
V. Executive Orders

This is an excerpt from the ASFPM No Adverse Impact Legal Guide for Flood Risk Management.

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V. Executive Orders

V.A. Generally

The use of the presidential Executive Order is increasingly common in our modern government. These sometimes-controversial legal documents produced by the executive branch of the U.S. government are signed, written, and published directives from the President of the United States that manage operations of the federal government. Executive Orders may be referenced by their consecutive number or topic. For example, Executive Order 11988 *Floodplain Management*, discussed in greater detail later herein, may be referenced by number as *Executive Order 11988* or by topic as the *Floodplain Management Order*.

All Executive Orders are published in the Federal Register, the daily journal of the federal government published to inform the public about federal regulations and actions. They are also catalogued by the National Archives as official documents produced by the federal government. Since both Executive Orders and Proclamations have the force of law, much like regulations issued by federal agencies, the Orders are codified under Title 3 of the Code of Federal Regulations (“CFR”).

V.A.1. Constitutional role

Executive Orders are not legislation; they require no approval from Congress, and Congress cannot simply overturn them. Congress may pass legislation that could invalidate an Executive Order or make it difficult—or even impossible—to implement the Order, such as reducing or removing funding. However, such legislation is subject to presidential veto, that is in turn subject to congressional override. A sitting U.S. President may overturn or revoke an existing Executive Order by issuing another Executive Order to that effect. As the use of Executive Orders has become more common, the practice of a new administration overturning or “revoking” prior presidential Executive Orders has also become increasingly common in recent years. Finally, a court of competent jurisdiction has the power to stay enforcement of, or overturn an Executive Order found to be beyond the President’s constitutional authority.

V.A.2. Basic Elements

There are formatting differences among Executive Orders released by the White House Press Office, those printed in the Federal Register, those printed under Title 3 CFR, and those found in

digital archives as HTML text. Regardless of the source, however, all formats will include basic elements central to the Order:

Heading. Executive Orders are generally labeled as such, and include a number and a date of issue.

Title. Each Executive Order has a title, typically indicating the Order's subject matter.

Introduction. An introduction, e.g., "by the authority vested in me as President by the Constitution and the laws of the United States of America," followed by what is being ordered and why. It may even resemble the beginning of traditional legislation, with recitals and conclusions.

Body. Executive Orders are grouped into sections and subsections, each numbered or lettered according to a general outline. Sections spell out the Order(s), action steps to realize the Order(s), and other directives, such as study or evaluation, and subsections add additional details, including any relevant definitions.

Signature. Executive Orders are signed by the issuing President. Following the signature is a "White House" notation and the date that the Order was issued.

Online Repositories. Online repositories of Executive Orders include: White House,¹⁶³³ National Archives and Records Administration,¹⁶³⁴ and American Presidency Project.¹⁶³⁵

¹⁶³³ <https://www.whitehouse.gov/briefing-room/presidential-actions/> (Executive Orders from the current presidential administration are available as PDFs from the White House Press Office).

¹⁶³⁴ <https://www.archives.gov/federal-register/executive-orders/>; (Archive of all things related to the U.S. government, the National Archives maintains a digital index of Executive Orders, searchable by date, number, or topic; Orders may be viewed as PDFs or text, in the Federal Register or within Title 3 of the U.S. Code).

¹⁶³⁵ http://www.presidency.ucsb.edu/executive_orders.php; (an archive maintained by the University of California Santa Barbara includes text of almost all Executive Orders, searchable by year of issue back to the early nineteenth century).

V.B. Executive Orders: Floodplain Stewardship

V.B.1. Background

Floodplain stewardship in the United States was initiated by twentieth-century federal interests in planning for and managing the nation's resources and addressing flooding disasters. In furtherance of the National Industrial Recovery Act of 1933 ("NIRA"), the National Planning Board was created.¹⁶³⁶ On April 28, 1934, by Executive Order 6693,¹⁶³⁷ President Roosevelt created the Committee on National Land Problems, composed of representatives of the Interior and Agriculture Departments and the Federal Emergency Relief Administration.¹⁶³⁸ E.O. 6693 authorized the Committee to, *inter alia*, study land problems to improve land use practices and develop a national land program.¹⁶³⁹

The National Planning Board and the Committee on National Land Problems were reorganized by Executive Order 6777 of June 30, 1934, as the National Resources Board, an independent agency reporting directly to the President.¹⁶⁴⁰ When title 11 of the NIRA expired, the National Resources Committee ("NRC") was established by Executive Order 7065 of June 7, 1935,¹⁶⁴¹ under the Federal Emergency Relief Appropriations Act of 1935, to continue the work of the National Resources Board.¹⁶⁴²

¹⁶³⁶ Eugene Buie, *A History of United States Department of Agriculture Water Resource Activities* 9 (1979) (In-house Report of the Soil Conservation Service).

¹⁶³⁷ Exec. Order No. 6693 (Apr. 28, 1934).

¹⁶³⁸ Franklin D. Roosevelt & Conservation 1911-1945 at 271 n.3 (Edward B. Nixon ed. 1957).

¹⁶³⁹ Franklin D. Roosevelt & Conservation 1911-1945 at 271 n.3 (Edward B. Nixon ed. 1957).

¹⁶⁴⁰ Exec. Order No. 6777 (June 30, 1934) (abolishing the National Planning Board E.O. 6693 of April 28, 1934); *see also* Eugene Buie, *A History of United States Department of Agriculture Water Resource Activities* 37 (1979). Roosevelt asked Congress for a permanent board in his address to Congress of Jan. 24, 1935. *See* FRANKLIN D. ROOSEVELT & CONSERVATION 1911-1945 at 318 n.1 (Edward B. Nixon ed. 1957).

¹⁶⁴¹ Exec. Order No. 7065 of June 07, 1935, *Creating the National Resources Committee*, 3 C.F.R. xxx (abolishing the National Resources Board created by E.O. 6777 of June 30, 1934).

