensive elevation information within the 0.2 percent annual flood approach creates confusion among stakeholders. Applying uniform standards without accounting for distinct elevation profiles further undermines the practicality and success of such a broad-reaching policy.

Moreover, the proposal lacks clarity on integration with local government systems and communications regarding policy implementation with non-Federal stakeholders. This oversight raises doubts about adaptability and alignment with existing regional policies, potentially leading to conflicts and inefficiencies in implementation.

The removal of Flood Hazard Boundary Maps (FHBM) without clear alternatives or specific evaluation methodologies tailored to different regions also raises serious concerns. This omission fails to ensure region-specific evaluations and risks breeding confusion and opacity in applying standards uniformly across diverse regions.

In short, a one-size-fits-all approach overlooks the complexity of regional flood dynamics and other variabilities, leaving critical questions unanswered. To effectively address the multifaceted challenges posed by floods, a tailored, regionally-sensitive strategy is imperative, ensuring that diverse regional needs and variations are appropriately considered and integrated into any proposed policies.

Recommendations: *FEMA needs to engage collaboratively with stakeholders by initiating comprehensive consultations with local governments, non-Federal stakeholders, and regional*

experts to gather insights and refine the currently proposed national approach. FEMA needs to ensure that policies align with regional differences and address specific challenges identified by stakeholders.

In addition, FEMA needs to develop a robust communication strategy to clarify the integration of local government systems and policy implementation with non-Federal stakeholders. Further, the Agency needs to ensure transparency in decision-making processes and provide channels for feedback to address concerns and enhance cooperation.

4) Need for Establishing Metrics for Gauging Progress in Achieving Goals.

Creating metrics is essential. The current policy outlines objectives but lacks specific metrics to gauge progress toward achieving them. The absence of suitable metrics guarantees a transition into subjective assessments, making it impossible to balance trade-offs among objectives.

Recommendations: FEMA must establish *appropriate metrics to ensure objective evaluation and avoid subjective interpretations. FEMA needs to include, in the policy statement, measurable metrics, allowing for a quantifiable assessment of advancement toward achieving well-defined and substantiated objectives.*

5) Climate Informed Science Approach.

FEMA is proposing the use of CISA as the preferred FFRMS approach, where data is available and actionable for both critical and non-critical actions, as CISA uses a more site-specific approach to predict flood risk based on future conditions. However, CISA appears to be a framework built upon continually evolving models, projections, and assumptions regarding climate change and anticipated future conditions. This approach involves deriving risk preferences and standards from fluctuating circumstances and decision-making processes. It generates various risk thresholds due to the dynamic nature of decisions and cases for data that does not exist yet.

Contrary to the fundamental principles outlined in Executive Orders 12866 and 13563, which stress the need for regulations to enhance predictability and reduce uncertainty for the regulated public, CISA introduces uncertainty into regulations and regulatory decision-making. It leaves the regulated public to speculate on which standards will emerge from a multitude of potential climate scenarios, thereby adding more ambiguity to the flood risk management process instead of resolving uncertainties.

In the “Federal Flood Risk Management Standard Climate-Informed Science Approach (CISA) State of the Science Report” (March 2023), the National Climate Task Force reveals that:

“The FFRMS includes four approaches for determining a future flood elevation for Federally funded projects—CISA, the Freeboard Value Approach (FVA), the 0.2-Percent-Annual-Chance (500-year) Flood Approach (0.2PFA), *and the elevation and*

flood hazard area that result from using any other method identified in an update to the FFRMS.” [Emphasis added.]

The inclusion of the “*elevation and flood hazard area resulting from using any other method identified in an update to the FFRMS*” in CISA acts as a safety net for FEMA and potentially other Federal agencies. However, this inclusion amplifies operational uncertainty within FFRMS rather than addressing it. This persistent uncertainty poses a challenge for the public in understanding the favored standard or risk preference dictated by the fluctuating climate scenarios. Questions about elevation or flood hazard area remain unanswered within CISA. The approach lacks specific criteria for making these determinations, rendering it excessively variable and potentially impractical to implement at the Federal, state, regional, or local level. Further, there is not a good understanding of which level of government would be tasked with this implementation.

