Housing Finance and Regulatory Affairs
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RE: ID: FEMA-2017-0023
Dear Associate Chief Counsel Davis:

On behalf of the National Association of Home Builders (NAHB), I am pleased to submit the following recommendations regarding which Federal Emergency Management Agency (FEMA) regulations, policies, and information collections that may warrant consideration as the Agency formulates its response to E.O. 13777, "Enforcing the Regulatory Reform Agenda." These comments are submitted in response to FEMA's June 15, 2017 Federal Register notice *Evaluation of Existing Regulations, Policies and Information Collections*.

NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new housing units constructed within the U.S. each year. Due to the wide range of activities they conduct on a regular basis to house the nation's residents, NAHB members are often required to comply with various FEMA mandates and/or opt to participate in voluntary programs and initiatives to meet their business goals. The number and breadth of these rules and initiatives, however, impose significant costs, delays, and other challenges that not only impact the ability of their businesses to thrive and grow, many also negatively affect housing affordability and stifle economic development. As such, NAHB is pleased to provide the following suggestions and is hopeful that the Administration's focus on regulatory reform and reducing burdens will provide meaningful relief for the nation's home building industry.

I. BACKGROUND

Reducing unnecessary regulatory burdens, promoting economic growth and job creation, and minimizing the impacts of government actions on small businesses are central tenets of President Trump's agenda. To effectuate these goals, President Trump released the Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Executive Order 13771) on January 30, 2017.[1] This Order, among other things, directs the agencies, for each new regulation issued, to identify at least two prior regulations to be modified or eliminated so that the net cost of the regulation is zero. Recognizing the challenges associated with this Order's implementation, on February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which

[1] 82 Fed. Reg. 9339 (February 3, 2017).

provided additional guidance as to how the agencies are to "alleviate unnecessary regulatory burdens" on the American people.[2]

Section 3(a) of E.O. 13777 requires each federal agency to establish a "Regulatory Reform Task Force" that is charged with evaluating existing regulations and "making recommendations to the agency head regarding their repeal, replacement, or modification." The term "regulation" is defined to include any rules, regulations, or policies that "establish an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedures or practice requirements of an agency."[3] As a result, "regulation" can be broadly interpreted to include regulations, policies, guidance documents, and even federal programs that prescribe procedures or practices that either FEMA or regulated entities must follow to comply with agency requirements. Importantly, when evaluating existing regulations and making recommendations for repeal, replacement or modification, each federal agency is also directed to ensure their respective Regulatory Reform Task Forces "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations including State, local and tribal governments, small businesses, consumers, non-governmental organizations and trade associations."

Directing federal agencies to periodically review existing regulations for potential repeal or modification and asking for public input is not a new concept. The idea of presidentially-directed regulatory review was introduced by President Clinton in 1993 through Executive Order 12866 and most succeeding presidents have tweaked these provisions or added new ones to ensure systematic and periodic review of most regulations. In addition, Congress, under Section 610 of the Regulatory Review Act (RRA), requires all federal agencies to periodically review existing regulations. NAHB does not view these two retrospective review processes as redundant or duplicative. Rather, they underscore the importance both Congress and the Administration place on ensuring federal regulations, policies, and programs remain relevant, efficient, and accomplish their stated objectives, while imposing the least possible burdens upon the regulated community. Unfortunately, while compelling in concept, these efforts, to date, have resulted in arguably minimal improvements for the small businesses that feel the brunt of the regulatory bite.

II. THE NEED FOR REFORM

The stresses confronting the U.S. housing market, specifically those affecting the small businesses that comprise the vast majority of residential construction companies, are real and widespread. They include an increasingly tight labor market, lack of available financing for new construction projects, cost impacts from trade sanctions on lumber prices, declining housing production levels, and declined home values and their collective impact on remodeling activity. Furthermore, residential construction is one of the most heavily regulated industries in the country. In these economic times, the decrease in production, loss of jobs within the industry, and other factors point to the need to reduce the regulatory burden on this vital industry.

The majority of NAHB's members run small businesses that construct 10 or fewer homes each year and/or have fewer than 12 employees. Small businesses are the engine of growth for the U.S. economy. At the same time, they are disproportionately impacted by federal regulations, underscoring the need for, and importance of, conducting meaningful reform to reduce these onerous requirements. For example,

[2] 82 Fed. Reg. 12,285 (March 1, 2017).
[3] E.O. 13771, "Reducing Regulations and Controlling Regulatory Costs" Section 4.

residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners.

NAHB estimates that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.[4] The significant cost of regulations reflected in the final price of a new home has a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.[5] Given the outsized impact of these regulations on the final price of a newly built single-family home, it is critically important that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to impose the least possible burden on the regulated entities. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, the federal agencies must to also be cognizant of the challenges that will continue to remain if the cumulative impacts from complying with regulations at all levels of government are not fully considered and addressed.

In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a broken segment of the economy. By examining the cumulative impacts and burdens placed by the myriad of regulations – many of which are duplicative, overlapping, or contrary to one another – along with assessing their performance, NAHB is certain that the agency will find sufficient room for efficiencies and streamlining.

III. IDENTIFYING AND PRIORITIZING REGULATIONS FOR REPEAL, REPLACEMENT OR MODIFICATION

E.O. 13777 requires the agencies to gather input from a variety of sources and sets the baseline criteria that each Regulatory Reform Task Force is to consider when reviewing and making recommendations for repeal, replacement, or modification. Specifically, agencies are to attempt to identify existing federal regulations that:

i. Eliminate jobs or inhibit job creation;
ii. Are outdated, unnecessary, or ineffective;
iii. Impose costs that exceed benefits;
iv. Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
v. Are inconsistent with requirements under the Data Quality Act of 2001, or rely on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility; or
vi. Derive from or implement Executive Orders or other Presidential directives that have since been subsequently rescinded or substantially modified.

[4] http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.358516237.1489032231.
[5] http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/

While E.O. 13777 provides the criteria each Regulatory Reform Task Force should use to evaluate existing regulations for possible repeal or reform, the E.O. is essentially silent on what factors should be considered when identifying which specific regulations should be repealed or revised. A primary concern for NAHB and other small businesses is how FEMA and the other agencies will ensure all sectors of the economy and different sized firms will benefit from E.O. 13777's call for regulatory relief. As such, NAHB believes it is imperative for each agency to provide the public and the regulated community with some indication of the criteria it will use to identify federal regulations that may be addressed under the E.O. At a minimum, NAHB suggests the agencies consider the following criteria when assessing existing regulations (including guidance documents, interpretive memoranda and other related actions) for potential deregulatory action:

- Impacts. What sector(s) of the economy are impacted; what types of businesses are impacted; how many entities are impacted (direct and indirect); and what is the nature of the impact(s)?
- Economics. What are the costs, benefits and cost/benefit ratio; who incurs the costs and reaps the benefits; how do costs impact small vs large entities?
- Need. Is the regulation required by statute; does the regulation confer authorization (such as a permit) that is needed for the lawful operation of certain businesses?
- Data & Technology. Is there new, publicly available information that would impact the underlying rule or the underlying assumptions; does new data impact the rule's achievability, efficacy, cost or value; does a change in technology impact costs or achievability?
- Redundancy. Are there similar regulations within any agency or at any level of government that address the same or similar issue(s); are those rules duplicative or inconsistent with one another?
- Other Rules. Do more current regulations surpass the need for an existing rule; can rules be combined to meet the same outcome?

Importantly, in contemplating any reforms NAHB strongly encourages FEMA's Regulatory Reform Taskforce to group existing regulations by which industry sector or entity size must comply with the regulations. Such an approach not only helps to better promote regulatory relief across all sectors of the economy, but it also compels FEMA's program offices to better understand, evaluate, and address cumulative impacts, as oftentimes it is not the costs and burdens of individual regulations that are problematic, but the additive nature of the rules, particularly as they apply to heavily regulated industries like residential construction. Similarly, because some regulatory actions are necessary to provide authorizations (i.e., federal permitting programs) to conduct daily business operations in compliance with the law, care must be taken to fully consider and avoid the unintended consequences that can result from rushed deregulatory action(s).

IV. GENERAL COMMENTS

FEMA administers a number of programs and priorities aimed at preparing for, and responding to disasters, hazards, and other emergencies. It also manages the National Flood Insurance Program (NFIP), including overseeing the development and updating of the 100-year floodplain maps, disaster assistance, and mitigation. As FEMA completes it work, NAHB continues to be concerned about the agency's participation in the development of building codes and standards, overly broad reliance on guidance and other documents that do not go through the rulemaking process, failure to regularly engage residential building experts and other members of the public, and the limitations of its outreach efforts.

a. Participation in Codes and Standards Development Must Be Limited

OMB Circular A119 directs federal agencies to use voluntary consensus standards where appropriate and practical, and directs agencies to participate in the development process for those standards.[6] As a result, FEMA Building Science Branch staff and private contractors hired by FEMA participate in the International Code Council's (ICC) code development process and serve on several industry standards committees. Through this participation, FEMA submits proposed changes and testifies. FEMA staff and its contractors also develop guidance documents that describe best practices for constructing buildings to resist natural hazards.

While well-intentioned, these FEMA representatives often lack residential experience and are under no obligation to ensure resultant codes are workable or affordable. On the flood side, some staff and contractors have strong environmental science and floodplain management backgrounds, but little to no construction experience – residential or otherwise. Other FEMA contractors are often big national engineering companies focused on large-scale building and infrastructure projects, rather than residential construction.

As a result, many provisions for wind and seismic resistance in the International Building Code (IBC), International Residential Code (IRC), and the ASCE 7 *Minimum Design Loads for Buildings and Other Structures* standard, for example, have become overly burdensome, expensive, and inflexible as they relate to dwellings, multifamily buildings, and light-frame construction. This can harm affordability, impose land-use limitations, and constrain builder and home owner design and material choices.