¹⁶⁴² Eugene Buie, *A History of United States Department of Agriculture Water Resource Activities* 9 (1979). The Committee was also authorized to consult with other government agencies and public and private research organizations. FRANKLIN D. ROOSEVELT & CONSERVATION 1911-1945 at 389 n.1 (Edward B. Nixon ed. 1957).

In 1939, the NRC was reconstituted as the National Resources Planning Board ("NRPB") by Congress and elevated to the role of planning division of the Executive Office of the President.¹⁶⁴³ Victim to push-back from numerous sides for its ongoing advocacy for Social Security, Congress abolished the NRPB in 1943,¹⁶⁴⁴ instructing that the agency's functions not be transferred to any other agency, effectively stifling comprehensive national resource planning efforts for decades. At the same time as Congress was abolishing the NRPB, President Roosevelt established the Federal Interagency River Basin Committee ("FIARBC"),¹⁶⁴⁵ with numerous regional river basin subcommittees formed prior to reorganization of FIARBC as the Interagency Committee on Water Resources ("ICWR").¹⁶⁴⁶

In 1962, the U.S. Senate published a report prepared by the ICWR,¹⁶⁴⁷ that was transmitted to Congress by President Kennedy. The report significantly impacted the planning processes of federal water agencies. Known as Senate Document 97,¹⁶⁴⁸ it laid out new policies, standards, and procedures to be used in the formulation, evaluation, and review of agency plans. The objectives of flood control were left essentially unchanged: flood control and prevention benefits were to consist of a reduction in damage from inundation, plus increases in the net return from higher property values made possible as a result of lowering the amount of flood damage. However, Senate Document 97 also established a general planning approach based on "the expectation of an expanding national economy in which increasing amounts of goods and

¹⁶⁴³ Eugene Buie, A History of United States Department of Agriculture Water Resource Activities 10 (1979) (In-house Report of the Soil Conservation Service); see generally Charles E. Merriam, The National Resources Planning Board: A Chapter in American Planning Experience, 38 THE AMERICAN POLITICAL SCIENCE REVIEW 1075-88 (1943).

¹⁶⁴⁴ Independent Offices Appropriation Act of 1944, effective Aug. 31, 1943; see generally, Norman Beckman, FEDERAL LONG-RANGE PLANNING: THE HERITAGE OF THE NATIONAL RESOURCES PLANNING BOARD 6 (1958); Philip J. Funigiello, *City Planning in World War II: The Experience of the National Resources Planning Board*, 53 SOCIAL SCIENCE QUARTERLY 91, 104 (Jun 1, 1972):-

¹⁶⁴⁵ National Research Council, New Directions in Water Resources Planning for the U.S. Army Corps of Engineers 13 (1999).

¹⁶⁴⁶ The NIARBC was abolished by letter of President Dwight D. Eisenhower to Secretary of the Interior Douglas McKay, May 26, 1954, and succeeded by the Interagency Committee on Water Resources.

¹⁶⁴⁷ Established as an advisory, coordinating body for interagency water use projects by an agreement, December 29, 1943, among the Federal Power Commission and the Departments of War, Agriculture, and the Interior, later extended to the Departments of Commerce; Labor; and Health, Education, and Welfare, the ICWR took the first step toward development of uniform flood-frequency techniques for federal agencies was the publication in April 1966 of Bulletin 13 "Methods of Flow Frequency Analysis" by ICWR 1966; it summarized methods commonly used by U.S. federal agencies. Bulletin 13 was quickly followed by Bulletin 15 "A Uniform Technique for Determining Flood Flow Frequencies" published in December 1967 by the WRC; this was the first set of uniform flood frequency techniques to be employed by all federal agencies.

¹⁶⁴⁸ Senate Document 97, Policies, Standards, and Procedures in the Formulation, Evaluation, and Review of Plans for Use and Development of Water and Related Land Resources (1962).

services are likely to be required to meet the needs of a growing population, higher levels of living, international commitments and continuing economic growth.”¹⁶⁴⁹

V.B.1.a. The Unified National Program for Managing Flood Losses

The Water Resources Planning Act of 1965¹⁶⁵⁰ created the U.S. Water Resources Council (“WRC”)¹⁶⁵¹ and authorized the creation of federal-state river basin commissions.¹⁶⁵² The following year, the Bureau of the Budget Task Force on Federal Flood Control Policy was established, with Gilbert White as chair, and issued a report—House Document 465, *A Unified National Program for Managing Flood Losses*.¹⁶⁵³ HD 465 posited that floodplain land use decisions reflect “best use” based on accurate information whenever current and potential floodplain occupants and local land use decision-makers consider anticipated development *benefits* and are aware of—and bear the full flood risk *costs* of—their floodplain use decisions.¹⁶⁵⁴

Some HD 465 recommendations focused on providing federal assistance to states and localities to directly advance recommended floodplain planning and regulation, but major recommendations focused on future achievement primarily through actuarially based flood insurance for floodplain development. The *Unified National Program* reports published in 1976, 1979, 1986, and 1994 introduced “wise use” and defined it as two outcomes that are set as goals for the nation—continuously reducing potential flood losses, while also protecting and restoring natural floodplain functions, through local government police powers-based land use restrictions.

¹⁶⁴⁹ See Peter Rogers, *America's Water: Federal Roles and Responsibilities* (1993); See also 2 The Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States* p. 4-5 (1992); Eugene Buie, *A History of United States Department of Agriculture Water Resource Activities* (1979) (In-house Report of the Soil Conservation Service).

¹⁶⁵⁰ 42 U.S.C. (1962).

¹⁶⁵¹ See generally 18 CFR 701 et seq.; THE WATER RESOURCES COUNCIL: 1966-82: History: Established by the Water Resources Planning Act (79 Stat. 244), July 22, 1965, to encourage the conservation, development, and use of water and related land resources on a coordinated basis by the federal government, states, localities, and private enterprise. Coordinated and reviewed river basin and regional plans. Terminated October 31, 1982.

¹⁶⁵² 2 The Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States* §4 p. 5 (1992) (citing Beatrice Hort Holmes, *History of Federal Water Resources Programs and Policies, 1961-70* (1979)).