On August 22, 2016, in FEMA's Proposed Updates to its Floodplain Management and Protection of Wetlands Regulations to Implement Executive Order 13690 (*see* 81 Fed. Reg. 57402, Docket ID: FEMA-2015-0006), FEMA reaffirmed the FFRMS position that CISA is the preferred government-wide approach to enforce flood risk management standards for Federally funded actions involving new construction, substantial improvement, or repairs to substantial damage *and* private and non-Federal activities covered by licensing, permitting, loan or grants-in-aid programs administered by Federal agencies. (*See id.* at 57407.) However, later in the same notice, the agency rejected use of the CISA approach as being “not appropriate at this time.” (*See id.* at 57411.) Several reasons were given by FEMA for this decision, including that, “actionable climate data are not currently available for all locations” and, in addition to the data challenges, CISA “might result in a decision-making process that could unnecessarily delay recovery in the wake of a disaster event for non-critical actions.” (*See id.*) These concerns still exist now.

As a result, FEMA's reliance on CISA is questionable, and hence, concerning. Recent discussions have cast doubt on our ability to model unobservable phenomena, such as in climate science technology. The fluid nature of decision criteria within CISA, tied to emerging climate scenarios, is evident in statements suggesting multiple scenarios and phased decision-making over time. Additionally, the data is not always reliable, nor does it exist for all areas of the nation. These issues were referenced in a 2019 article entitled “A climate intelligence arms race in financial markets,” Jesse M. Keenan, *Science* 365 (6459), pp. 1240-1243, which states that:

“There are many laudable models in the CST (climate science technology) industry, but there are also inferior models being misapplied to inform maladaptive decisions and investments within the private and public sectors. For example, some CST providers are commonly criticized by scientists for overselling their capacity to downscale physical exposure assessments, which can drive long-term capital planning by local jurisdictions. The down scaling may suggest a measure of uncertainty that is beyond current scientific consensus. As such, some providers pitch certainty in quantitative models that is unwarranted or not soundly “complemented with qualitative approaches to capture the full complexity [of] tangible and intangible aspects of vulnerability in its different dimensions.” Much better are those CST firms that provide largely non probabilistic

decision support within scenario planning that explicitly acknowledges the limitations of the technology.”

With CISA, the fluid nature of decision criteria being made subject to the fluctuations of emerging climate scenarios is evident in statements like the following:

“Multiple scenarios might be used as part of a broader risk management approach and considered, as possible, in project planning to evaluate risks across a range of conditions and to *identify trigger points and thresholds that guide alternative solutions.*” Additionally, “A hybrid approach also may be considered in which a decision can be phased in over time, such that a lower set of scenarios can guide decision-making in the near-(5 to 20 years) to moderate-term (20 to 35 years), while not precluding the capability to respond to the more extreme scenarios in the longer term (Hinkel et al. 2015).” *Federal Flood Risk Management Standard Climate-Informed Science Approach (CISA) State of the Science Report*, National Climate Task Force, March 2023.

Hence, applying CISA to establish flood risk management standards is risky.

Recommendations: *Should FEMA consider this approach, absolute transparency and adherence to replicability and peer review principles become imperative. The lack of coherent decision criteria within CISA raises concerns about the clarity of Congressional authority guiding this standard. If FEMA cannot define the decision criteria for CISA, it should discard it as a standard, as it fails to meet the necessary criteria for a standard approach.*

6) Need for Analyzing Economics and Cost-Benefit Criteria.

In the Federal sector, regulations are typically shaped using cost-benefit analysis. The Environmental Protection Agency (EPA), for example, employs this method to establish regulatory standards, balancing health, safety, and traditional economic objectives. Cost-benefit analysis holds an inherent democratic advantage by considering individual preferences, including risk tolerance. This is reflected in how much individuals are willing to pay for beneficial outcomes and safety enhancements through risk reduction.

Society should not be burdened with costs from regulatory mandates exceeding what people, collectively, are willing to pay for the associated benefits. Cass Sunstein, former Administrator of the Office of Information and Regulatory Affairs, discusses these principles in what he terms as the “easy cases” where individuals, not the government, finance risk reduction efforts.

Sunstein emphasizes that in these cases, where individuals foot the bill for risk reduction, the government should not force them to pay more than they are willing to. People have limited budgets and may prefer allocating resources to essentials like food, healthcare, or clothing instead of spending excessively to eliminate minor risks. (Sunstein, Cass R. *The Cost-Benefit Revolution* (The MIT Press).

FEMA should adhere to this fundamental democratic principle by utilizing comprehensive cost-benefit analyses in crafting the proposed risk standards. Departing from a net-benefits approach might be permissible if compelling evidence, such as the constraints highlighted in the policy statement, demonstrates their significance outweighs economic losses.