Rather than being allowed full access to participate in the development of all building codes, FEMA Building Science Branch staff and FEMA contractors who develop and promote residential building code changes and related design guidance should be required to have experience in one- and two-family dwelling or multifamily building construction. Further, FEMA should establish a formal policy that it will post all proposed changes to building codes and standards that it intends to offer or support, including all supporting documentation, for public review and comment before submitting to ICC or other standards developers. Each proposed change must also include a benefit/cost analysis and meet a 10-year simple payback. These steps will help to ensure that only those proposed changes that are in the public interest will be forwarded and supported by the federal government.

b. Broad Reliance on Guidance Hinders Transparency and Public Involvement

In completing its work, FEMA relies on a myriad of guidance documents, handbooks, policy statements and other directives to explain its programs, expectations, and policies. Because many of these documents are used to direct the activities of landowners and citizens, they have the force and effect of the law and its implementing rules, and, hence, meet the definition of "regulation" outlined in E.O, 13771. Examples include the *Guidelines and Standards for Risk Analysis and Mapping*, *Community Rating System Coordinator's Manual*, *and Community Resilience Indicators and National-Level Measures*. Many of these documents have not been vetted through the public, their existence is not well known, and many are difficult to locate, yet the agency expects the public to be knowledgeable and comply.

[6] 81 Fed. Reg. 4673 (January 27, 2016).

A current document is illustrative of this issue. FEMA is seeking public comment on a draft policy "Guidance for Participating Communities on Satisfying National Flood Insurance Program (NFIP) Floodplain Development Requirements."[7] The public has only been notified of the opportunity to review this document via the FEMA website. This ongoing predisposition of any agency to directly post potentially significant changes to policy solely on its web site is extremely troubling. There is an assumption that such actions will sufficiently reach all stakeholders and provide adequate notice of any change in policy or regulatory interpretation by FEMA. As these documents are not posted in a single location nor is there a single means of notification that new guidance has been posted, it is unreasonable to assume that potentially impacted stakeholders, especially small businesses, will be able to monitor all aspects of the agency's website on the off chance new guidance documents that could impact their business will be made available.

FEMA is strongly urged to revisit its standard protocol for advising the public of potential policy changes and soliciting feedback. Only through providing opportunities for adequate notice and comment, timely updates and broad outreach will the agency be able to reach its constituency and ensure its programs are effective and workable on the ground.

c. Recognition of NAHB and its Members' Expertise Lends Credence and Credibility

FEMA recognizes the value and need of bringing communities together to create more resilient places. Indeed, its "What does it take?" website states, "Professionals in a variety of disciplines provide the expertise to make communities safer. Engineers, architects, hydrologists, geologists, urban planners, digital cartographers, and others all play vital roles.

Their work provides the evidence-based knowledge needed to understand risk and take action to reduce it, including: properly elevating homes in flood-prone regions; strengthening buildings in hurricane zones; retrofitting structures for improved earthquake resistance; providing funds to manage wildfire risk and making building codes for new construction more vigorous."[8] Yet despite this recognition, FEMA rarely calls upon the expertise of the home building industry to help direct its actions. NAHB's members possess a wealth of experience and knowledge that is directly related to much of FEMA's work. Building technology, construction techniques, and best practices are the language of the trade, yet FEMA has failed to regularly involve NAHB or its representatives on projects affecting residential construction. For example, in 2008, FEMA published a *Home Builder's Guide to Construction in Wildfire Zones* for which NAHB was neither a reviewer nor contributor.[9] NAHB is also frequently left out of relevant FEMA projects funded through the Applied Technology Council, or only brought in at a late stage when key conclusions have already been reached.

Building homes and communities are our members' livelihoods, whether those homes are constructed in urban areas, mountainous topography, for low-income residents, or within the 100-year floodplain. Our staff and members have the experience and expertise to help ensure FEMA programs and practices that affect residential construction are effective, cost-efficient and workable on the ground. But to do so, NAHB needs to be appointed as a member of project review panels or otherwise have its input solicited at early stages of any FEMA or FEMA-funded

[7] https://www.fema.gov/media-library/assets/documents/131010.
[8] https://www.fema.gov/what-does-it-take.
[9] FEMA P-737, 2008.

project affecting residential construction. FEMA would also benefit by including NAHB as a member of any FEMA-funded committee making decisions affecting residential construction.

d. Increased Outreach Vital for Agency Success

The increased focus on sea level rise, climate change, more intense storms and recent flooding events further illustrate the need for the public to have ready access to good data and information so that they can make informed decisions. Recognizing this, and coupled with increased inquiries from our members, NAHB was dismayed to find the FloodSmart website was no longer accessible. While FEMA may contend much of the information remains available to the public through the agency website it is not presented or intended to be accessed in the same manner.

www.FloodSmart.gov was not a perfect site, however, it did provide easy access to information, such as status updates regarding the map change process and was presented in manner that did not require an intimate knowledge of the regulatory program. The data and material was communicated in an easily accessible format that the average citizen, homeowner or small business owner could both access and understand. The loss of those tools, as well as the program statistics provided within the site is a detriment to many in the field who serve members that have little to no experience navigating federal agency websites that are tied to jargon that often confuses rather than clarifies issues. NAHB urges FEMA to expeditiously launch the successor to www.FloodSmart.gov and provide other similar opportunities to share information related to its disaster assistance and mitigation programs.

V. SPECIFIC REGULATIONS IN NEED OF REFORM

Consistent with the directives under E.O. 13777, NAHB submits the following specific regulations, policies, and programs for consideration by FEMA's Regulatory Reform Task Force.

a. Regulations Implementing the Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act was signed into law in 1988.[10] It updated the statutory authority for most Federal disaster response activities, particularly as they relate to FEMA and FEMA programs. Under the Stafford Act, FEMA is authorized to provide direct disaster assistance to states, local governments, and tribes following a declaration by the President of a "major disaster" caused by any of a long list of "natural catastrophes." According to FEMA, assistance provided by the Stafford Act is most typically used by government entities to recoup some of the costs incurred for debris removal, emergency protective measures, and restoration of public infrastructure.

i. Disaster Deductible

Once a presidential disaster declaration has been made, the Stafford Act allows FEMA to provide financial assistance to eligible state, local, or tribal governmental entities. The regulations require FEMA to consider several factors when determining if and how much assistance to provide to an impacted area, including estimated costs of assistance; localized impacts; existing insurance coverage within the impacted area; hazard mitigation; whether other natural catastrophes have impacted the same area previously; and availability of assistance under other federal programs. Under the current regulations, the amount of federal assistance provided is determined by either a fixed dollar amount or as a percentage of all eligible costs that have

[10] PL 100-707.

been documented by the requesting governmental entity. The Stafford Act establishes a minimum level of federal assistance across all authorized categories of assistance at not less than 75 percent of eligible costs. Furthermore, the Act allows the President or FEMA to grant waivers to impacted governmental entities from the fundings' matching requirements if the locality seeking the funding is unable to provide a funding match due the impact of the natural catastrophe or general economic conditions.

On January 12, 2017, FEMA issued a Supplemental Advance Notice of Proposed Rulemaking (SANPRM) detailing how the agency might establish a deductible for its Public Assistance Program.[11] As a component of the model, FEMA identified seven opportunities for States to earn credits toward meeting the proposed deductible. NAHB submitted comments questioning the deductible approach and how credits might be calculated.[12] Several of the mechanisms for earning credits are problematic, as follows.

- ***Credits must be limited to activities targeted by the Public Assistance Program***

FEMA's Public Assistance Program was specifically designed as a mechanism to provide supplemental federal disaster grant assistance for debris removal, life-saving emergency protective measures, and the repair, replacement, or restoration of disaster-damaged publicly owned facilities and the facilities of certain private non-profit organizations. The Public Assistance Program also encourages protection of these damaged facilities from future events by providing assistance for hazard mitigation measures during the recovery process. Despite the clear and intentional limitations of the Public Assistance Program, FEMA is suggesting a deductible credit program that would recognize and incentivize activities that are unrelated to the publicly owned facilities that are central focus of the program. FEMA is strongly urged to keep the "public" in the Public Assistance Program.

- ***Use of the Building Code Effectiveness Grade Schedule (BCEGS®) to determine credits is inappropriate***

Potential credit number five is grounded on the "Building Code Effectiveness Grade Schedule (BCEGS®)," which scores participating communities using a rating system developed and issued by The Insurance Services Office, Inc. (ISO). The suggested credit structure would provide participating States an opportunity to earn between 4 percent and 40 percent credits based on their BCEGS score. Accrual of the credit would be divided into two components to reflect the two scores BCEGS provides a jurisdiction - the Residential Credit of up to 20 percent and the Commercial Credit of up to 20 percent. In addition to being beyond the primary scope of the Public Assistance Program, use of the BCEGS is unwise.

First, although FEMA argues that code adoption and enforcement as evaluated by the BCEGS process serves as a proxy for community resiliency, this statement can be misleading. The simple conversion of the Residential and Commercial BCEGS Scores into a percent credit towards a deductible overlooks the fact that the programs funded by Public Assistance that the deductible is intended to offset are not substantially tied to the structures covered by the codes evaluated by the BCEGS. Whereas Public Assistance funds are

[11] 82 Fed. Reg. 4064 (January 12, 2017).
[12] *See* NAHB comments on the Federal Emergency Management Agency (FEMA) Proposed Rule: *Establishing a Deductible for FEMA's Public Assistance Program* (March 21, 2016). Available at https://www.regulations.gov/document?D=FEMA–2016–0003-0118 and https://www.regulations.gov/document?D=FEMA–2016–0003-0195 .

typically used for debris removal, emergency protective measures, and restoration of public infrastructure, the scope of activities eligible for funding associated with the construction, repair, or renovation of residential structures is extremely limited in relation to the program as a whole. As a result, providing a credit that incentivizes activities that are disconnected from the core of the program at question is inconsistent with the traditional nature of a deductible where the funding or activity being required to access a program or service is linked to that service.