¹⁶⁵³ U.S. House of Representatives, House Document 465, 89th Cong., 2nd Sess. (1966).

¹⁶⁵⁴ Paul Scodari & Leonard Shabman, *Review of Federal Reports on a Unified National Program for Floodplain Management, 1966-1994* app. B at 10 (2014).

Contemporaneously, Executive Order 11296, *Flood Hazard Evaluation*, was issued, directing federal agencies to evaluate the flood hazard before undertaking federally financed or supported actions, and to lead the prevention of uneconomic use and development of floodplains.¹⁶⁵⁵ E.O. 11296, executed by President Johnson,¹⁶⁵⁶ was a mid-twentieth century presidential recognition that structural flood control measures alone were inadequate to stem rising flood losses.¹⁶⁵⁷ The NFIA, disaster assistance, other related federal programs, and some state and local government floodplain management programs were the progeny of E.O. 11296.¹⁶⁵⁸ A decade later, annual flood losses were estimated to approach \$3 billion.¹⁶⁵⁹ Flood losses continue to rise today.¹⁶⁶⁰

V.B.2. Executive Orders Post-NFIA

Since the enactment of the NFIA, and prior to 2016, three Executive Orders specifically addressed floodplain management issues:

- E.O. 11988 of May 24, 1977,¹⁶⁶¹ executed by President Carter, replacing E.O. 11296;

¹⁶⁵⁵ 2 The Federal Interagency Floodplain Management Task Force, *Floodplain Management in the United States* §4 p.6 (1992).

¹⁶⁵⁶ Exec. Order No. 11296, 31 Fed. Reg. 10663 (Aug. 11, 1966); *see also*, James E. Goddard, *Origin and Rationale of Criterion used in Designating Floodways*, p. 5 (Federal Insurance Administration, Oct. 1978) available at https://s3-us-west-2.amazonaws.com/asfpm-library/FSC/General/FIA_Origin_and_rationale_of_criterion_used_in_designating_floodways_1978.pdf.

¹⁶⁵⁷ Water Resources Council, *Floodplain Management Guidelines for Implementing E.O. 11988*, 43 Fed. Reg. 6,030, p.1 (Feb. 10, 1978)[hereinafter 1978 Guidelines]; *see also*, James E. Goddard, *Origin and Rationale of Criterion used in Designating Floodways* (Federal Insurance Administration, Oct. 1978) p.6, available at https://s3-us-west-2.amazonaws.com/asfpm-library/FSC/General/FIA_Origin_and_rationale_of_criterion_used_in_designating_floodways_1978.pdf; United States Interagency Task Force on Floodplain Management, *Further advice on Executive Order 11988* (1991).

¹⁶⁵⁸ *See* Water Resources Council, *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* [hereinafter 2015 Guidelines], p.1 (Oct. 8, 2015).

¹⁶⁵⁹ 2015 Guidelines, p.1.

¹⁶⁶⁰ *See generally*, National Centers for Environmental Information, National Oceanic and Atmospheric Administration, <https://www.ncdc.noaa.gov/billions/climatology>.

¹⁶⁶¹ Exec. Order No. 11988, 3 C.F.R. 1978 Comp., p. 117, *as amended by* Exec. Order No. 12148, 3 C.F.R. 1980 Comp. p. 412, and Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268.

- E.O. 12148 of July 20, 1979,¹⁶⁶² executed by President Carter, amending E.O. 11988; and,
- E.O. 13690 of January 30, 2015,¹⁶⁶³ executed by President Obama, amending E.O. 11988, as amended.

V.B.2.a. E.O. 11988, Floodplain Management

E.O. 11988 was ordered in furtherance of the National Environmental Policy Act of 1969,¹⁶⁶⁴ the NFIA,¹⁶⁶⁵ and the Flood Disaster Protection Act of 1973,¹⁶⁶⁶ to "avoid . . . the long term and short term *adverse impacts* associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practical alternative. . . ."¹⁶⁶⁷

In the decade that followed E.O. 11296, it was widely recognized that the *natural and beneficial* functions and values of floodplains, wetlands, and coastal barrier islands must be restored and preserved.¹⁶⁶⁸ On May 24, 1977, President Carter issued a comprehensive *Environmental*

¹⁶⁶² Exec. Order No. 12148, 3 C.F.R. 1980 Comp. p. 412, §5-207 (amending Exec. Order No. 11988, 3 C.F.R. 1978 Comp. p. 117, §2 (d) by deleting "Federal Insurance Administration" and substituting therefor "Director of the Federal Emergency Management Agency").

¹⁶⁶³ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268.

¹⁶⁶⁴ 42 U.S.C. §§ 4321 et seq.

¹⁶⁶⁵ 42 U.S.C. §§ 4001 et seq.

¹⁶⁶⁶ 42 U.S.C. §§ 4001 et seq., *as amended* (1973); Public Law 93-234, 87 Stat. 975.

¹⁶⁶⁷ Exec. Order No. 11988, 3 C.F.R. 1978 Comp., p. 117 (issued in 1977 to avoid, to the extent possible, the long- and short-term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative) (emphasis supplied); *see also*, Federal Emergency Management Agency, *The 100-year base flood standard and the floodplain management executive order: A review prepared for the Office of Management and Budget by the Federal Emergency Management Agency* (Sept. 1983); James E. Goddard, *Origin and Rationale of Criterion used in Designating Floodways* (Federal Insurance Administration, Oct. 1978) available at https://s3-us-west-2.amazonaws.com/asfpm-library/FSC/General/FIA_Origin_and_rationale_of_criterion_used_in_designating_floodways_1978.pdf.