However, the cost-benefit analysis in FEMA's proposed rule falls short. While FEMA presents a review of costs and benefits in its regulatory analyses section with its proposed rule (*see* 88 Fed. Reg. at 67899), it mainly offers examples where a single alternative standard yields some net benefits. FEMA, however, admits its inability to adequately quantify many of the costs and benefits of its risk reduction strategies. This stands in contrast to the requirements of Executive Order 13563, which “emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.” (*See id.*)

For example, FEMA notes, numerous times its regulatory analyses section, its inability to quantify the costs and benefits of several aspects of the rule; to illustrate: “Due to the highly project-specific nature of facilities projects and numerous options for making them resilient, FEMA could not estimate the costs of improving flood resiliency of facilities” (*see id.* at 67873); “FEMA does not have data to quantify the benefits of additional freeboard” (*see id.* at 67873); “FEMA was unable to monetize the impacts of the rule for facilities” (*see id.* at 67873; *see also id.* at 67902); “FEMA was unable to quantify the cost for increased resiliency standards for an estimated 20,961 affected facility projects over the 10-year period of analysis” (*see id.* at 67902; *see also id.* at 67907); “Additionally, FEMA was unable to quantify the cost for projects that may be diverted out of the floodplain, impacts to projects with existing basements, project delays, or forgone projects that may result from this rule” (*see id.*; *see also id.* at 67907); “Quantified estimates of the benefits of this rule are available for only PA Category E projects” (*see id.* at 67904; *see also id.* at 67873); “FEMA is unable to quantify these benefits” (*see id.* at 67909); “Due to the vast diversity of facilities, the highly project-specific nature of facilities projects, and numerous options for making them resilient, FEMA could not estimate the costs of improving flood resiliency of facilities” (*see id.* at 67904; *see also id.* at 67873).

FEMA also notes in its regulatory analyses discussion of its implemented partial interim policies for public assistance (PA) and hazard mitigation assistance (HMA) that “At the time this RIA was conducted, these partial implementation policies had been in place for less than 6 months, which is an insufficient period to provide adequate data for analysis.” (*See* 88 Fed. Reg. at 67900.) Therefore, “FEMA was unable to complete an in-depth analysis of the impact of these interim policies,” and the agency had to resort to a less-representative pre-guidance baseline that would assess “what the world would be like if the relevant guidance (*i.e.*, the partial interim policies for PA and HMA) had not been implemented.” (*See id.*)

In sum, given FEMA's inability to adequately quantify the costs and benefits of numerous aspects of its risk reduction strategies in its proposed rule, it appears that FEMA is significantly relying on a subjective assessment of the proposed rule's costs and benefits, as noted by FEMA itself: “FEMA believes that the benefits of the rule—quantified and unquantified—would justify its costs.” (*See id.* at 67900.)

Lastly, it should be noted that, without adequate cost-benefit considerations, FFRMS could actually lead to further deterioration of key infrastructure (for example, police and fire stations) where meeting the new, higher standards is not technically or financially feasible - so communities will just leave them to deteriorate in place and not serve the public need. These sorts of costs also need to be considered in the agency's analyses.

Recommendations: Before finalizing implementation, FEMA should conduct more thorough, quantitative cost-benefit analyses, considering the cumulative effects of recent floodplain governing rules. This step is crucial to make well-informed decisions regarding appropriate risk-reduction strategies and to ensure a thorough understanding of the overall impact of the proposed rule's implementation.

7) Importance of Consideration of Alternatives to the Proposed Standard.

As noted above, the cost-benefit analysis in FEMA's proposed rule falls short. While FEMA presents a review of costs and benefits in its regulatory analyses section with its proposed rule (*see* 88 Fed. Reg. at 67899), it mainly offers examples where a single alternative standard yields some net benefits.

Formulation and consideration of alternatives are integral to sound cost-benefit analysis. FEMA needs to ensure its review of costs and benefits as part of its regulatory analyses considers an adequate range of alternatives to the proposed standard and its various approaches. There are always alternatives. Part of these alternatives will include identifying the use cases where imposing the standard will create new risks and costs greater than the risk the standard seeks to mitigate. In those cases, a standard requiring a detailed cost-benefit and trade-off analysis is always available as an alternative to the standard.

Recommendations: As part of conducting more thorough, quantitative cost-benefit analyses (discussed above), FEMA needs to consider an adequate range of alternatives to the proposed standard and its various approaches, should defer issuing this rule until such alternative cases have been thoroughly examined to avoid the risks of using the standard in circumstances where its errors are likely to render it imprudent as a standard.