Second, the federal government has no authority to dictate the adoption of a particular building code or version of a building code by any jurisdiction. Indeed, using the BCEGS rating system as the foundation of a credit and applying a residential code to a deductible for a program that is not targeted at residential recovery projects is concerning. Through this filter, the resilience-building activities FEMA is suggesting look less like program incentives and more like a backdoor way to impose federal building code requirements. This is neither appropriate nor acceptable.

Third, the design bias within the BCEGS rating system may have a counter intuitive effect on the underlying goals of the SANPRM because it favors adoption of the most recent code over all other building-code related activities, such as enforcement or the voluntary use of above code building practices. This could severely impact a community's ability to direct building activities, provide incentives, and maximize the potential value of this credit should the community chose to use it.

In addition, the weight of this bias, magnified by its use as the foundation of one of a limited list of credits, will compound the issues related to inappropriately relying on a residential code system to incentivize savings in the Public Assistance program, which applies to publicly owned facilities. While the notice implies this credit is intended to reward States for undertaking resilience-building activities that is not the case. Instead of incentivizing voluntary efforts at the State and local level to implement enhanced efforts in code adoption and enforcement, FEMA has suggested shifting to a deductible, where the weight of the credit structure would push jurisdictions to continuously adopt the most recent version of the International Codes®. That is not an incentive. Further, given the time and resources needed to do so, and the fact that most states are on a 3-6 year cycle for updating their building codes, it is unlikely that even the most progressive states will be able to fully capitalize on this credit.

Finally, while the choice of the BCEGS rating systems as the foundation of the credit for undertaking resilience-building activities could be seen as addressing concerns with how FEMA would account for the complexity and variation of the building code adoption process across the nation, the agency cannot overlook these shortcomings should it choose to move forward with the proposal and implementation of the deductible concept. On the contrary, FEMA must reevaluate the need for the deductible for its Public Assistance Program proposal. Balancing the need for sound federal fiscal management and increased local resilience can be better achieved when the policy goals of the actions being taken by the agency are more closely aligned to the funding streams they are trying to influence.

Should FEMA chose to issue a proposed deductible program, the dueling focus of incentivizing resilient-building activities through this credit and the Public Assistance

Program's goal of providing funds for the repair and replacement of public infrastructure must be addressed. NAHB urges FEMA to withdraw this credit as an option for the deductible. While NAHB does not encourage the incorporation of this credit into any future version of the deductible model, should the agency do so, it would be more appropriate to focus solely on the portion of the credit that covers those buildings whose repair or replacement would be most likely to be financed through funding distributed under Public Assistance program – namely publicly-owned commercial buildings.

ii. Public Assistance Guidelines

The Stafford Act provides FEMA much of its statutory authority for promoting mitigation and offering grants and public disaster assistance (e.g. Pre-Disaster Mitigation and Hazard Mitigation Grant Programs). Of particular interest is Section 323, which requires any repairs or construction funded under the Stafford Act to be "in conformity with applicable codes, specifications, and standards."[13] Subpart M of the Stafford Act's implementing regulations further defines "applicable codes, specifications, and standards" to include any building code that meets the minimum requirements of the National Flood Insurance Program (NFIP) and is substantially equivalent to the National Earthquake Hazard Reduction Program's (NEHRP) *Recommended Seismic Provisions for Buildings and Other Structures* (FEMA P-1050, 2014).[14] FEMA has also issued Recovery Policy FP-104-009-4 that offers further guidance regarding required minimum standards for public assistance.[15]

FEMA has argued that it is necessary for states and local jurisdictions to adopt the 2015 International Building Code (IBC), International Residential Code (IRC) and International Existing Building Code (IEBC) in their entirety and un-amended in order to remain eligible for Public Assistance (PA) funding. This contravenes its own policy, which acknowledges these codes apply to the design of buildings even "in instances where communities have not adopted building standards." In other words, it should not matter what building code is adopted and enforced in a community as long as the project itself is designed to the 2015 IBC, IRC and/or IEBC.

While FEMA can certainly advocate for the adoption of hazard-resistant building codes and standards if doing so has been properly vetted with the public, it lacks the regulatory and statutory authority to advocate for the adoption of, or against the amendment of, non-hazard-related provisions, such as energy efficiency, accessibility, mechanical or plumbing provisions. Forcing states and jurisdictions to commit to wholesale adoption of the model building codes that address these non-hazard related issues will increase the cost of construction, as builders will have to comply with sprinkler, energy efficiency, and other mandates that have nothing to do with disaster resistance.

To clarify these discrepancies and ensure local control, FEMA should amend FP-104-009-4 to specifically state that it does not require states and local jurisdictions to adopt the latest editions of the IBC, IRC and IEBC in order to receive PA funding. FEMA should also retract any letters in which they have implied or stated that jurisdictions that did not adopt the latest building codes would be ineligible for PA funding. Further, FEMA should amend FP-104-009-4 to clarify that

[13] 42 U.S.C. 5165a.
[14] 44 CFR 206.400(b).
[15] FEMA, *Public Assistance Required Minimum Standards, FEMA Recovery Policy FP-104-009-4*, September 30, 2016.

earthquake-resistant provisions of locally-adopted codes need only be "substantially equivalent" to the NEHRP provisions, matching the Subpart M language on minimum standards. These suggested changes will ensure that state and local governments maintain authority over and control of their building codes while ensuring proper use of PA funds.

b. Regulations Implementing the National Flood Insurance Program

In 1968, Congress created the National Flood Insurance Program (NFIP) to provide a means for property owners to protect themselves from flood events. The NFIP directs the use and development of flood-prone areas and manages the risk of flooding offers flood insurance to homeowners, renters and business owners if their community participates in the NFIP. Since its creation, FEMA has implemented the NFIP through three basic categories of activities.

First, FEMA designates Special Flood Hazard Areas (SFHAs), which have traditionally been defined as the 100-year floodplain, or the area with a 1 percent chance of flooding annually. FEMA publishes and periodically updates and amends SFHAs through Flood Insurance Rate Maps (FIRMs) based on factual data, including the calculation of the Base Flood Elevation (BFE). Second, FEMA enrolls communities in the NFIP when they satisfy the minimum eligibility requirements. In short, communities must agree to adopt and enforce floodplain management ordinances, including minimum construction requirements that are designed to ensure occupant safety and reduce future flood damage. For example, the NFIP requires all newly-constructed homes within the Special Flood Hazard Area to be elevated so that the lowest floor is at or above the base flood elevation. For existing structures, the program requires homes to be elevated if the owner proposes to conduct renovation activities that exceed 50% of the home's value. Also, through the Community Rating System (CRS), FEMA encourages communities to undertake floodplain management measures that go beyond the minimum land use criteria for NFIP eligibility.

Third, Congress mandates that FEMA make flood insurance available for development in NFIP eligible communities. This includes requiring that all structures that are located within a Special Flood Hazard Area (SFHA) or high-risk area and have a federally backed mortgage to have flood insurance.[16] Flood insurance is optional for all other structures. There are approximately 5 million policies nationwide in over 22,000 participating communities.

i. <u>Community Involvement</u>

The NFIP was specifically designed to be a shared program among federal, state and local governments. While FEMA plays an oversight role, much of the on-the-ground responsibility is passed to the participating communities. To be eligible to participate in the NFIP, a community must demonstrate that it regulates land use in the SFHA by: 1) requiring permits for development; 2) prohibiting development in floodways that would obstruct the discharge of floodwaters and thereby raise the BFE; 3) prohibiting residential development below the BFE; and 4) requiring floodproofing construction methods for nonresidential development below the BFE. Communities can also chose to participate in the Community Rating System, which rewards them for doing more than the minimum by providing discounted insurance premiums in exchange for the work the community does to reduce its flooding risks.

[16] *See* 42 U.S.C. § 4012a.

- ***Community requirements for demonstrating compliance inappropriate***

In May 2017, FEMA issued a draft policy "Guidance for Participating Communities on Satisfying National Flood Insurance Program (NFIP) Floodplain Development Requirements" ("Draft Policy").[17] Through the Draft Policy, FEMA has proposed new guidelines for participating NFIP communities that are intended to ensure those communities are in compliance with the longstanding requirement that they permit "all development proposals in the SFHA," including temporary development. Critical to the conversation is the definition in NFIP regulations that "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." [18] *(Emphasis added).*

The Draft Policy explains that "[i]n some low-to-no impact situations, the permit requirement can be satisfied if the community follows a Review, Assess, and Document (RAD) process." Under the RAD process, NFIP participating communities would be responsible for reviewing all proposed development in the SFHA, assessing whether any floodplain management requirements apply, and for development projects that do not trigger any other permit requirements (e.g., building or grading permit), documenting the assessment and result. The Draft Policy illustrates how the RAD process could augment a community's traditional review of proposed development projects that need building or grading permits to ensure local communities have a means to review "all" proposed development.

Additionally, while the Draft Policy acknowledges that local communities may decide "to exempt obviously insignificant activities," it's expressly discourages local communities from listing any exemptions in their adopted floodplain regulations. As with much in the Draft Policy, this runs contrary to prior FEMA guidance and directives regarding this issue. However, while a change in Administration can result in a change in interpretation, FEMA has not indicated that is what is occurring in this instance. The Draft Policy implies that local jurisdictions should already be requiring permits for any development projects. Further, the proposed policy specifically states that it "does not supersede any existing policy." Elsewhere, FEMA has stated that exemptions of small projects in ordinances is the preferred approach as it avoids challenges regarding a building official being arbitrary in determining which project needs a permit.[19] This established strategy is consistent with the need for floodplain management regulations to be applied uniformly across the entirety of the participating jurisdiction. How else is a local community supposed to ensure that they are applying any exemptions fairly and without bias if they are not listed in their regulations?