¹⁶⁶⁸ 2015 Guidelines, p.1;

Message to Congress, accompanied by, *inter alia*, E.O. 11988, *Floodplain Management*, and E.O. 11990, *Protection of Wetlands*,¹⁶⁶⁹ to replace E.O. 11296.¹⁶⁷⁰

E.O. 11988 requires each “executive agency”¹⁶⁷¹ responsible for:

1. acquiring, managing, and disposing of federal lands and facilities;
2. providing federally undertaken, financed, or assisted construction and improvements; and
3. conducting federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities

to provide leadership and take action to reduce the risk of flood loss; minimize the impacts of floods on human health, safety, and welfare; and restore and preserve the *natural and beneficial* values served by floodplains in carrying out the agency’s responsibilities.¹⁶⁷² In E.O. 11988, *floodplains* are defined as:

the lowland and relatively flat areas adjoining inland and coastal waters including floodprone areas of offshore islands, *including at a minimum*, that area subject to a one percent or greater chance of flooding in any given year.¹⁶⁷³

E.O. 11988 requires each agency, “as allowed by law,” to issue or amend existing regulations and procedures within one (1) year to comply with the Order, requires the procedures to incorporate the *Unified National Program for Floodplain Management*¹⁶⁷⁴ of the WRC, and “explain the

¹⁶⁶⁹ Exec. Order No. 11990, 3 C.F.R. 1977 Comp. p. 121 (most of the Nation’s wetlands are located in floodplains. Both the floodplain and wetland E.O.s were issued as part of the *President’s Message on the Environment*, May 24, 1977; the guidance provided in E.O. 11990 and agency regulations and procedures for floodplain stewardship will frequently apply to wetlands); see Water Resources Council, 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, 16 (Oct. 8, 2015).

¹⁶⁷⁰ <https://www.presidency.ucsb.edu/documents/the-environment-message-the-congress>; see also B.H. Holmes, *Federal Participation in Land Use Decisionmaking at the Water’s Edge—Floodplains and Wetlands*, 13 NAT. RES. LAW. 351, 352 (1980-81) (in the early 1970s, Congress rejected numerous attempts to pass a national land use policy act. Although the bills introduced would merely have made federal funds available for the states to implement their own programs, “opponents considered it to be an attempt to indirectly impose federal environmental policies on the local zoning process.”).

¹⁶⁷¹ See 5 U.S.C. §105. The term “agency” includes military departments. See Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117.

¹⁶⁷² Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §1 (emphasis supplied).

¹⁶⁷³ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §6.

¹⁶⁷⁴ Unified National Program for Floodplain Management.

means that the agency will employ to pursue the nonhazardous use of riverine, coastal, and other floodplains in connection with the activities under its authority.”¹⁶⁷⁵

E.O. 11988 was a significant policy initiative, tying together the need to protect lives and property with the need to restore and preserve *natural and beneficial* floodplain values. The Order directed federal agencies to lead the nation by exemplary demonstration of a comprehensive approach to floodplain management and to prepare procedures for achieving the Order’s goals.

E.O. 11988 provides that “to the extent possible,” agencies utilize existing processes “such as those of the Council on Environmental Quality [“CEQ”] and the [WRC]”; prepare their procedures in consultation with the WRC, the Federal Insurance Administration,¹⁶⁷⁶ and the CEQ; and “update such procedures as necessary” to comply with the Order.¹⁶⁷⁷ E.O. 11988 required the WRC to issue guidance.¹⁶⁷⁸

V.B.2.b. Floodplain Management Guidelines for Implementing E.O. 11988 (“1978 Guidelines”)

In 1978, the WRC published Floodplain Management Guidelines for Implementing E.O. 11988 (“1978 Guidelines”).¹⁶⁷⁹ The 1978 Guidelines provided:

1. an explanation of key terms and floodplain management concepts;
2. section-by-section analyses of E.O. 11988; and
3. a[(n) eight (8) step] decision-making process leading from the determination that a proposed action is located in a floodplain through the implementation of agency actions.¹⁶⁸⁰

¹⁶⁷⁵ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §1(d).

¹⁶⁷⁶ The FIA was replaced by the Director of FEMA, Exec. Order 12148.

¹⁶⁷⁷ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §1(d). Exec. Order No 12148 deleted “Federal Insurance Administration” substituting “Director of the Federal Emergency Management Agency.” See Exec. Order No. 12148, 3 C.F.R. 1979 Comp. p. 412, §5-207.

¹⁶⁷⁸ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(1).

¹⁶⁷⁹ Water Resources Council, *Floodplain Management Guidelines for Implementing E.O. 11988*, 43 Fed. Reg. 6,030, (Feb. 10, 1978).

¹⁶⁸⁰ Water Resources Council, *Floodplain Management Guidelines for Implementing E.O. 11988*, 43 Fed. Reg. 6,030, (Feb. 10, 1978).

The *1978 Guidelines* recognized the evolving temporal context of these Executive Orders' identification of the nation's floodplains as the scene of: (1) unacceptable and increasing flood losses, and (2) degradation of *natural and beneficial* values.¹⁶⁸¹

The *1978 Guidelines* provided broad interpretive guidance to assist each agency in developing its own individual procedures for compliance with E.O. 11988, recognizing that agency procedures would necessarily vary to meet legislatively prescribed missions and the requirements of the Order. The 1978 Guidelines provided a glossary of terms, an introduction to E.O. 11988, a detailed interpretation of E.O. 11988, an eight (8) step decision-making process to implement the Order, and appendices addressing floodplain information sources, related programs and references, and copies of E.O. 11988, E.O. 11990, and E.O. 11514.¹⁶⁸²

Eight (8) steps for an agency to accomplishing [sic] the purpose of E.O. 11988:¹⁶⁸³

1. determine if the proposed action will occur in a floodplain;¹⁶⁸⁴
2. provide for early public review;¹⁶⁸⁵
3. consider practical alternatives to avoid adverse effects and incompatible development in the floodplain;¹⁶⁸⁶
4. identify potential effects of any action the agency may take in a floodplain;¹⁶⁸⁷
5. minimize harm to and restore and preserve natural and beneficial values of the floodplain;¹⁶⁸⁸
6. reevaluate alternatives to the proposed action in light of previous steps;¹⁶⁸⁹
7. release findings and public explanation prior to proposed action implementation;¹⁶⁹⁰ and

¹⁶⁸¹ Water Resources Council, *Floodplain Management Guidelines for Implementing E.O. 11988*, 43 Fed. Reg. 6,030, p.1 (Feb. 10, 1978).

