

DIMENSIONS

OBAMA ADMINISTRATION PROPOSES NEW FLOODPLAIN MANAGEMENT STANDARDS

By Michael J. Gross, Esq. and David J. Miller, Esq.

Earlier this year, President Obama issued Executive Order (“E.O.”) 13690, which is aimed at limiting the cost to the federal government of relief and recovery in the wake of a flooding disaster. EO 13690 is connected to the President’s Climate Action Plan (“CAP”), which calls for federal agencies to make updates to the standards by which they attempt reduce the risk of flood-related damage to projects receiving federal funding.

E.O. 13690 amends an earlier executive order signed by President Carter in 1977, which established federal policy for agencies to avoid impacts to floodplains. The 1977 executive order, E.O. 11988, applies to “federal actions,” which includes the construction and management of federal facilities; federal financing and other assistance to construction projects; and, importantly, federal activities and programs “affecting land use, including water and related land use planning, regulating, and licensing activities”. It is important to note that E.O. 13690 does not replace E.O. 11988, but simply amends it without specifically addressing to which federal programs the new provisions will apply. Thus, the broad application of the original executive order to federal programs, including permitting, likely applies to the new floodplain definitions, despite the suggestion in the CAP that new floodplain standards should only apply to federally funded projects.

In short, E.O. 13690 directs federal agencies to update their floodplain management policy by implementing

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the Federal Flood Risk Management Standard (“FFRMS” or “the Standard”). The FFRMS includes three major provisions affecting projects receiving subject to the FFRMS. First, the Standard establishes a policy favoring the use of natural features and nature-based approaches when federal actions implicate floodplains. Second, the Standard requires a higher vertical elevation in establishing a floodplain to avoid flood risks. Third, the elevation and corresponding floodplain are to be determined using one of three approaches described in E.O. 13690 and incorporated into the FFRMS.

The vertical elevation requirement, referred to in the FFRMS as the “elevation component,” applies to all new construction and “substantially improved structures,” defined as improvements or rehabilitation that equals or exceeds 50 percent of the value of the structure. Generally, the elevation component requires a vertical

elevation of the base flood elevation (“BFE”) plus an additional two feet. The BFE is the elevation of the 100-year floodplain, i.e. the area susceptible to a one percent chance of annual flood. In the case of “critical actions,” defined as actions that cannot withstand any chance of flooding such as prisons and hospitals, the elevation component requires an elevation of the BFE plus three feet.

The FFRMS also requires updates to agencies’ approach to delineating a floodplain. Pursuant to the updates in E.O. 13690, a floodplain can be defined by applying one of three approaches. The first approach defines a floodplain as the elevation and flood hazard area that result from using a “climate-informed science approach” which employs the “best-available, actionable hydrologic and hydraulic data and methods.” The second approach uses the “freeboard value,” which mirrors the elevation component, to define a floodplain. The freeboard value is determined by adding two feet to the BFE or three feet in the case of “critical actions.” The third approach simply defines a floodplain as the area subject to flooding by the 0.2 percent annual chance flood (i.e., a 500-year floodplain). Additionally, E.O. 13690 allows the possibility of additional floodplain definition approaches established in updates to the FFRMS. Of the three approaches, the freeboard value approach has been predicted to be the most likely adopted by federal agencies.

Currently, guidelines for implementing the changes to floodplain management

[Continued on page 13](#)

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OBAMA ADMINISTRATION

Continued from page 5

included in E.O. 13690 and the FFRMS are in the final stages of the administrative rulemaking process. In March and April of this year, the Federal Emergency Management Agency (“FEMA”) held eight “listening sessions” to hear public comment on the proposed guidelines and the period for submitting comments on the draft guidelines ended on May 6, 2015. The [National Association of Home Builders](#) (“NAHB”) has been at the forefront of the industry’s response to E.O. 13690 and submitted [comprehensive comments](#) detailing the various problems with the guidelines as drafted.

Reaction to the draft guidelines was mixed, but drew criticism on several fronts. Initially, E.O. 11988 has been, at best, loosely implemented since in 1977. Commenters, including the NAHB, raised concerns about federal agencies suddenly promulgating regulations to implement E.O. 11988 without clear direction or a designated lead agency. As noted above, E.O. 13690 has also been accused of going beyond the scope of the changes envisioned by the CAP, which only calls for changes to federally funded projects as opposed to all federal programs related to flooding.

In terms of the various methods of delineating a floodplain established in E.O. 13690, there is no requirement that federal agencies select an approach uniformly, even within a single agency. Consequently, different programs within one agency can reach different conclusions as to the reaches of a floodplain, thereby creating uncertainty as to whether or not property is or is not in a floodplain. The language of E.O. 13690 and the FFRMS themselves also sows uncertainty surrounding implementation of the floodplain management standards. For example, it is unknown what the term “climate-informed science approach” means or,

in fact, what agency should determine what it means. The significant public participation describing the above-referenced issues during FEMA’s listening sessions has contributed to increasing Congressional interest in these issues. Congress is currently deciding on if and how it will respond to E.O. 13690, however appropriations legislation has been introduced which would prohibits funds from be used to implement to FFRMAS. Congressional action could clarify the confusion in the FFRMS and proposed guidelines as proposed, ideally to address the specific concerns noted above.

While the concern is not immediate as the guidelines remain in draft form and agencies have not begun to propose new regulations to comply with the Executive Orders and the FFRMS, there is the potential for impacts to builders in New Jersey in the future. Apart from those issues discussed above, the new floodplain definition, if widely adopted by federal agencies, could expand the scope of the National Flood Insurance Program (“NFIP”) and result in more locations being subject to mandatory flood insurance. This, however, would require FEMA to change its current NFIP regulations defining floodplains, which has not been proposed to date. That said, such a change to the regulations would seem authorized, if not mandated, under the current language of the Executive Orders and the FFRMS. This would be true for all federal agencies, but the question whether agencies will adopt the FFRMS across the board remains unanswered.

Similarly, the Executive Orders and the FFRMS do not appear to have an immediate impact on New Jersey’s treatment of flood hazard areas. While the Flood Hazard Area Control Act rules do provide for a method of determining the extent of a flood hazard area by reference to FEMA flood zone maps, they do not peg ultimate flood

hazard area designations to the federal rules, but rather establish independent standards. Those standards would have to be changed by the rulemaking process in order to expand New Jersey’s floodplain definitions. However, if FEMA adopts new flood zone maps incorporating the floodplain definitions from the FFRMS and E.O. 13690, New Jersey’s floodplain standards will no longer match what is shown on the FEMA maps, creating a dilemma for the regulations that rely on the FEMA maps.

In sum, the eventual effects of E.O. 13690 are not yet known. Many factors will impact the ultimate outcome, including the impact of ongoing public participation, possible Congressional intervention, and the possibility that federal agencies simply will not adopt new regulations in the wake of E.O. 13690. NJBA will be closely monitoring the process of adopting the FFRMS and the implementation guidelines and updated its members as new information develops.

NJDEP’S NEWS FILL MATERIAL

Continued from page 10

obtaining the agreement of NJDEP and a broad range of stakeholder groups representing the quarries, LSRPs, and remediating parties. This was a significant achievement.

Like other NJDEP guidance documents, the Fill Material Guidance provides property owners, builders, and their LSRPs with opportunities to apply creative solutions to address site-specific conditions and reduce project costs. Some examples include reductions in sampling frequencies, reduced laboratory test requirements, and flexibility in evaluating whether new contaminants will be brought to the site in alternative fill. You should discuss these options with your LSRP – they could save you time and money.