While fashioned as an opportunity to reduce the administrative burden, the Draft Policy is likely to have the exact opposite effect on both NFIP participating communities and property owners. In authorizing the RAD process, the Draft Policy creates an entirely new work flow for most NFIP participating communities. It will trigger the development and implementation of the RAD process for minor development activities in the SFHA that do not trigger any other local permit, necessitate significant additional outreach to floodplain

[17] https://www.fema.gov/media-library/assets/documents/131010.
[18] 44 CFR §59.1.
[19] See FEMA's Management Requirements, *A Study Guide and Desk Reference for Local Officials*, FEMA 480, p. 5-18 & 5-19.

property owners/developers to inform them of the new requirement, and require ongoing administrative and recordkeeping efforts to review and document these minor activities.

Furthermore, the increased documentation of minor development activities that might previously have been exempted may have unintended implications for local communities, homeowners, builders and developers. The review process could be commandeered as a means to further track related requirements beyond those covered by this initial memo. NAHB is concerned that FEMA appears to be creating a process where all "development" could be subjected to provisions, such as an Endangered Species Act compliance review or contributing to calculations of the trigger for the 50% Rule (both issues are further discussed elsewhere in this comment letter). NAHB cautions FEMA against creating an administrative backdoor that will serve only to increase the burden on local communities and homeowners. It will only serve to further impede an already complicated process.

- ***Community Rating System Program should be subject to public review***

The Community Rating System (CRS) is designed to provide incentives for communities to engage in activities beyond the minimum NFIP requirements and aid their citizens in preventing or reducing flood losses. However, while the underlying goal of the program is laudable, the implementation of CRS at both the national and local levels has morphed into a system that is less voluntary and more compulsory because it relies on skewed ratings that can have detrimental impacts on the housing industry, yet the public was not given an opportunity to review or comment on the program's details prior to their adoption.

As a non-regulatory program, the guiding manual that is used for oversight of the CRS has never been published in the Federal Register for notice and comment. However, the most recent update of the *CRS Coordinator's Manual* was released earlier this year and will be in effect until March 31, 2020.[20] While the manual was reviewed by the Office of Management and Budget with regards to the related burden imposed under the Paperwork Reduction Act, there was no opportunity during the development of this or any iteration of the manual for impacted stakeholders – including the communities it seeks to engage, to respond to the menu of 19 creditable activities. By design, the manual seeks to provide each local jurisdiction with a number of policy portfolio options for accruing the best possible class rating for their community, yet gave the communities and their citizens no voice as to what options are on the menu.

The key to the CRS program is that not all activities are required and not all communities are required to adopt the same mix of activities. However, over time, an additional weight has begun to be given to certain groups of activities, such as the adoption of a freeboard requirement, which disproportionately impacts certain types of community development initiatives. This means that without an ability to comment on the development of the CRS Coordinator's Manual – the guidebook for the entire CRS program, which sets the criteria for CRS classification, explains how the program operates, what is credited, and how credits are calculated – impacted stakeholders are at a serious disadvantage going into policy discussions with participating communities who look to it as a guide in designing their floodplain management programs. In an effort to ensure all stakeholders have an opportunity

[20] FEMA, *National Flood Insurance Program Community Rating System Coordinator's Manual*, FIA-15/2017, OMB No. 1660-0022; Expires March 31, 2020.

to help direct this program in a meaningful way, NAHB strongly urges FEMA to solicit input on the Manual.

- ***CRS Building Code credit is problematic***

The CRS provides credit for building codes in two ways – recognizing communities that have adopted the current editions of the relevant codes and using a community's Building Code Effectiveness Grade Schedule (BCEGS®) classification. Recent updates to the BCEGS® Credit have made the credit a problematic proxy for the purpose of resilience-based incentives. While FEMA has relied on BCEGS as a proxy for community resilience and a prerequisite for communities to qualify for certain CRS class ratings, recent changes to the BCEGS score calculations have impacted the ratings, creating a heavy design bias. As a recent Home Innovation Research Labs review shows, the BCEGS favors adoption of the most recent code over all other building-code related activities, such as enforcement or the voluntary use of above code building practices. [21] According to that report, given the substantial weight placed on code adoption, a jurisdiction that continues to use 2009 codes in 2016 can have its rating drop from Class 1 to Class 9 even if it demonstrates excellent commitment to all other aspects of code enforcement. This could severely impact a community's ability to direct floodplain management activities, provide incentives, and maximize the potential value of related CRS credits.

Further, for both of the building code credits, local jurisdictions would need to continuously focus resources on adopting a new code every 3-6 years, whether those changes are justified, just to maintain their CRS and BCEGS ratings. This is extremely problematic, as codes cover many more aspects of the building, above and beyond those related to resiliency and mitigation. Such an expectation and result is neither realistic nor prudent. Because of these reasons, FEMA is urged to reevaluate how this credit is determined. At a minimum, it should refrain from using the BCEGS score as the basis for the Building Code credit.

ii. <u>Building Standards</u>

A key component of the NFIP is its directive to participating communities to ensure that buildings in the floodplain are constructed with methods and practices that minimize flood damages and meet other construction requirements. For most residential structures, this includes ensuring the lowest floor is elevated so that it is at or about the BFE, resilient practices are followed, and mitigation measures are taken, when appropriate. The NFIP also requires buildings to be elevated and brought into compliance if damaged by any cause and for which the repair costs are 50% or more of the value of the building.

- ***Lowest floor elevation in existing buildings unworkable***

The NFIP regulations require the lowest floor of the lowest enclosed area of a new building be elevated to or above the base flood elevation.[22] This includes basements and crawlspaces, unless such areas are unfinished and used solely for parking of vehicles, building access or storage. This requirement also applies to existing buildings that have been substantially improved (i.e. altered or added to) or substantially damaged. These are typically buildings

[21] Home Innovation Research Labs, *ISO BCEGS Rating System Review*, September 7, 2016.
[22] See 44 CFR 59.1 (Definitions); 44 CFR 60.3 (Flood plain management criteria for flood-prone areas), Sections (c)(2), (c)(3), (c)(7) and (c)(8).

constructed before a community joined the NFIP, or where updated maps have increased the base flood elevation or mapped existing properties into the flood hazard area.

For buildings that cannot be elevated in their entirety (e.g. rowhouses in an urban environment), FEMA's only recommendation is that residential building owners abandon floor levels below the base flood elevation. This is accomplished by filling in basements and/or demolishing the existing lowest floor framing and reconstructing a new floor at a higher elevation. In doing so, a building owner loses habitable area, loses income if rentable space is abandoned, and faces a reduction in building value, in addition to incurring the costs of demolition, construction, and fill. As a result, building owners may find themselves underwater on mortgages or other financing, or find they cannot maintain the building due to loss of income.

In lieu of these overly-stringent requirements, FEMA should revise the NFIP construction requirements to allow dry or wet floodproofing of substantially improved or substantially damaged residential buildings, particularly multifamily buildings. FEMA is also urged to provide guidance to communities on ways to mitigate the financial impact of abandoning habitable space in a building. For example, some jurisdictions have relaxed zoning height restrictions to allow an additional story to be added to replace the lost space. Similarly, FEMA is urged to revise the requirements for its grant programs (e.g. Hazard Mitigation Grant Program or Pre-Disaster Mitigation) to allow compensation of building owners for loss of habitable space. Currently, such funds would only go to elevation projects or complete buyouts.

- ***Premium reductions for non-elevation mitigation appropriate***

In September 2015, FEMA released a publication that describes alternative mitigation measures intended for a variety of housing types that could not feasibly be elevated.[23] In the guidance, FEMA specifically acknowledged that the techniques had applicability in single family homes, 1-4 family midrise multi-family residential buildings and high-rise multi-family residential buildings. This publication was intended to fulfill the requirement of Section 26 of the Homeowner Flood Insurance Affordability Act (HFIAA) passed by Congress in 2014, which directed FEMA to: (1) issue guidelines for property owners that provide alternative methods of mitigation efforts (other than building elevation), to reduce flood risk to residential buildings that cannot be elevated due to their structural characteristics; (2) inform property owners how implementation of these methods may affect NFIP risk premium rates; and (3) take into account, when calculating the risk premium rate, the implementation of any mitigation method identified in the FEMA guidelines. However, almost two years after the date of publication, FEMA's adherence to this mandate is only partially complete.

First, the alternative mitigation options identified in the publication are extremely limited and only marginally more realistic for many properties than the elevation requirement they are designed to avoid. For example, those measures categorized as Interior Modification/Retrofit Measures (Basement Infill, Abandon Lowest Floor, and Elevate Lowest) and Wet Floodproofing using Flood Openings cannot be used for single story structures and would be

[23] FEMA, *Reducing Flood Risk to Residential Buildings That Cannot Be Elevated,* FEMA P-1037 / September 2015.

equally problematic for any single family detached home. Given these realities, it seems odd to provide these "options" as reasonable mitigation alternatives to elevation.

Second, FEMA has yet to complete its work on those measures that could more reasonably be implemented in a broader array of situations, such as Wet Floodproofing (Elevate Building Utilities, Floodproof Building Utilities, and use of Flood Damage-Resistant Materials), Dry Floodproofing (Passive Dry Floodproofing System) and Barrier Measures (Floodwall with Gates and Floodwall without Gates, Levee with Gates and Levee without Gates). While these clearly provide a more reasonable range of options to reduce flood risks, FEMA continues to conduct further analysis to determine the appropriate premium reduction associated with each measure.