¹⁶⁸² Exec. Order No. 11514, Protection and Enhancement of Environmental Quality, 3 C.F.R. 1966-1970 Comp., p. 902.

¹⁶⁸³ See Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2; 8-Step Decision-Making Process for Executive Order 11988, <https://files.hudexchange.info/resources/documents/Floodplain-Management-8-Step-Decision-Making-Process-Flow-Chart.pdf>.

¹⁶⁸⁴ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(1).

¹⁶⁸⁵ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(4) ("in accordance with §2(b) of Exec. Order No. 11514 as amended, including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under §102(2)(c) of [NEPA], as amended").

¹⁶⁸⁶ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(2).

¹⁶⁸⁷ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2.

¹⁶⁸⁸ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §1.

¹⁶⁸⁹ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(2)(i).

¹⁶⁹⁰ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2(a)(2)(ii).

8. implement proposed action in compliance with minimization plans and flood insurance requirements.¹⁶⁹¹

E.O. 11988 requires agencies charged with responsibilities for federal real property and facilities to:

1. at a minimum, construct federal structures and facilities to comply with the NFIP, and deviate only to the extent that NFIP standards are demonstrably inappropriate;¹⁶⁹²
2. apply accepted floodproofing and other flood protection measures to new construction and rehabilitation located in the floodplain in compliance with the Order and, wherever practicable, elevate structures above the base flood¹⁶⁹³ level rather than fill;¹⁶⁹⁴
3. provide on structures and other appropriate places on public property that has suffered flood damage or is located in an identified flood hazard area, conspicuous delineation of past and probable flood height to enhance public education of flood hazards;¹⁶⁹⁵ and
4. reference in the conveyance of federal property in floodplains proposed for lease, easement, right-of-way, or disposal to non-federal public or private parties, any uses restricted by federal, state, or local floodplain regulations; and attach other appropriate restrictions, except as prohibited by law; or withhold the property from conveyance.¹⁶⁹⁶

V.B.2.c. Real Property Transaction Disclosures

E.O. 11988 also requires agencies that guarantee, approve, regulate, or insure any financial transaction related to an area located in a floodplain to inform parties to such transactions of the hazards of locating structures in the floodplain;¹⁶⁹⁷ requires agency heads to submit to the CEQ and the WRC by June of 1978, a report on the status of their agency's procedures and the

¹⁶⁹¹ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §3(a); *see also* 8-Step Decision-Making Process for Executive Order 11988, <https://files.hudexchange.info/resources/documents/Floodplain-Management-8-Step-Decision-Making-Process-Flow-Chart.pdf>.

¹⁶⁹² Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §3(a).

¹⁶⁹³ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §6(b) (flood that has a one percent or greater chance of occurring in any year).

¹⁶⁹⁴ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §3(b).

¹⁶⁹⁵ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §3(c).

¹⁶⁹⁶ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §3(d).

¹⁶⁹⁷ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §4.

impact of the Order on their operations;¹⁶⁹⁸ revoked E.O. 11296;¹⁶⁹⁹ exempts essential emergency work performed pursuant to certain sections of the 1974 Disaster Relief Act;¹⁷⁰⁰ and allows for executive agency assumption of responsibilities under certain circumstances.¹⁷⁰¹

V.B.2.d. Relationship between E.O. 11988 and 11990

President Carter's comprehensive *Environmental Message to Congress* of May 1977 was accompanied by both E.O. 11988 and E.O. 11990¹⁷⁰² to replace E.O. 11296. Because most of the Nation's wetlands are located in floodplains, the guidance provided in E.O. 11990 and agency regulations and procedures for floodplain stewardship will frequently apply to wetlands.¹⁷⁰³ Executive Order 11990, *Protection of Wetlands*, directs all federal agencies to avoid, if possible, adverse impacts to wetlands and to preserve and enhance the *natural and beneficial values* of wetlands. Each agency is directed to avoid undertaking or assisting in wetland construction projects unless the head of the agency determines that there is no practicable alternative to such construction and that the proposed action includes measures to minimize harm.

V.B.3. Climate Action, the Federal Flood Risk Management Standard (FFRMS), and Water Resources

V.B.3.a. Executive Order 13653

In September 2014, President Obama directed that the *1978 Guidelines* be revised consistent with E.O. 13653 of November 1, 2013, *Preparing the United States for the Impacts of Climate*

¹⁶⁹⁸ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §5.

¹⁶⁹⁹ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §7.

¹⁷⁰⁰ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §8.

¹⁷⁰¹ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §9.

¹⁷⁰² Exec. Order No. 11990, 3 C.F.R. 1977 Comp. p. 121; *see* discussion *infra* notes xx-xx and accompanying text. Most of the nation's wetlands are located in floodplains. Both the floodplain and wetland E.O.s were issued as part of

the *President's Message on the Environment*, May 24, 1977; the guidance provided in E.O. 11990 and agency regulations and procedures for floodplain stewardship will frequently apply to wetlands; *see* 2015 *Guidelines*.

¹⁷⁰³ See 2015 *Guidelines*.

Change,¹⁷⁰⁴ and the *President's Climate Action Plan* ("USCAP").¹⁷⁰⁵ The *USCAP*, published in June 2013,¹⁷⁰⁶ outlined steps proposed by the executive branch to cut the carbon pollution that causes climate change and affects public health. The plan, consisting of a wide variety of executive actions, has three (3) key goals:

1. Cut Carbon Pollution in America;¹⁷⁰⁷
2. Prepare the United States for the Impacts of Climate Change;¹⁷⁰⁸ and
3. Lead International Efforts to Combat Global Climate Change and Prepare for its Impacts¹⁷⁰⁹

V.B.3.b. Executive Order 13690

The result of the E.O. 13653¹⁷¹⁰ revision effort was E.O. 13690, *Establishing a Federal Flood Risk Management Standard and a Process of Further Soliciting and Considering Stakeholder Input*,¹⁷¹¹ amending E.O. 11988, as amended. Signed on January 30, 2015, by President Obama, Executive Order 13690¹⁷¹² modifies E.O. 11988 and the *1978 Guidelines* to move beyond an earlier "emphasis on flood control and protection to a broader focus on flood risk

¹⁷⁰⁴ Exec. Order No. 13653, 3 C.F.R. 2014 Comp. p. 330.

