

May 6, 2015

Regulatory Affairs Division  
Office of Chief Counsel  
Federal Emergency Management Agency  
8NE, 500 C Street, SW  
Washington, DC 20472-3100

Dear Madam or Sir:

As a partner in the Downey Brand law firm, I am pleased to represent several dozen clients active in the flood risk reduction area. While many of my clients are submitting letters of their own, I wanted to provide a letter with my own thoughts. These are provided solely by me and not on behalf of any of my clients.

As a preliminary matter, I am very supportive of the stated goal which appears to underlie the Draft Guidelines and Executive Order 13690 (“EO 13690”): to more fully consider climate change in predicting flood risk and to ensure that this is considered in the context of Federal investments in infrastructure. Indeed, to know that climate change will almost certainly affect flood risk, and to not consider this in the context of federal investments, would be foolhardy and could shorten the useful life of Federal infrastructure. But the question is not whether climate change should be considered. Rather, the questions are (1) how it should be considered, (2) whether the Draft Guidelines provide a clear, consistent, and predictable framework for managing the process within the Federal family, and (3) whether other areas have been accidentally swept into the consideration of the Draft Guidelines. It is my belief that the Draft Guidelines as currently formulated do a disservice to the Federal Government by not providing a clear, consistent, and predictable framework and by accidentally sweeping other areas into coverage of the Draft Guidelines. I therefore recommend that changes be made to the Draft Guidelines and that they then be released for a further comment period.

This letter is organized into two sections, consisting of general comments that are thematic in nature, and then specific comments on specific sections of the Draft Guidelines.

### **General Comments**

I have concerns about the process that was used to issue EO 13690 and is being used to develop guidance for EO 13690. First, the use of the Water Resources Council, an apparently defunct non-funded entity to lead this effort, creates the impression of a star-chamber approach to

government, where it is not even clear who is leading the effort. I would encourage the leadership of this effort to shift from the Council to FEMA, a well-known and respected agency with wise leadership. Second, the relatively brief comment period for such a significant change in Federal policy, especially when it is apparent to us that many Federal agencies and non-Federal stakeholders have yet to grasp the significance of the policy, handicaps the ultimate goal: to get an effective dialogue going with stakeholders to make the Draft Guidelines as good as they can be. I do not believe that many of the industries that will be affected by this change in policy are even aware of the new executive order. Finally, it is remarkably inefficient to require each Federal agency to develop an implementation plan within 30 days of the close of the comment period because the comments received may result in changes to the Draft Guidelines which would help the agencies better prepare implementation plans.

I also have significant concerns about the scope of actions that the Draft Guidelines seek to affect. On the one hand EO 13690 states that the FFRMS “will ensure that agencies expand management from the current base flood level 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.” This language refers to modifying “agency” behavior and ensuring maximum use of “taxpayer dollars,” implying that it only affects Federal investment decisions. On the other hand, the Draft Guidelines provide: “The Guidelines do not intend to prohibit floodplain development in all cases, but rather to create a consistent government policy against such development under most circumstances.” (P7;L231-233)<sup>1</sup> This sentence suggests that the Draft Guidelines and the underlying policy apply to all development. It also uses language that is simply overbroad by covering all development in areas in which development may still be sensible. By way of example, if a community currently has accredited levees and may allow development, but the Draft Guidelines would require the consideration of climate change thus resulting in the community being in the EO 13690 Floodplain, is it the intention of the Draft Guidelines to inhibit private, residential development? Or for an existing urban community of hundreds of thousands of people, where levee accreditation has been lost but work is underway to improve the levees, is it the intention of the Draft Guidelines to put all investments and permits on hold during the period of levee reaccreditation?

It is also not clear how, if at all, EO 11988 is to continue to be implemented for actions not covered under EO 13690. As noted above, the plain language of the policy section of EO 13690 suggests that EO 13690 only applies to Federal investment actions (and I think that is the best interpretation and hope the final guidelines clarify this). But we all know that EO 11988 has historically been applied by the Federal government to actions other than Federal investments, such as permitting. Since EO 13690 seems to completely amend and absorb EO 11988, is there an Executive Order that still applies to permitting? Does this mean that EO 13690 does apply to permitting, and if so, would it preclude specific private actions?

---

<sup>1</sup> Throughout this letter, P refers to the page number of the Draft Guidelines and L refers to the line number.

For these reasons, I believe that the Draft Guidelines should include a scope section, based upon the policy statement in EO 13690, that very clearly states that it is limited to agency action in expending Federal investment dollars. The following is an example of such a statement of scope:

Scope: Executive Order 11988 clearly applies to a broad array of Federal actions, and has been interpreted in this way over the nearly 40 years that EO 11988 has been implemented. This interpretation includes Federal investment decisions and regulatory actions, among others. While EO 13690 amends EO 11988, it also includes a statement of policy that explains the purpose of the new executive order. That statement of policy explains the purpose of the new standard and ends with the following statement: “Incorporating this Standard will ensure that agencies expand management from the current base flood level 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.” Consistent with this statement, the framework of these Guidelines is to be applied by all Federal agencies to Federal investment decisions only, and not to regulatory actions or financial loan guarantees.