8) Need for Assessing the Risks of the Proposed Standard.

FEMA's proposal suggests an elementary standard based on elevation and area determined by flood elevations across the watershed. This approach is vulnerable to availability heuristic bias, presuming that higher is universally better, which is not always the case. By proposing a standard without thorough consideration, FEMA introduces a new risk – the potential for this standard to generate higher costs than the benefits it yields. In essence, it reflects bureaucrats' risk preferences imposed on the public, lacking rigorous consequentialism based on individual preferences.

FEMA admits that their proposed standard could lead to errors, sometimes incurring costs greater than what it prevents or saves. To address this, FEMA should subject their new standard

to test scenarios. However, the current proposal lacks clarity in this aspect. Identifying cases where the standard might err is crucial. In instances where errors' probability and consequences are significant, a detailed cost-benefit analysis becomes essential. Essentially, the standard must be formulated in comparison to alternatives and grounded in cost-benefit analysis. Clarity should be provided to the public regarding its application.

Prior discussions have highlighted “use cases” where applying the flood risk management standard leads to not-understandable outcomes, for example, elevating a bridge higher than the flood-prone roads connecting to it. Further, FEMA admits that the proposal could potentially conflict with several acts aimed at protecting vulnerable populations like the disabled and elderly. Moreover, the proposed rule fails to take into account USACE civil works projects built under USACE rules but operated and maintained by NFS. Do USACE rules and requirements on the infrastructure trump FEMAs? This is unclear.

Recommendations: These additional scenarios need identification and either exclusion or limitations concerning the application of the proposed standard. The proposal's reliance on availability heuristic bias exceeds reasonable limits. FEMA should postpone issuing this rule until these cases are thoroughly examined to prevent the standard's risky application where errors could make it impractical as a standard.

9) Need for Analysis of Inconsistencies and Cumulative Effects of Rules Across Federal Agencies.

The introduction of the new FFRMS occurs amid a surge of fresh flood regulations, such as “Risk Rating 2.0: Equity in Action” (which should have, but did not, go through rulemaking), the Technical Mapping Advisory Commission (TMAC) proposal aimed at expanding regulatory flood boundaries, heightened standards within National Flood Insurance Program (NFIP) floodplain management regulations, USACE's pursuit of new levee safety mandates, and the utilization of “Risk Informed Decision Making,” which bypasses public review, comment, or adherence to the Information Quality Act. All of these regulations are being implemented without meticulous and rigorous evaluation of their cumulative costs and benefits both within and outside of their respective agencies.

Among these proposals, some might overlap or duplicate each other, potentially leading to redundancy, confusion, and additional costs when considering the entire cluster of regulations. The absence of coordination across these regulations is evident, creating a lack of consistency and harmony. For instance, the new TMAC proposal to enlarge a floodplain might intersect with the FFRMS standard in various aspects, and vice versa.

There is also confusion on how FEMA will work with USACE to remedy conflicts with the NFIP requirements when civil works projects are carried out. For example, an NFIP-participating community will be required to adopt and enforce floodplain management regulations that meet or exceed the minimum NFIP standards and requirements and to ensure compliance with NFIP, they have to ensure that development projects do “not result in any increase in flood levels within the community during the occurrence of the base flood discharge.” In FEMA

implementation guidance, FEMA extends this definition of “development” to include USACE civil works projects.”

Unavoidable confusion and costs are going to result when different Federal agencies adopt different standards that might apply to the same facility. Hence this lack of coordination and consideration of inconsistencies and impacts among this cascade of regulations is concerning, as it will introduce confusion and additional costs, and potentially compromise flood protection.

Recommendations: *FEMA should delay issuing this rule until conducting comprehensive assessments of cumulative impacts, ensuring a more informed and coordinated approach. Additionally, FEMA should provide additional documentation on how FFRMS will impact other Federal agencies programs, especially USACE civil works projects, and whether FEMA's FFRMS policy will supersede other Federal agencies' rules and regulations. Further, it is important that FEMA closely coordinate with other agencies that typically co-regulate projects, including the USACE with water resources projects.*

10) Importance of Providing an Appeals Process for Stakeholders.

There is no viable process available to non-Federal entities to seek a review and adjudication of decisions made under the FFRMS. Federal outlays nearly always involve cost-sharing or matching funds. The adverse impacts of this proposal will not be confined to the Federal government but will have far-reaching impacts on non-Federal public entities and the private sector. Ultimately, Federal taxpayers should also be protected from a Federal standard that will likely grow to impose ever-increasing costs without being subject to the discipline of being justified by the associated benefits.