¹⁷⁰⁵ Executive Office of the President, *The President's Climate Action Plan*, June 2013 [hereinafter *USCAP*], <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>; <https://perma.cc/SB7B-PEKG>; <http://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf>; see also Review of the President's Climate Action Plan: Hearing Before the S. Comm. on Env't and Pub. Works, 113th Cong. 743 (2014); The President's Climate Action Plan: What is the Impact on Small Business?: Hearing Before the Subcomm. on Agric., Energy and Trade of the S. Comm. on Small Bus., 113th Cong. 31 (2013).

¹⁷⁰⁶ Executive Office of the President, *The President's Climate Action Plan* (June 2013).

¹⁷⁰⁷ Executive Office of the President, *The President's Climate Action Plan* 5-6 (June 2013).

¹⁷⁰⁸ Executive Office of the President, *The President's Climate Action Plan*, 5, 12 (June 2013).

¹⁷⁰⁹ Executive Office of the President, *The President's Climate Action Plan*, 5, 17 (June 2013).

¹⁷¹⁰ Exec. Order No. 13653, 3 C.F.R. 2014 Comp. p. 330.

¹⁷¹¹ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268; see also John McShane, Enhancing Efforts to Protect and Restore the Natural Functions of Floodplains With the Revised Implementing Guidelines of Executive Order 11988, Floodplain Management (June 2015) available at https://asfpm-library.s3-us-west-2.amazonaws.com/Website/CON/C2_McShane.pdf.

¹⁷¹² Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268; see also John McShane, Enhancing Efforts to Protect and Restore the Natural Functions of Floodplains With the Revised Implementing Guidelines of Executive Order 11988, Floodplain Management (June 2015) available at https://asfpm-library.s3-us-west-2.amazonaws.com/Website/CON/C2_McShane.pdf.

management.”¹⁷¹³ E.O. 13690 applies to “federally-funded projects,”¹⁷¹⁴ i.e., “actions where federal funds are used for new construction, substantial improvement, or to address substantial damage.”¹⁷¹⁵ This approach is arguably more limited than E.O. 11988’s reference to “federal actions.”¹⁷¹⁶ E.O. 13690 established a Federal Flood Risk Management Standard (“FFRMS”), and directed that revised implementing guidelines for the Executive Order be published in the Federal Register for public comment.¹⁷¹⁷

Consistent with the President’s direction, FEMA—as Chair of the Mitigation Framework Leadership Group—published for public comment in the Federal Register ‘Draft Guidelines’ for agencies on the implementation of E.O. 13690 and 11988.¹⁷¹⁸ The Department of the Interior held a meeting of the interagency WRC, who unanimously accepted the recommendations of the Mitigation Framework Leadership Group and issued the *2015 Guidelines*.¹⁷¹⁹ The *2015 Guidelines* incorporate the FFRMS and other E.O. 13690 amendments.

The FFRMS and E.O. 13690 amendments require agencies, where possible, to use natural systems, ecosystem processes, and nature-based approaches in the development of alternatives for all actions to which E.O. 11988 applies.¹⁷²⁰ E.O. 13690 modifies floodplain determination for

¹⁷¹³ See 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, 14 (Oct. 8, 2015); Thomas Ruppert and Erin L. Dedy, Climate Change Impacts on Law and Policy in Florida in FLORIDA’S CLIMATE 209,231 (E. Chassignet, ed., 2017).

¹⁷¹⁴ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §1.

¹⁷¹⁵ See 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, 16 (Oct. 8, 2015); Thomas Ruppert and Erin L. Dedy, Climate Change Impacts on Law and Policy in Florida in FLORIDA’S CLIMATE 209, 231 (E. Chassignet, ed., 2017).

¹⁷¹⁶ Exec. Order No. 11988, 3 C.F.R. 1977 Comp., p. 117, §2; *See* Water Resources Council, 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, 16 (Oct. 8, 2015)[hereinafter 2015 Guidelines]; Thomas Ruppert and Erin L. Dedy, Climate Change Impacts on Law and Policy in Florida in FLORIDA’S CLIMATE 209,231 (E. Chassignet, ed., 2017).

¹⁷¹⁷ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §2(i)(1).

¹⁷¹⁸ 80 Fed. Reg. 6530 (February 5, 2015).

¹⁷¹⁹ 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, (Oct. 8, 2015); https://asfpm-library.s3-us-west-2.amazonaws.com/General/Implementing_Guidelines_for_EO11988_13690_08_Oct15_508.pdf.

¹⁷²⁰ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §2(c); *2015 Guidelines*.

federally-funded projects from the one percent (1%) annual chance flood standard of E.O. 11988 to expand the floodplain both horizontally and vertically:

- The preferred method, if the data is available, is the climate-informed science approach, i.e., a customized analysis of the area in question under potential future climate scenarios.¹⁷²¹
- alternatively, agencies are required to expand management from the base flood elevation ("BFE") to a higher vertical flood elevation by adding two feet (2') of freeboard elevation and corresponding horizontal floodplain expansion. This alternative is for actions where federal funds are used for new construction, substantial improvement, or to address substantial damage to structures and facilities.¹⁷²²
- A higher standard (three feet (3') of freeboard) is required for "critical actions,"¹⁷²³ i.e., "any activity for which even a slight chance of flooding would be too great."¹⁷²⁴
- Agencies may use the area subject to flooding by the 0.2 percent (0.2%) annual chance flood or the elevation and flood hazard area that result from using any other method identified in an update to the FFRMS.¹⁷²⁵

Although the FFRMS describes various approaches for determining the higher vertical flood elevation and corresponding horizontal floodplain for federally funded projects, it is not meant to be an "elevation" standard. The FFRMS is a resilience standard. The vertical flood elevation and corresponding horizontal floodplain determined using the approaches in the FFRMS establish the level to which a structure or facility must be resilient. This may include using structural or nonstructural methods to reduce or prevent damage; elevating a structure; or, where appropriate, designing it to adapt to, withstand, and rapidly recover from a flood event.¹⁷²⁶

V.B.3.c. Executive Order 13693

E.O. 13693 of March 19, 2015, titled *Planning for Federal Sustainability in the Next Decade*,¹⁷²⁷ executed by President Obama, introduced new and expanded upon the requirements

¹⁷²¹ 2015 Guidelines.