NAHB urges FEMA to prioritize the release of these analyses, as they will not only have a direct impact on the affordability of NFIP premiums today, but will help incentivize the necessary mitigation and building activities to minimize risk moving forward. If we are to collectively work to provide resilient affordable housing where it is needed, local jurisdictions must have information about the full range of mitigation activities available and not be forced into a costly and less effective choice because it is the only option they feel they have. At a minimum, FEMA should revise its flood insurance rating to provide premium reductions for all of the mitigation measures documented in *Reducing Flood Risk to Residential Buildings that Cannot be Elevated*, not just the interior modification/retrofit measures. If these activities are shown to reduce risks, there is no reason not to recognize the benefits.

- ***Wet and dry floodproofing should be allowed for multifamily structures***

The NFIP's minimum construction requirements allow nonresidential buildings to use dry and wet floodproofing techniques in lieu of elevation.[24] Dry floodproofing involves building a structure to be watertight below the base flood elevation, typically accomplished with solid masonry or concrete walls and the use of temporary flood shields over doors and windows. Wet floodproofing assumes a portion of the lowest floor will flood and relies on the use of flood damage-resistant materials. These techniques, however, cannot be used in residential buildings (single-family or multifamily). This limitation assumes builders are incapable of constructing water-tight walls, and that homeowners and multifamily building owners and managers will not install flood shields when required. Instead, residential buildings must have their lowest floor elevated so that it is at or above the base flood elevation.

Expanded application of these techniques to multifamily buildings would help alleviate significant challenges in urban areas where FEMA's only recommendation is that residential building owners abandon floors that are below the base flood elevation. This is accomplished by filling in basements and/or demolishing the existing lowest floor framing and reconstructing a new floor at a higher elevation. In doing so, a building owner loses habitable area, loses income if rentable space is abandoned, and faces a reduction in building value, in addition to incurring the costs of demolition, construction, and fill. As a result, building owners may find themselves underwater on mortgages or other financing, or find they cannot maintain the building due to loss of income.

[24] 44 CFR 60.3.

In an effort to provide additional options and alleviate some of the challenges of floodproofing existing structures, NAHB urges FEMA to initiate a rulemaking to allow wet and dry floodproofing for both residential and non-residential portions of multifamily buildings. As part of this rulemaking, FEMA could explore requiring specific plans for ensuring installation of flood shields be submitted to the building official as a condition of permitting dry floodproofing and/or allowing accessory elements, such as walls or planters surrounding a plaza to incorporate flood shields without being treated as a flood protection structure.

- ***NFIP 50% Rule too stringent***

Local floodplain management requirements that are adopted by a local jurisdiction as part of the minimum requirements for participation in the NFIP include both new and existing structures. For those existing structures located within the 100-year floodplain that are to be renovated, remodeled, maintained or repaired, the NFIP mandates additional measures be taken if the structure falls under the substantial improvement (SI) or substantial damage (SD) definitions.

Commonly referred to as the "50% Rule," these requirements stipulate that if the costs of any "substantial improvement" (or "substantial damage" repair) to a structure, including reconstruction, rehabilitation, addition, or other improvement exceeds 50% of the market value of the building, that structure must be brought up to current floodplain management standards. Furthermore, FEMA regulations allow state/local officials to calculate "cumulative substantial improvement" if they so desire, which allows them to determine, if the combined value of a set of repair or improvement projects meets the 50% over a set period of time, that the structure meets the SI definition and must be brought up to current standards. The implied goal with cumulative substantial improvement is that it allows state and local officials to capture "phased improvements" or the cumulative impact of repetitive low impact damage that may occur often, yet not individually trigger the 50% trigger. Inherent in these calculations is how the value of a structure is determined and what is included in the 50% equation.

While the cost of the land is clearly excluded from the calculation of the market value of the structure, the other components make it a much more complicated and contentious situation. Under existing regulations, the cost of the project means all structural costs, including all materials, labor, built-in appliances, overhead, profit, and repairs made to the damaged/improved areas of the building worked on at the same time. Yet in identifying those elements that are to be included in determining project cost, FEMA specifically distinguishes a building's structural elements from its interior finishes and utility service equipment.

Structural project costs are those related to the essential functions and soundness of the building and specifically include foundations/footings/pilings, monolithic/concrete slabs, bearing walls/tie beams/trusses, floors/ceilings, interior partition walls, and attached decks/porches, among others. Whereas interior finish and utility service equipment costs are generally those associated with dispensable, non-structural, more easily replaceable items that may commonly be associated with maintenance and repair projects, such as built-in bookcases, cabinets, countertops, appliances, HVAC, light fixtures/ceiling fans, wall finishes, windows, doors, security systems, and more; This broad inclusion of building elements that

have no bearing on the structural integrity of a building, coupled with the ability to count multiple projects over an extended period of time, can make the cost of a modest renovation or repair project easily exceed 50% of the home's market value for many homeowners, thereby triggering the need to elevate the home to, or above, the applicable Base Flood Elevation or Design Flood Elevation.

The default elevation requirement of the SI/SD regulation offers no reasonable alternative to the homeowner, if triggered. The requirement to elevate, if triggered, is additional to any other needed work to bring the home to code and is itself an inherently costly, inefficient, and burdensome requirement that homeowners may not become aware of until midway through a project. If the renovation or repair is already underway when it is discovered additional work is needed that subsequently triggers the 50% Rule, the homeowner may be left with little to no choice in the matter.

Furthermore, in much of the nation, the forced requirement for elevation is ill-suited for application to the aged housing stock and the knowledge that the 50% Rule may be triggered has and will continue to impede necessary and desired renovations, repairs, and maintenance. For example, in many regions of the country the existing single family housing stock is 40+ years old. In New Orleans, this older housing is about 1660sf, with 2 – 3 bedrooms and 1 ½ baths. The average value of these homes is $240,000. In the same area, new single family homes are being built to respond to the market. These homes are approx. 2400sf and have 4 or more bedrooms and 2 or more baths. The average value of these homes is approximately $468,000. The differences don't stop there. The older homes were built to the existing building codes of their time and to what the market, at that time, demanded. They have smaller rooms, a separate dining room, separate living room, separate kitchens and full baths in the hallways between bedrooms. Today's homes tend to have more open spaces, larger bedrooms with a master bedroom and a master bath and closet, kitchens that are open to living rooms and dining areas.

Today's owners and buyers want a chance to buy an affordable home and to maintain, update and renovate these older homes. But given the average cost to update these existing single family homes, coupled with the stringent requirements of the 50% Rule, that may not be possible.

Midrange kitchen renovation	$60,000
Bathroom addition	$78,000
Bathroom renovation	$18,000
Total	$156,000

Under the 50% Rule, if you have a $240,000 home and do only $130,000 of renovations, the 50% of the value is exceeded and the home must be brought up to existing building codes and flood elevations. To elevate a slab foundation alone may cost in excess of $100,000. Combining that expense with the original renovation cost, the project quickly becomes unaffordable and difficult to get financed. Existing neighborhoods and subdivisions built in the late 60's through the early 80's become less marketable. This affects homeowners' investments, municipal revenue through lower property taxes, remodeling contractors and suppliers and so on.

In New Orleans and its surrounding parishes, like many areas across the country, many neighborhoods where built in the 60's through the 80's. Several of the local licensed remodelers have run into this issue. A family buys or already owns a house and has plans to update it. After estimating the renovation costs and explaining the ramifications of the 50% Rule and the resultant costs, many deals have fallen through and the work either doesn't get done or is done by the owner or an unlicensed contractor, which oftentimes does not meet code and increases overall risks. By providing more latitude with how the cost of the job is determined for the purposes of the 50% Rule, where regular maintenance, remodeling, and updating can occur without reaching the 50% trigger, more work could get done and existing housing stock could be maintained and improved.

The 50% Rule not only inhibits the adaptive reuse of older homes, it can hinder regular maintenance and other improvements needed to comfortably house aging residents. One of our members has a client who is hoping to install a small addition and several improvement projects, including a new roof, a kitchen and utility room upgrade and the construction of a 600sf detached wood working shop for his retirement. The home is valued at $260,000. The small addition, kitchen and utility room upgrades can be completed without exceeding the 50% threshold, but the $130,000 limit keeps them from completing necessary maintenance projects, including the roof and windows.

It makes little sense to disincentivize the completion of necessary and regular maintenance, particularly when certain building components have a known shelf life and a predictable schedule as to when they should be replaced. For those reasons, building components, such as roofs, water heaters, and HVAC systems should not be included in the 50% calculation. Equally problematic, how do you tell a client entering his retirement years, that he cannot build the wood working shop he has be dreaming of for the last 10 years or that the ramp that is now needed so that he can access his home from his wheelchair cannot be built? As a result of the stringent interpretation and requirements of the 50% Rule, thousands of homes have been relegated to disrepair and/or tear-down status. Given the tie back to the value of the structure, it is also low-moderate income earners, retirees, and the elderly that are forced to bear the biggest brunt of the rule's rigid requirements.

NAHB understands the underlying goal of the regulation and urges FEMA to refocus on the improvements and repairs most directly tied to the resilience of structures and those that contribute to reducing their susceptibility to future damage. NAHB urges FEMA to remove the interior finish and utility service equipment costs from FEMA's list of Substantial Improvement/Damage structural cost factors and limit the determination to a per project basis that would more realistically reflect the costs to improve a structure, without undermining the integrity of the underlying purposes of the 50% Rule. A more realistically accounting for the costs associated with substantial improvement, can encourage and facilitate necessary repair, maintenance and renovation activities and ensuring thousands of homes remain appealing to and viable for the next generation of home buyers, thereby contributing to healthy home sales and commerce.