Another significant challenge with the Draft Guidelines relates to the correct application of the guidelines to leveed basins? These basins often have high levees but often currently provide adequate levels of flood protection. In these cases it is not clear how to incorporate climate change considerations, as there is a BFE in the river channel 10-20 feet above the ground, but no BFE in the protected zone. I believe that the final Guidelines should have a specific section that applies to leveed basins. I suggest that this section state explicitly that for leveed basins that are not in a Special Flood Hazard Area under the National Flood Insurance Program, but which do not meet the FFRMS, that the relevant agency shall use its judgment in determining what additional actions shall be taken, but that in no case shall the agency require more than three feet of elevation above the land surface of the basin for the structure to be constructed by the agency.

### **Specific Comments**

- 1) P2;L60-64: As noted above, the definition of “Action” is too broad. While it is important to ensure that the Draft Guidelines apply to the appropriately broad range of activities to which it should apply, this definition will bring in actions that do not align with the goal of EO 13690:
  - a. The definition starts with “any Federal activities including . . . .” The word “any” truly means any. Thus, the use of “any” coupled with “including” means that the list is only representative but not exclusive.
  - b. The phrase “acquiring, managing, and disposing of Federal lands and facilities” includes the concept of disposing. If the goal of EO 13690 is to ensure that the Federal government makes wise decision in Federal investments, what is the reason to include the disposal of land?

- c. The phrase “providing Federally undertaken, financed, or assisted construction and improvements” appears to be the correct scope of actions that should be covered by EO 13690.
- d. The phrase “conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities” gives us significant concerns as the Federal government has extensive activities as a regulator, including under the environmental protection statutes. While this issue is covered in more detail elsewhere in this comment letter, by way of example is it the Federal government’s intention to apply the rules of EO 13690 to a residential housing project that requires a Clean Water Act 404 permit for a small bridge crossing a stream? I believe it should not as its inclusion of that action is not consistent with the brief information provided with the issuance of EO 13690.

As noted above, I recommend that general language be inserted that makes clear the scope of EO 13690. I also recommend that the definition of action be amended to clearly exclude regulatory actions and Federal financial guarantees.

- 2) P10; L306 & 320: There are extensive references to all Federal actions being covered. It is worth noting that this is a much more expansive standard than even the National Environmental Policy Act, which merely covers all “major Federal actions with a significant effect on the human environment.” I recommend that the Draft Guidelines place some reasonable curbs on the actions to which it will apply. Here are some actions that are not connected to Federal investments but that could be construed to be included in EO 13690’s orbit absent clear and specific guidance that they are not to be included:
  - a. The issuance of a 404 permit for a residential development in an area that is not within the 100-year floodplain but could be construed as within the EO 13690 floodplain.
  - b. The sale of an old post office to a private citizen if the post office is in a special flood hazard area.
  - c. A Federal security grant for to a non-profit that is located in an A99 zone.
  - d. The payment of crop insurance proceeds to a farmer with crops adjacent to the river.
  - e. The payment to a Federal contractor developing new maps under the National Flood Insurance Program.
  - f. Transmittal of the President’s budget to Congress which includes recommended appropriations for construction of levees and ecosystem recreation features, all of which are in the base floodplain; or approval of a budget by Congress including the same items; or expenditures by Federal agencies for the same items.

I therefore recommend that these various references be revised to make clear that all Federal actions are not covered.

- 3) P11; L348-358: This section creates the ability for an agency to decide to take an action even if the action would be located in a floodplain. This is essential because, as noted in

the Draft Guidelines, the action may be the only practicable action. But even in such a case a notice must be circulated. It would be impractical to issue such a notice each time a crop insurance payment must be made. Or every time a security grant is to be issued. Or every time a 404 permit is issued. This is why it is essential that the final Guidelines carve out those actions that very clearly are not intended to be covered by EO 13690. Quite simply, the definition of action needs to be narrowed.

- 4) P14; L458-467: Dialogue with certain Federal employees and a careful review of PowerPoint presentations given at listening sessions suggests that Federal permits are not subject to EO 13690. However, this paragraph appears to suggest otherwise, thus affecting 404 permits, permits issued under Section 33 U.S.C. section 408, renewal of existing leases for cabins located on Federal Forest Service Land, licenses for use of Federal research, renewal by the FCC of certain bandwidth licenses (cell, TV, radio) transmitted by facilities already located in the floodplain, and dozens of other permissions. Again, the Draft Guidelines should have a very clear section on what is and what is not covered as an action, and then agency-specific guidelines can further refine that list.
- 5) P17; L572-579: This paragraph makes it appear that in addition to structures, facilities too must be elevated. We believe that the Draft Guidelines are instead seeking to state that (i) structures must be elevated, and (ii) facilities must be regulated so as to not raise the BFE. If this is true, it should be clearer as the current draft creates ambiguity. If this is not true, we do not think it makes sense to say that all facilities (roads, levees, dams, docks, etc.) must be elevated. As noted above, it is also not clear how this would apply to a new structure (e.g., a veterans' hospital) that is to be constructed in a leveed basin that has 100-year protection but may not yet have higher levels of protection. In such a case, is elevation required? If so, would elevation of 2-3 feet within the basin be required? Would elevation be required to 2-3 feet higher than the BFE in the river channel that could be 20 or more feet off the ground? This must be clarified using the suggested language above, and it must be remembered that entire regions can consist of adjacent leveed basins precluding the option of siting such a hospital elsewhere.
- 6) P18; L596-599: This section says that agencies shall elevate structures. But it does not state whether this applies only to structures being constructed by the agency, also applies to structures being cost-shared by the agency, or also applies to structures that require a permit or license from an agency. Again, the Draft Guidelines should be revised to be much clearer about what actions are covered consistent with the language above.
- 7) P21; L696-723: This section states that it applies to a series of financial agencies “in addition to the other responsibilities” that those agencies have “under this Order.” This phrasing could be interpreted as reinforcing that the requirements of elevation apply to all Federal actions, including loan guarantees or the approval, regulation, or insurance of a