¹⁷²² 2015 Guidelines.

¹⁷²³ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §2(i)(1).

¹⁷²⁴ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §2(j); *2015 Guidelines* at 38-39.

¹⁷²⁵ Exec. Order No. 13690, 3 C.F.R. 2016 Comp. p. 268 §2(i)(1).

¹⁷²⁶ 2015 Guidelines at 4.

¹⁷²⁷ Exec. Order No. 13693, 3 C.F.R. 2015 Comp. p. 281.

established by E.O. 13423,¹⁷²⁸ E.O. 13514,¹⁷²⁹ the Energy Policy Act of 2005, and the Energy Independence and Security Act (EISA) of 2007. E.O. 13693 requires federal agencies to achieve:

GHG emissions reductions and reporting; energy conservation and renewable energy; green building performance; water and stormwater management, fleet performance; employee commuting and workplace travel; facility resilience; sustainable acquisition; solid waste diversion and pollution prevention; performance contracting; electronics stewardship; and strategic sustainability performance plans.¹⁷³⁰

V.B.3.d. Executive Order 13766

On January 24, 2017, President Trump executed E.O. 13766, titled *Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects*,¹⁷³¹ to expedite the construction of infrastructure projects.¹⁷³²

V.B.3.e. Executive Order 13783

On March 28, 2017, President Trump executed E.O. 13783, titled *Promoting Energy Independence and Economic Growth*,¹⁷³³ rescinding the *USCAP*,¹⁷³⁴ and revoking E.O. 13653.¹⁷³⁵

V.B.3.f. Executive Order 13807

On August 15, 2017, President Trump executed E.O. 13807, titled *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure*

¹⁷²⁸ Exec. Order No. 13423, 72 Fed. Reg. 3919 (Jan 26, 2007). 3 C.F.R. 2008 Comp. p. 193.

¹⁷²⁹ Exec. Order No. 13514.

¹⁷³⁰ See <https://www.epa.gov/greeningepa/executive-order-13693-planning-federal-sustainability-next-decade>.

¹⁷³¹ Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017) (revoked by E.O. 13990).

¹⁷³² Exec. Order No. 13766, 82 Fed. Reg. 8657 (Jan. 30, 2017) §1 (signed with presidential memoranda intended to permit construction of Keystone XL, Dakota Access pipelines).

¹⁷³³ Exec. Order No. 13783, 3 C.F.R. 2018 Comp. p. 314.

¹⁷³⁴ Exec. Order No. 13783, 3 C.F.R. 2018 Comp. p. 314 §3(a)i; *USCAP*.

¹⁷³⁵ Exec. Order No. 13783, 3 C.F.R. 2018 Comp. p. 314 §3(b)i; E.O. 13653.

Projects,¹⁷³⁶ revoking E.O. 13690,¹⁷³⁷ and immediately rescinding numerous energy-related rules and guidance issued by the Obama administration. E.O. 13807 requires agencies to evaluate their regulations affecting the development or use of domestic energy supplies and to suspend, revise, or rescind any regulations that “unduly burden” the development of domestic energy resources.¹⁷³⁸

V.B.3.g. Executive Order 13834

On May 17, 2018, President Trump signed E.O. 13834, titled *Efficient Federal Operations*,¹⁷³⁹ revoking E.O. 13693,¹⁷⁴⁰ and establishing energy and environmental performance goals, based on statutory requirements, for agencies with respect to management of facilities, vehicles, and operations,¹⁷⁴¹ and providing duties for the Federal Chief Sustainability Officer,¹⁷⁴² heads of agencies,¹⁷⁴³ and additional duties for the Chair of the CEQ¹⁷⁴⁴ and Director of OMB.¹⁷⁴⁵

V.B.3.h. Executive Order 13956

On October 13, 2020, President Trump executed E.O. 13956, titled *Modernizing America’s Water Resource Management and Water Infrastructure*,¹⁷⁴⁶ establishing an “Interagency Water Subcabinet,” co-chaired by the Department of the Interior and the Environmental Protection Agency and including representatives from the Departments of Agriculture, Army, Commerce, and Energy, the White House Council on Environmental Quality, and the Offices of Management

¹⁷³⁶ Exec. Order No. 13807, 3 C.F.R. 2018 Comp. p. 369 (reflecting President Trump’s stated desire to roll back Obama-era energy regulations and promote domestic energy resources).

¹⁷³⁷ Exec. Order No. 13807, 3 C.F.R. 2018 Comp. §6 (p. 377); *see also* <https://www.theleveewasdry.com/2017/08/trump-executive-order-issued-federal-flood-risk-management-standard-regulatory-reform/>; <https://www.lexology.com/library/detail.aspx?g=4flac556-5700-4d9e-9a14-c35cd7ebef6c>.

¹⁷³⁸ Exec. Order No. 13807, 3 C.F.R. 2018 Comp. §6 (p. 377). E.O. 13

¹⁷³⁹ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018).

¹⁷⁴⁰ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §8.

¹⁷⁴¹ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §1.

¹⁷⁴² Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §6.

¹⁷⁴³ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §7.

¹⁷⁴⁴ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §4.

¹⁷⁴⁵ Exec. Order No. 13834, 83 Fed. Reg. 23771 (May 22, 2018) §5.