FEMA, local jurisdictions, and all impacted stakeholders would be well served by the convening of a stakeholder conversation aimed at addressing the concerns around the hurdles to maintaining housing affordability, marketability, mitigation and sustainability given the stringency of substantial damage/substantial improvement program requirements. NAHB

urges FEMA to expeditiously bring home builders, remodelers, local floodplain managers and others tasked with administering FEMA's 50% Rule to the table for a conversation about the value of excluding interior finish and utility service equipment costs in calculations supporting implementation of the 50% Rule. Furthermore, FEMA should discourage local jurisdictions from counting multiple projects towards triggering the 50% threshold over time.

An update to the SD/SI Desk Reference should also be initiated to reflect the latest and best understanding across the industry of the impacts of the program on the housing industry, housing affordability and homeowners. NAHB urges FEMA to ensure that in implementing the 50% Rule, local jurisdictions limit the calculation of project cost to only those structural elements necessary to the structural integrity of the building.

iii. Flood Insurance Rate Maps

Accurate and scientifically sound Flood Insurance Rate Maps (FIRMS) are essential components of the NFIP, as they are the backbone for depicting the location of the 100 year floodplain or Special Flood Hazard Area (SFHA) - the geographic basis for determining coverage by the NFIP in participating communities. Despite technical advances in the field and numerous efforts by Congress and the Administration to advance public policy in the area through the establishment of the Technical Mapping Advisory Committee (TMAC), creation of the Map Modernization Program, or its successor FEMA's Risk MAP Program, continuing technical and funding challenges have stymied attempts to modernize national mapping efforts. According to a 2013 report from the Association of State Floodplain Managers (ASFPM), digital maps have replaced paper for only 92% of the population and 62% of the land area. As the maps and the mapping process continue to evolve, there remain ongoing concerns about how the maps are made, what information is used and depicted, and how corrections are made.

- ***Follow Technical Mapping Advisory Committee advice on future conditions***

The Technical Mapping Advisory Council (TMAC) is a Federal advisory committee that was established by Congress to review and make recommendations to FEMA on matters related to the national flood mapping program. Included in its mandate authorized by the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12), TMAC was tasked with developing recommendations for incorporating future conditions, climate science, and future development into the mapping program. TMAC issued its recommendations in a 2015 report, which suggested that "all future conditions flood risk information be non-regulatory."[25] The TMAC cited several reasons as to why such data should not be incorporated into a regulatory product or used for rating risks within the NFIP, most notably because of immature and imprecise scientific data and an incomplete economic impact analysis.

NAHB urges FEMA to clearly parse out the nuance of these recommendations and not mistake the difference between outlining the best available methodologies for considering the impacts of future conditions and a dictate for how that information is used. Furthermore, understanding the potential implications of future conditions, the range of uncertainty involved and how the data may be considered over the long term is a wholly different

[25] TMAC Future Conditions Risk Assessment and Modeling. December 2015. p 7. Accessed at https://www.fema.gov/media-library-data/1454954261186-c348aa9b1768298c9eb66f84366f836e/TMAC_2015_Future_Conditions_Risk_Assessment_and_Modeling_Report.pdf

construct than applying a risk rating across the 12-month duration of an NFIP issued insurance policy or even the 30-year duration of an average mortgage.

- ***Clarify use of preliminary maps, advisory maps and "all available data"***

In general, communities operate under the community-adopted FIRM, a preliminary map, or an advisory map. The map adoption process is designed to be an iterative process that allows for the development and review of data by multiple stakeholders as well as the outreach to impacted community members throughout the process. Ultimately, the end product of the "normal" process is the community-adopted FIRM but there are instances, which may last for extended periods of time (e.g., months or years), where local jurisdictions may operate under preliminary or advisory maps.

Preliminary Maps are the initial maps produced as a part of FIRM creation or updating efforts. They are subject to comment and appeal and are governed by the regulations found at 44 CFR §67. Advisory maps are intended to provide a quick indication to an affected community of any changes to the BFE or SFHA that may have occurred since the adoption of a final FIRM as a result of a flood event. FEMA cannot require affected communities to abide by the information contained in the Advisory Maps, but strongly urges those communities to use them to guide immediate reconstruction efforts.

Reliance on preliminary or advisory maps can be confusing and problematic for both communities and landowners. Requiring use of these interim maps not only puts local jurisdictions in the position of relying on a non-regulatory product, but it also undermines their ability to completely vet the information they are supposed to be afforded time to review. At a minimum, FEMA must allow sufficient time between the publishing of the new maps and their adoption by local jurisdictions so that the new elevations, their justifications, and all data regarding how private and public flood control structures have been addressed may be fully studied by and vetted through independent experts.

Efforts by FEMA and local jurisdictions to assert that preliminary map regulations are superseded by other sections of the code through an overly broad interpretation of the "required use" of "all available data" is wrong.[26] It short circuits the map review process that is supposed to give state and local jurisdictions sufficient time to review all data and adversely affect local jurisdictions during the interim between the maps' publication and effective dates despite the nature of the process. Furthermore, the requirements of to "utilize any base flood elevation and floodway data available from a Federal, State, or other source... [44 CFR 60.3(b)(4)]" should only come into play for communities where no Base Flood Elevations (BFEs) or an identified floodway have been developed.

FEMA must ensure the practice of notifying owners whose properties have been remapped or newly-mapped is continued during the map adoption process and that the map appeals process is not short changed. The entirety of the map appeals processes, both during and subsequent to a community adopting a final FIRM, should be made more transparent, timely, and predictable to ensure owners and local jurisdictions ample opportunity to engage with the agency during the review.

[26] http://www.ncfloodmaps.com/pubdocs/available_data_jun07.pdf

- ***Map Accuracy Vital***

In any discussion of maps and the mapping process, it is equally important to discuss the accuracy of the FIRMs. For flood maps to be fair and accurate, they have to take into account all flood control efforts, like levees and dams. In many cases, FEMA has neglected to factor in privately funded flood control structures, or any flood control structures that were not built by the U.S. Army Corps of Engineers. Similarly, there have been reported cases of FEMA drawing in rivers or streams where none exist or mistakenly using data from one community for another. As a result of these mistakes, many properties are being mapped into higher rate-zones, which results in homeowners being forced to purchase unneeded flood insurance or pay higher than necessary premiums because their homes have been inaccurately mapped as being below the BFE. It typically takes years for these mistakes to be fixed, often requiring a lengthy and costly appeals process for the community and homeowner, as well as forcing the payment of escalated premiums until the problem is resolved.

During the map modernization effort, FEMA was able to digitize, update, and modernize many of the nation's aging flood maps. While FEMA was successful in digitizing most of the FIRMs, not all were based on updated hydrologic data. As a result, a National Academy of Sciences report faulted some of the maps because of a lack of reliable topographical data. Because of these data deficiencies, there are large discrepancies between what was mapped in the 100-year floodplain decades ago, what areas may be reflected as falling within the 100-year floodplain on the newer maps and what the actual 100-year floodplain is today.

While FEMA continues efforts to correct for these deficiencies through the RISKMAP program the challenge is daunting. According to a 2013 ASFPM report, initial cost(s) to provide flood mapping for the nation ranging from $4.5 billion to $7.5 billion.[27] Further maintaining accurate and up-to-date flood maps would require steady-state costs from $116 million to $275 million annually according to the report.

However, inaction will cost the nation as well. Inaccurate flood maps can have significant direct and indirect implications for builders and developers, with impacts sometimes felt mid-project as building requirements change for land already purchased for development. Additionally, changes to insurance premiums can affect purchase and sales decisions made by consumers. As a result, builders and developers are often forced to resort to the map appeals process to redress concerns regarding the impact of the program on their projects. While some of the LOMC requests refer to actual physical changes to the map others result from inaccurate mapping of a structure or more complex errors made by during the map development. The process is cumbersome, costly, and time consuming and even in the instance where the error is the fault of the federal agency or contractor, the burden of proof remains with the community/owner/developer to provide correct for errors. FEMA is urged to identify additional steps it will take to increase quality control and provide assurances to the public that the maps are valid.

[27] Association of State Floodplain Managers, *Flood Mapping for the Nation: A Cost Analysis for the Nation's Flood Map Inventory*, March 1, 2013.

- ***Improvements to the Letter of Map Change (LOMC) process needed***

Landowners and local governments can file letters requesting map changes (LOMC) on a case-by-case basis as they relate to particular projects. However, this process can be both costly and time consuming. There are six different types of FEMA-recognized LOMCs that can be further divided into two broad categories.

The first category is conditional letters of map amendment or revision (i.e., CLOMA, CLOMR, and CLOMR-F). These are statements from FEMA on whether or not a project, as designed, would either be located outside a SFHA or result in modifying a floodplain as depicted on an existing FIRM. The important distinction here is that conditional letters represent FEMA's opinion on projects not yet constructed. Once these structures or actions have been completed, FEMA must take a separate administrative action to revise the map.

The second category is letters of map amendment or revision (i.e., LOMA, LOMR, and LOMR-F). They represent FEMA's acknowledgment of a structure that is already built, but that requires revisions to an existing FIRM. These LOMCs are corrections to an existing FIRM, and become part of the public record for that map. Subsequently, whenever FEMA decides to update or replace the existing FIRM, these LOMCs are to be incorporated into the new FIRM for the particular area.

The time and resources devoted to a LOMC process, in one example over 8 months and a quarter of a million dollars for a Midwest builder engaging in in a CLOMR-F process on a subdivision project, can have overwhelming impacts on the project. In some states with short construction seasons, going through the lengthy LOMC process could create devastating costs and delays.

While NAHB commends FEMA for developing online tools for application submissions, the circuitous and dense design of the FEMA website make it challenging for the average applicant to find them. Furthermore, the burden of proof still remains on the community, homeowner, or builder to prove the presence of an error, even if that error was made by FEMA or one of its contractors. The fiscal burden associated with having to correct someone else's error should not be left to landowners, small businesses, or local communities to bear. As FEMA continues its efforts to streamline regulatory processes and improve the customer experience, NAHB urges it to evaluate the LOMC process to make it the inclusion of the LOMC process to make it more timely, predictable and streamlined.