financial transaction, including any HUD grants or loan guarantees for housing. Again, the Draft Guidelines should be revised to be much clearer about what actions are covered.

- 8) P27; L934: The definition of Critical Action is drafted so broadly as to make practically any action a critical action. It is defined as “any action for which even a slight chance of flooding would be too great.” Without further guidance as to what the phrase “too great” means, agencies may have greatly disparate interpretations of what is a critical action. We suggest that some examples be given of the type of actions that the Mitigation Framework Leadership Group believes are critical actions. Such a list will help guide agencies in their interpretations of the meaning of the term “too great.”
- 9) P31; L1035: This eight-step flow chart appears to introduce a new concept not otherwise supported by Draft Guidelines. If the answer to the first question (determine if proposed action is in the floodplain) is no, then the flowchart directs the agency to ask “does the action have: (a) impacts in the floodplain; or (b) indirectly support floodplain development.” The second question (indirectly support floodplain development) does not appear in EO 13690 and appears to go significantly beyond the scope of EO 13690 and the Draft Guidelines. Is the U.S. Corps of Engineers precluded from repairing a levee because it may indirectly support floodplain development? Is the Department of Transportation precluded from providing any transportation funds to New Orleans because it may indirectly support floodplain development? Is the Bureau of Reclamation precluded from constructing a water supply dam because it may indirectly support floodplain development? This question should be deleted from the eight-step process as it has nothing to do with ensuring that investments in Federal infrastructure will survive changes to the climate.
- 10) P33; L1086: I believe that other Federal agencies should not be permitted to utilize their own Base Flood Elevations rather than FEMA’s Flood Insurance Rate Maps (“FIRMs”), as allowing multiple Federal agencies to use different BFEs can lead to conflicting approaches and approvals for funding and permitting. Indeed, I further believe that there should be some standardization, or at least a method of decision-making, to ensure that different Federal agencies do not use different methods of defining the floodplain. It is my suggestion that the Draft Guidelines provides that where different Federal agencies are involved, the agency with lead status under NEPA should select the methodology of complying with the FFRMS, and where NEPA does not designate a lead agency, some other method should exist to determine who is in the lead.
- 11) P45; L1397-1403: This paragraph should be read carefully to determine if it is intended to apply to leveed basins. These basins are often “not within the existing base floodplain but [are still] close to the existing floodplain boundary.” The last sentence would instruct the agency to consider the basin to be in the floodplain because “the ground elevation is lower than the floodplain elevation.” I believe that this needs to be reworded to ensure that it does not apply automatically to leveed basins.

- 12) P46; L 1443 & P50; L1604-1605: This appears to expressly require that agencies work to avoid the direct and indirect support of floodplain development and does not distinguish between federal agency construction and private construction. As noted above, this language could lead a Federal agency to conclude that no permits could be granted to build a home in an area that is not in a special flood hazard area, but where the current FIRM does not take into effect climate change. Much clearer guidance is required to ensure that this language would not preclude such an action.
- 13) P51; L1617-1619 and the following section: The language used in this part of the Draft Guidelines suggest that Federal actions in issuing permits or licenses are not allowed in any area that may, in the future, be part of the regulatory floodplain due to climate change, or that may indirectly support private development in an area that may, in the future, be part of a regulatory floodplain due to climate change. If this is intended, then this is a significant change in Federal policy that has the potential to result in Federal agencies abandoning urban areas that are located near rivers or in low coastal areas and Federal agencies to preclude further private investment in these areas. This would be far reaching and could result in no Federal permits and licenses being issued in areas such as New Orleans and Sacramento. The language of the Draft Guidance must be tightened to preclude this interpretation.
- 14) P62; L2003-2005: The Draft Guideline gives us the test of whether the proposed location must clearly outweigh the requirement of EO 13690. Until it is clear that EO 13690 does not apply to Federal permitting, this test would be oppressive and would likely preclude the issuance of almost all 404 permits for private uses.

Thank you for the chance to submit these comments. I would be pleased to answer any questions that you may have and would be happy to provide any review which might be allowed of a revised product. I also again request that the Draft Guidelines be reissued after addressing the various public comments.

Sincerely,

DOWNEY BRAND LLP



Scott L. Shapiro