



Executive Order 13690 Requires Federal Agencies to Consider Climate Change in Determining a Higher Flood Elevation and Expanded Flood Hazard Area

On January 30, 2015, President Obama signed Executive Order (EO) 13690. EO 13690 revises President Carter's 1977 EO 11988 by requiring all federal agencies, when engaging in any agency action that might potentially affect floodplains,¹ to use one of the following three approaches to determine the elevation and extent of the floodplain, with the Climate-Informed Science Approach (as defined below) being the preferred method:

1. **The Climate-Informed Science Approach ("Climate Science Approach").** The Climate Science Approach encourages agencies to use the best available, actionable hydrologic and hydraulic data, as well as methods that integrate current and future changes in flooding based on climate change data.
2. **The Freeboard Value Approach ("Freeboard").** Freeboard is the elevation resulting from adding two feet to the Base Flood Elevation (BFE) for non-critical actions and adding three feet to the BFE for critical actions.²
3. **The 500-Year Elevation Approach ("500-year").** The 500-year Approach employs statistical data to establish a floodplain with less than a 0.2 percent chance of the same flood occurring twice in one year.

Pursuant to EO 13690, the Federal Emergency Management Agency (FEMA) drafted for public comment the Revised Guidelines for Implementing Executive Order 11988, Floodplain Management ("the Guidelines"). The Guidelines maintain the existing eight-step decision-making process currently in place under EO 11988 and its implementing regulations, while incorporating elements of the revised EO 11988 (EO 13690) within certain steps. The public comment period for the Guidelines began on February 5, 2015, and will end on April 6, 2015, unless extended.

¹ FEMA's implementing regulations for EO 11988, 44 CFR §9.4, defines *base floodplain* as the 100-year floodplain (one percent chance floodplain) and *base flood* as the flood that has a one percent chance of being equaled or exceeded in any given year.

² The Revised Guidelines for Implementing Executive Order 11988 define *Base Flood Elevation* (BFE) as the computed elevation to which floodwater is anticipated to rise during the base flood. BFEs are shown on the Flood Insurance Rate Maps and on the flood profiles in the Flood Insurance Study (FIS). *Critical action* is defined as any activity for which even a slight change of flooding would be too great. These typically involve hospitals, nursing homes, facilities that house highly volatile, flammable or toxic materials, emergency operation centers, and power-generating plants.

To facilitate public comment on the Guidelines, FEMA is holding listening sessions across the country. Jones Walker attorneys attended FEMA's March 5, 2015, listening session in Biloxi, Mississippi, which focused on the new aspects of floodplain management provided by EO 13690 and the Guidelines. Staff from FEMA and the United States Army Corps of Engineers ("the Corps") were present and engaged in dialogue with members of the public.

The session concluded with the submission of both written and oral public comments, which focused on the following areas of concern:

- **Climate-Science Approach.** Who determines which sets of data are the "best available climate-informed science"? Will this data take into account site-specific and regional factors? What criteria will be established to qualify climate data as correct data?
- **Timing of implementation.** Federal agencies will have 30 days from the close of the public comment period to submit their individual agency implementation plans. Many comments noted this period is too restrictive. There were also requests to extend the public comment period beyond the April 6, 2015, deadline. Are the Guidelines retroactive? Are there ongoing projects which will be subject to the Guidelines? This is especially important for Corps projects that go through multiple phases from feasibility through operating and maintenance.
- **Redefinition of the Base Flood Elevation and the extent of the floodplain.** What discretion does an agency have in choosing which of the three elevation approaches to employ and do they always have to choose the method yielding the highest elevation and widest footprint? How can a developer perform proper due diligence on a piece of property if he/she is unable to ascertain from a flood map, as is standard practice, whether the property is located inside a floodplain? Will the current FEMA floodplain maps be updated to reflect the new elevation and floodplain determination approaches?
- **Federal actions.** Which federal agency actions will be subject to the EO? Are Federal Housing Authority construction loans, Housing and Urban Development Community Development Block Grants, or Federal Deposit Insurance Corporation-insured loans subject to the EO? What types of financing will trigger the EO? How will federal agencies work together in implementing the new standard to ensure consistency in permitting or other decisions where more than one federal agency action is required for a particular project in the floodplain? How will the Guidelines affect state coastal master plans?

According to the January 30, 2015, fact sheet published by the President's Council on Environmental Quality, "at least 350 communities across the country...have already adopted standards that either meet or exceed this new Federal standard." Jones Walker is currently researching which communities on the Gulf Coast currently meet or exceed this standard.

Jones Walker also spoke to officials from the Corps who indicated there will be a public comment period for their upcoming individual implementation plan. We will continue to monitor and participate in ongoing discussions with federal and state agencies on how they plan to implement the standard. Our attorneys are available to assist in the formulation and submission of comments on the Guidelines.

For further information, contact [F. Rivers Lelong, Jr.](#), [Robert W. Scheffy, Jr.](#), [Alex P. Prochaska](#), or [Merri Hope Thompson](#).

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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