- ***Benefits and use of Elevation Certificates must be clarified***

An ongoing point of confusion within the NFIP program continues to be the FEMA developed Elevation Certificate (FEMA 81-31). While a community must include an official record in its permit files that new buildings and substantial improvements in all identified Special Flood Hazard Areas (SFHAs) are properly elevated, it does not mandate how that is to be done. The elevation certificate can provide the necessary documentation that the community has met its regulatory requirement to obtain the elevation of the lowest floor for new or substantially improved structures in both A and V zones.[28] However, only communities participating in the Community Rating System use the Elevation Certificate. While elevation information is needed to show compliance with a community's floodplain

[28] 44 CFR §60.3(b)(5)(i) and 44 CFR §60.3(e)(2).

management ordinance, it can also be useful on a structure specific basis for insurance rating purposes or for supporting an application for a Letter of Map Amendment (LOMA) or a Letter of Map Revision Based on Fill (LOMR-F).

Despite recent updates to streamline the Elevation Certificate and the application process, the accompanying FAQ bulletin has not been updated since 2004.[29] Furthermore, continuous advances in mapping technology keep moving the ball forward with regard to the information that is often paired together with the Elevation Certificate. NAHB urges FEMA to evaluate the opportunity to bring these parallel tracks in alignment with each other, as one cannot look at the future of mapping or the LOMC process without fully understanding how all of the pieces work together.

c. Interplay between NFIP and the Endangered Species Act (ESA)

Over the last decade, FEMA has been locked in a protracted legal battle regarding its relationship to, and compliance with, the Endangered Species Act (ESA). Most recently, the National Marine Fisheries Service (NMFS) determined that the NFIP, as it exists today, potentially violates the ESA's prohibition against any discretionary federal action that may result in "jeopardizing the continued existence of" an endangered or threatened species or result in the "destruction or adverse modification" of designated critical habitat.[30,31]

NMFS's rationale as to why the NFIP violates the ESA is that the very existence of the program encourages future land development and construction activities in and around floodplains – areas that may serve as important critical habitat for certain federally-protected species (i.e., various subspecies of salmon). Because of these important ecological functions, it claims the federal government should prohibit or at least restrict future land development or construction activities from occurring within floodplains. Such an interpretation is extremely problematic.

The most recent example stems from a 2010 lawsuit in Oregon, where FEMA agreed to settle the case by among other things, consulting with NMFS over its implementation of the NFIP. The outcome of that consultation was a BiOp, finalized on April 14, 2016 (hereinafter the NMFS' BiOp), that concluded that FEMA's implementation of the NFIP in Oregon "is likely to jeopardize the continued existence of 16 ESA listed anadromous fish species and Southern Resident killer whales, and it will result in the destruction or adverse modification of designated or proposed critical habitat for the 16 anadromous fish species."[32] Under the ESA, a "jeopardy" or "adverse modification" determination results in a strict federal prohibition against the proposed federal action – in this instance, the administration of the NFIP. However, NMFS can exempt a proposed activity from a "jeopardy" or "adverse modification" determination if the activity has successfully undergone the ESA's Section 7 consultation process, including the adoption of any "reasonable and prudent alternatives" (RPAs) that modify and/or restrict the originally proposed federal activity for the benefit of the endangered species or designated

[29] FEMA 467-1, found at https://www.fema.gov/media-library-data/20130726-1511-20490-9287/fema467-6-10-04.pdf accessed July 26, 2017.
[30] 16 U.S.C. 1536(a)(2).
[31] 50 C.F.R. 402.02.
[32] Letter from William Stelle, Jr., Regional Administrator, NMFS West Coast Region to Mark Eberlein, U.S. Department of Homeland Security, FEMA Region X (April 14, 2016), http://www.westcoast.fisheries.noaa.gov/publications/habitat/2016_04-14_fema_nfip_nwr-2011-3197.pdf.

critical habitat.[33] The BiOp issued by NMFS to FEMA contains several RPAs that, if adopted by FEMA, would fundamentally change the NFIP program nationwide.

As a result of NMFS' BiOp, FEMA and the NFIP participating communities in Oregon face two unmanageable options: (1) immediate suspension of "*all NFIP related activities*," including halting the issuance of any new building permits for projects occurring within SFHA; or (2) agreeing to fully implement NMFS's proscribed modifications to the NFIP program (which would require FEMA to undertake a series of federal rulemakings). Specifically, implementation of NMFS's BiOp would require FEMA to revise the minimum eligibility criteria for communities to enroll in the NFIP, FEMA's floodplain mapping program, and FEMA's requirements for landowners and local governments that submit Conditional Letters of Map Change (LOMC) and Conditional Letters of Map Revision (CLOMR) to FEMA. FEMA has until January 1, 2021 to complete all necessary rulemakings under the NFIP.[34]

State and local governments in Oregon will also need to establish new permitting and mitigation requirements to restrict future land development and construction activities not only within the floodplain, but also in and around areas described and mapped by FEMA as "*riparian buffer zones*."[35] The BiOp will require changes to FEMA's floodplain mapping program and the manner in which communities demonstrate full compliance with the ESA.

The central question raised by the requirements contained within NMFS's BiOp is whether FEMA has the authority under the NFIP to dictate local land use in those communities that participate in the NFIP by prohibiting certain activities in and around floodplains due to their potential impacts on endangered species. Such an approach, if adopted, would contradict the objectives of the NFIP, which is to ensure future land development and construction activities within floodplain areas are fully insured, constructed above the most current base-flood-elevation (BFE), and meet stringent locally enforced building codes and standards. However admirable it may be to conserve floodplains to protect endangered species, it is not the role of the NFIP.

Yet, FEMA has already publicly stated that it intends to fully comply with all the requirements within the NMFS's final BiOp and has taken several steps to implement its obligations. Failure by FEMA to comply with all mandatory requirements identified by the NMFS in the BiOp could result in FEMA being sued for violating the ESA.

i. <u>Methodology for documenting ESA compliance unworkable</u>

To date, FEMA has issued several regulatory guidance documents impacting landowners and NFIP communities submitting Letters of Map Change (LOMC) to FEMA. FEMA has also prepared a programmatic environmental impact statement (NPEIS) under NEPA for the NFIP to demonstrate compliance with the ESA as well as implement other legislative requirements directed by the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12) and the Homeowner Flood Insurance Affordability Act of 2014 (HFIAA).[36, 37]

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[33] 50 C.F.R. 402.14.
[34] *Id*. page 286.
[35] *Id*. page 279.
[36] FEMA's Guidance for Flood Risk Analysis and Mapping: Documentation of Endangered Species Act Compliance for Conditional Letters of Map Change. May 2016.
[37] 82 Fed. Reg. 17,023 (April 7, 2017).

- *Guidance for demonstrating ESA compliance before requesting LOMC impractical*

In May 2016, FEMA issued a document entitled "Documentation of Endangered Species Act Compliance for Conditional Letters of Map Change" to provide guidance to applicants seeking Letters of Map Change (LOMC) and Conditional Letters of Map Change (CLOMC). The guidance outlines the various roles and responsibilities, as well as the process FEMA would require entities seeking LOMC or CLOMC to follow to document compliance with the ESA.

Of particular concern is the sequencing and timing issue that would be created by requiring landowners and/or local governments to demonstrate ESA compliance before submitting their LOMC requests to FEMA. This approach creates both practical and financial problems. For landowners where endangered species are present or properties that have been designated critical habitat, FEMA's guidance means these landowners would first need to obtain an "incidental take" authorization from the Service before submitting their LOMC requests to FEMA. Obtaining such an "incidental take" authorization is the only way the land use activity for which the Service has determined, "is likely to adversely affect" an endangered species or designated critical habitat can legally proceed.

There are two ways to obtain such authorization – a section 7 consultation for projects requiring a federal permit or approval, and a section 10 incidental take permit (ITP) for activities by private landowners impacting endangered species and where no federal nexus exists (e.g., federal permit requirement or federal authorization). The result of either will be to add significant time and expense for private landowners or local governments seeking revisions to an existing FIRM by requiring all landowners to first complete the complicated and expensive ESA Section 7 consultation process or Section 10 incidental take permit process. While the Service's Section 7 consultation process can take between two months to four and half months to complete the Section 10 ITP typically takes landowners over two years to complete.

The purpose of this new requirement appears to expand the ESA's current consultation obligation to include exclusively private actions by landowners by requiring them to first provide proof from the Service they are complying with all the provisions of the ESA before submitting any floodplain map revision requests of FEMA. NAHB views this as an inappropriate expansion of FEMA's authority since FEMA does not authorize or approve the construction of structures or the placement of fill in or around floodplains. FEMA also does not determine what mitigation, if any, is required for the construction of building or placement of fill. FEMA's role is to ensure that the information depicted on FIRMs are accurate and scientifically sound. It is not FEMA's role under the LOMR process to determine what level of mitigation should be required to offset presumed impacts to endangered species.

But the reality is that, given the costs and permitting delays associated with both Section 7 and Section 10 consultation, it seems highly unlikely a landowner would commence, let alone successfully complete, the ESA's consultation process to obtain an "incidental take" authorization from the Service before submitting a LOMC request for a structure that is not even certain to ever be built. Most landowners who request a LOMC do so in the hope that FEMA will determine the proposed structures, if built as designed, would be located outside of the currently defined (i.e., mapped) floodway or floodplain. Furthermore, even in the

LOMC scenario where FEMA determines a proposed structure, if built as designed, would be located outside of the floodway or floodplain, FEMA's determination does not mean the proposed structure will actually be built. The application for a LOMC is simply part of a developers' due diligence that is completed during the site assessment and preliminary design phase to determine what the possibilities are. Subjecting these landowners to the full ESA consultation process makes little sense given how the LOMC are typically used. This reality, coupled with the difficulties private landowners face in obtaining both ESA section 7 and 10 permits, renders FEMA's requirement unrealistic. FEMA should not require private landowners with endangered species present to first demonstrate compliance with the ESA before submitting a LOMC request to FEMA.