Recommendations: *There needs to be an appeals process available to non-Federal entities to review and adjudicate decisions made under the FFRMS.*

11) Need to Identify and Adhere to Statutory Authorities.

For each objective and requirement outlined in the flood risk management standard, the rulemaking must specify the explicit and unambiguous statutory authority granted by Congress to pursue those objectives through the proposed standard. Decisions impacted by the standard significantly influence economic matters over time, requiring clear identification of the Congressional mandate empowering the imposition of such requirements.

While the President holds authority to impose mandates on Federal projects as cost-saving measures, the capacity to regulate activities within floodplains, both private and non-Federal, is limited to jurisdictions where local communities have voluntarily adopted floodplain regulations as a condition of participating in the National Flood Insurance Program.

Applying the proposed standard as a mandate to private and non-Federal government entities under different regulatory programs exceeds the clear authority bestowed upon FEMA or other agencies with specific regulatory roles. Furthermore, attempting to assert authority to safeguard wetlands under a flood risk management standard lacks a clear Congressional grant or assignment of such authority.

Recommendations: *FEMA should exclude from the standard any application to private and non-Federal activities covered by licensing, permitting, loans, or grants-in-aid programs administered by Federal agencies, unless explicit statutory authority has been granted (e.g., the NFIP program). Additionally, objectives related to regulating floodplain activities to protect wetlands should be removed from the proposal. The authority to protect wetlands is adequately outlined in the Clean Water Act, and the Federal jurisdiction is defined within the boundaries of that statute and recent Supreme Court rulings, including Sackett v. EPA (598 U.S. 21-454 (2023)), which has limited Federal authority over the regulation of wetlands.*

12) Roles, Responsibilities, and Authorities of NFS Might Not Align with Proposed FFRMS Policy.

FEMA needs to clarify how various NFS and other non-Federal stakeholders will engage with and be affected by the proposed rule.

When executed as intended, the distinct missions of flood control and floodplain risk management complement each other, forming the foundation for effective and cost-efficient flood protection. Collaboration between non-Federal sponsors, communities, the Corps, and FEMA can yield significant benefits. However, this collaboration is contingent on a clear, justified, and achievable delineation of agency and stakeholder roles and responsibilities.

However, the proposal fails to address the roles of non-Federal stakeholders, which can significantly hinder non-Federal stakeholders' understanding of their responsibilities within the FFRMS framework. Moreover, the FFRMS lacks an explanation of how its policies align with other floodplain-related policies. This oversight may burden local non-Federal sponsors with additional responsibilities related to addressing property damage and new construction, potentially creating confusion and additional workload, and importantly, likely forcing non-Federal sponsors to assume duties outside their legal authorities and core competencies, and expose them to potential liability.

Additionally, the proposal overlooks the potential impacts on non-Federal stakeholders. Non-Federal stakeholders might lack the means or resources to conform to FEMA's principles, diverting their attention from their existing duties and essential ongoing projects. Further, adjusting to FEMA's guidelines might strain the capacities of stakeholders, impacting their ability to effectively manage their existing commitments and projects, including infrastructure which was built by the Corps but maintained by NFS.

Further, if the FFRMS is not cautiously implemented, it could actually lead to further deterioration of key infrastructure (for example, as noted earlier, police and fire stations) where

meeting the new, higher standards is not technically or financially feasible – resulting in communities declining to develop needed new and upgraded infrastructure and just leaving existing facilities to deteriorate in place and not serve the public need. These sorts of factors also need to be taken into consideration in the agency's development and implementation of the standard.

Recommendations: *FEMA needs to provide greater clarity on the roles of state and local government and other non-Federal stakeholders. As part of this, FEMA needs to consider and accommodate the resource and legal boundaries of non-Federal stakeholders, ensuring that policies and directives are realistic and compatible with their authorities and available resources. Policies and guidelines need to acknowledge the legal limitations of non-Federal stakeholders, including concerning activities like land use planning and emergency management. Tailoring requirements that align with the authorities of non-Federal stakeholders is essential. This entails revising policies to avoid mandating actions that fall outside their legal jurisdiction.*

We thank you again for the opportunity to provide comments on the proposed rule, and hope that FEMA will address our comments as it proceeds with this FFRMS development process. NWC and its partners look forward to continued involvement in the discussions about reasonable and appropriate floodplain management and protection measures and rules.

For more information or questions, please contact me at (202) 203-4795 or by email at julie@waterways.org.

Sincerely,



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