- *Requiring participating communities to document ESA compliance unreasonable*

Following the release of an extensive 2006 analysis of the NFIP program, FEMA identified a number of possible program modifications. Many of these changes could have potential implications on environmental planning and historic preservation, as well as endangered species and critical habitat. In order to evaluate the impacts to the natural and human environment associated with the NFIP at a nationwide programmatic level, as well as an evaluation of impacts of alternative proposals for modifying the NFIP, FEMA prepared a draft nationwide programmatic environmental impact statement (NPEIS). The Draft NPEIS includes an evaluation of the potential impacts, as well as four alternatives.

FEMA has identified under the NPEIS its preferred alternative (Alternative 2) that would clarify how NFIP participating communities must document compliance with appropriate federal and state laws, including documentation of ESA compliance as a condition of issuing building permits for projects located within floodplains. FEMA's existing regulations implementing the NFIP's "minimum eligibility criteria" already require NFIP participating communities ensure that permit applicants seeking locally issued development permits for activities within the SHFA obtain all necessary federal permits.[38] However, NAHB is concerned that FEMA's preferred alternative to demonstrate ESA compliance has the potential to be misinterpreted by FEMA, and more importantly, by NFIP participating communities to create a higher standard of building permit review for proposed activities within SFHA than those that already exist for federal wetlands, stormwater, historic preservation, etc. Local governments bear neither the statutory nor regulatory obligations equivalent to a federal agency when it comes to impacts to critical habitat, so should not be responsible for the brunt of this requirement. Further, most local governments do not have the staff, resources, or expertise similar to federal agencies to ensure their activities comply with all facets of the ESA.

The ESA clearly differentiates the responsibilities and expectations for various parties involved whether they be federal or local, private or public. Importantly, NFIP participating communities do not bear the same level of responsibility as a federal agency under the ESA's section 7 process; chiefly, local government do not need to ensure their non-federal actions do not impact critical habitat. Likewise, NFIP participating communities bear no responsibility to ensure all landowners, developers, or builders seeking locally issued permits for actions occurring within SHFA provide documented proof that there is no possibility of a "take" of an endangered or threatened species could occur (i.e., prove an endangered species

[38] 44 C.F.R. Part 60.3(a)(2).

does not exist in area impacted). Quite the opposite, all that is required of NFIP participating communities under 44 C.F.R. Part 60.3(a)(2) is to ensure landowners seeking locally issued permits for activities within SFHA notify and provide documentation of obtaining all necessary federal permits, including all necessary ESA authorizations.

Given the complexities of the ESA and the differing standards under the ESA's section 7 provisions for federal agencies as compared to private individuals or local governments, FEMA must clarify its treatment of local governments. FEMA must make clear that local governments are not expected to act in lieu of a federal agency or be held to the same standard with regards to ensuring ESA compliance before issuing locally required land development and building permits for activities occurring within SFHAs.

d. Federal Flood Risk Management Standard

On January 30, 2015, President Obama signed Executive Order (E.O.) 13690, "Establishing a Federal Flood Risk Management Standard [FFRMS] and a Process for Further Soliciting and Considering Stakeholder Input" to improve the resilience of communities and federal assets against the impacts of flooding that are anticipated to increase over time due to climate change.[39] E.O. 13690, issued in response to President Obama's Climate Action Plan,[40] amended President Carter's E.O. 11988 "Floodplain Management"[41] and expanded federal floodplain management requirements beyond the longstanding 100-year floodplain.

E.O. 13690 and the FFRMS require federal agencies, including FEMA, to expand floodplain management from the 100-year floodplain to a "higher vertical elevation and corresponding horizontal floodplain to address current and future flood risk and ensure that projects funded with taxpayer dollars last as long as intended."[42] Pursuant to E.O. 13690 and the FFRMS, federal agencies must now define the floodplain for federally funded projects using any of the following approaches:

1. Climate-Informed Science Approach (CISA): Utilizing the best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding based on climate science;
2. Freeboard Value Approach (FVA): Freeboard (base flood elevation + X, where X is 3 feet for critical actions and 2 feet for other actions);
3. 0.2 percent annual chance Flood Approach (0.2PFA): 0.2 percent annual chance flood (also known as the 500-year flood); or
4. The elevation and flood hazard area that result from using any other method identified in an update to the FFRMS.

In October 2015, FEMA – serving as Chair of the Mitigation Framework Leadership Group (MitFLG) – issued Guidelines to assist the agencies in the implementing E.O. 13690.43 In order

[39] 80 Fed. Reg. at 6,425 (February 4, 2015).
[40] Executive Office of the President. The President's Climate Action Plan. June 2013. Available at: https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf
[41] 42 Fed. Reg. at 26,951 (May 24, 1977).
[42] E.O. 13690 Section 1.
[43] Mitigation Framework Leadership Group. *Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*. October 8, 2015. Available at: https://www.fema.gov/media-library-

to update its agency specific floodplain management regulations, FEMA issued a proposed rule on August 22, 2016, entitled "Updates to Floodplain Management and Protection of Wetlands Regulations to Implement Executive Order 13690 and the Federal Flood Risk Management Standard."[44]

i. <u>The FFRMS is unsupported and will create regulatory uncertainty</u>

NAHB filed comments addressing serious concerns with respect to the MitFLG's guidelines and FEMA's proposal.[45] Principally, NAHB asserted that the Obama Administration's decision to dramatically expand regulated floodplain areas was made without congressional oversight, without new floodplain maps, without supporting technical data and without comprehensive regulatory impact and cost-benefit analyses. If implemented, the lack of actionable science and accessible, consistent implementation protocols associated with E.O. 13690 and the FFRMS will generate regulatory uncertainty for countless federal programs, products, and permits, in turn threatening jobs and increasing project delays and costs without substantiated benefit. Given the significance the term floodplain has for landowners, states, local governments, and the federal government itself, any effort to change the meaning or geographic extent of the floodplain should be conducted by Congress and supported by federal statute, not by administrative fiat under an Executive Order.

ii. <u>The FFRMS should be withdrawn and all implementation efforts stopped</u>

Since E.O. 13690 was signed and for the reasons given above, NAHB has urged that E.O. 13690 and the FFRMS be withdrawn. Even if E.O. 13690 and the FFRMS are not withdrawn, FEMA must cease all efforts to implement the FFRMS. On March 28, 2017, President Trump signed E.O. 13783, "Promoting Energy Independence and Economic Growth."[46] Section 3.b of the order rescinds certain energy and climate-related presidential and regulatory actions including President Obama's Climate Action Plan. In addition, Section 3.d of the order provides:

> (d) The heads of all agencies shall identify existing agency actions [e.g., FEMA's proposal to implement E.O. 13690 and the FFRMS] *related to or arising from* the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section [e.g., President Obama's Climate Action Plan], or the final guidance listed in subsection (c) of this section. *Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions*, as appropriate and consistent with law and with the policies set forth in section 1 of this order.[47]

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data/1444319451483-f7096df2da6db2adfb37a1595a9a5d36/FINAL-Implementing-Guidelines-for-EO11988-13690_08Oct15_508.pdf

[44] 81 Fed. Reg. 57,402 (August 22, 2016) (Docket ID: FEMA–2015–0006; RIN 1660–AA85).

[45] *See* NAHB comments on the *Revised Guidelines for Implementing Executive Order 11988, Floodplain Management* (May 6, 2015). Available at: https://www.regulations.gov/document?D=FEMA-2015-0006-0270. *See also* NAHB comments in response to FEMA's proposed rule *Updates to Floodplain Management and Protection of Wetlands Regulations to Implement Executive Order 13690 and the Federal Flood Risk Management Standard* (October 21, 2016). Available at: https://www.regulations.gov/document?D=FEMA-2015-0006-0456

[46] 82 Fed. Reg. at 16,093 (March 31, 3017).

[47] *Id* (emphasis added).

Importantly, E.O. 13690 used the Climate Action Plan as the basis for establishing the FFRMS,[48] and it is in response to E.O. 13690 that FEMA and the MitFLG have developed the guidelines and FEMA has proposed updated regulations to implement the FFRMS. Given Section 3.b.i of E.O. 13783 revokes the Climate Action Plan, and Section 3.d of the order calls upon federal agencies to suspend, review, or rescind actions arising from the Climate Action Plan, FEMA and the MitFLG must revoke the guidelines to implement E.O. 13690, and FEMA must withdraw its proposed rule and cease all efforts to implement the order and the FFRMS.

VI. CONCLUSION

NAHB appreciate the opportunity to provide FEMA's Regulatory Reform Task Force with specific examples of existing regulations, regulatory policies, and programs for consideration as the Agency formulates its response to E.O., 13777. Please contact my colleague, Ms. Tamra Spielvogle at (202) 266-8327 or tspielvogle@nahb.org if you have any questions regarding any of the regulations, regulatory policies, or programs discussed within this letter. NAHB looks forward to future opportunities to engage with FEMA as it works toward reducing regulatory burdens and improving the overall environment for the nation.

Sincerely,

Susan Asmus, Senior Staff Vice President

[48] Section one of E.O. 13690 states, "As part of a national policy on resilience and risk reduction consistent with my Climate Action Plan, the National Security Council staff coordinated an interagency effort to create a new flood risk reduction standard for federally funded projects." 80 Fed. Reg. at 6,425.