¹⁷⁴⁶ Exec. Order No. 13956, 85 Fed. Reg. 65647 (Oct. 16, 2020).

and Budget, and Science and Technology Policy,¹⁷⁴⁷ echoing back to E.O. 7065 establishing the NRC. The Water Subcabinet is charged with responsibility for developing a national water strategy to enhance water storage, water supply, and drought resiliency, and to improve water quality, source water protection, nutrient management, and restoration activities.¹⁷⁴⁸ Created to eliminate “overlapping responsibilities” in federal water bureaucracy and streamline the process,¹⁷⁴⁹ E.O. 13956 directs the group to reduce “unnecessary duplication” in government and consolidate “existing water-related task forces, working groups, and other formal cross-agency initiatives.”¹⁷⁵⁰

V.B.3.i. Executive Order 13990

On January 20, 2021, President Biden executed E.O. 13990, titled *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*,¹⁷⁵¹ with a policy “to listen to the science;” and immediately review and take action to address federal regulations and other actions executed during the previous administration that conflict; and “immediately commence work to confront the climate crisis.”¹⁷⁵² E.O. 13990 requires agencies to account for the benefits of reducing climate pollution;¹⁷⁵³ and revokes the permit for the Keystone XL pipeline,¹⁷⁵⁴ and several executive orders including E.O. 13834 (except sections 6, 7, and 11).¹⁷⁵⁵ E.O. 13990 also suspends E.O. 13807, directs the Director of OMB and the Chair of the CEQ to recommend whether to issue a replacement,¹⁷⁵⁶ and 13920, and directs the Secretary of Energy and Director

¹⁷⁴⁷ Exec. Order No. 13956, 85 Fed. Reg. 65647 (Oct. 16, 2020) §3.

¹⁷⁴⁸ See Exec. Order No. 13956, 85 Fed. Reg. 65647 (Oct. 16, 2020) §5.

¹⁷⁴⁹ See Exec. Order No. 13956, 85 Fed. Reg. 65647 (Oct. 16, 2020) §1.

¹⁷⁵⁰ Exec. Order No. 13956, 85 Fed. Reg. 65647 (Oct. 16, 2020) §2b.

¹⁷⁵¹ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021).

¹⁷⁵² Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §§1-2.

¹⁷⁵³ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §5.

¹⁷⁵⁴ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §6.

¹⁷⁵⁵ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §7(a) (revoking E. O. 13766, 13778, 13783, 13792, 13795, 13927, and 13834 in part).

¹⁷⁵⁶ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §7(b).

of OMB to recommend whether to issue a replacement.¹⁷⁵⁷ Further, it directs the CEQ to rescind it draft guidance¹⁷⁵⁸ and review revise, and update its final guidance on GHGs.¹⁷⁵⁹

V.B.3.j. Executive Order 14008

On January 27, 2021, President Biden executed E.O. 14008 titled *Tackling the Climate Crisis at Home and Abroad*.¹⁷⁶⁰ Long and detailed, E.O. 14008 puts the climate crisis “at the center of United States foreign policy and national security,”¹⁷⁶¹ stating that “There is little time left to avoid setting the world on a dangerous, potentially catastrophic climate trajectory.”¹⁷⁶² E.O. 14008 Part I creates the presidentially-appointed “Special Presidential Envoy for Climate (“SPEC”) “to elevate the issue . . . and underscore the commitment” that the Biden administration “will make toward addressing it.”¹⁷⁶³ The SPEC will work with the Secretaries of State and Treasury (and others) to develop a “climate finance plan,”

making strategic use of multilateral and bilateral channels and institutions, to assist developing countries in implementing ambitious emissions reductions, protecting critical ecosystems, building resilience against the impacts of climate change, and promoting the flow of capital toward climate-aligned investments and away from high-carbon investments.¹⁷⁶⁴

E.O. 14008 Part II positions the Biden administration’s policy of “taking a government-wide approach to the climate crisis”¹⁷⁶⁵

that reduces climate pollution in every sector of the economy; increases resilience to the impacts of climate change; protects public health; conserves our lands, waters, and biodiversity; delivers environmental justice; and spurs well-paying union jobs and economic growth, especially

¹⁷⁵⁷ Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §7(c).

¹⁷⁵⁸ CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30097 (June 26, 2019); see Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §7(e).

¹⁷⁵⁹ CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change on National Environmental Policy Act Reviews*, 81 Fed. Reg. 51866 (August 5, 2016); see Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021) §7(e).

¹⁷⁶⁰ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021).

¹⁷⁶¹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. I.

¹⁷⁶² Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. I, §101.

¹⁷⁶³ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. I, §102(c).

¹⁷⁶⁴ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. I, §102(f).

¹⁷⁶⁵ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II.

through innovation, commercialization, and deployment of clean energy technologies and infrastructure.¹⁷⁶⁶

E.O. 14008 establishes the “White House Office of Domestic Policy,”¹⁷⁶⁷ the “National Climate Task Force,”¹⁷⁶⁸ and posits the policy to use the federal government’s buying power and real property and asset management to “lead the Nation’s effort to combat the climate crisis by example—specifically, by aligning the management of Federal procurement and real property, public lands and waters, and financial programs to support robust climate action.”¹⁷⁶⁹ Part II further addresses a federal clean electricity and vehicle procurement strategy;¹⁷⁷⁰ procurement standards;¹⁷⁷¹ renewable energy, oil, and natural gas development on public lands and in offshore waters;¹⁷⁷² fossil fuel subsidies;¹⁷⁷³ clean energy in financial management;¹⁷⁷⁴ and climate action plans and data and information products to improve adaptation and increase resilience.¹⁷⁷⁵

E.O. 14008 continues with three (3) policies for “empowering workers:” (1) “through rebuilding our infrastructure for a sustainable economy”;¹⁷⁷⁶ (2) “by advancing conservation, agriculture, and reforestation”;¹⁷⁷⁷ and (3) “through revitalizing energy communities”;¹⁷⁷⁸ including sections devoted to “sustainable infrastructure,”¹⁷⁷⁹ a strategy for creating a “Civilian Climate Corps,”¹⁷⁸⁰ “conserving our Nation’s lands and waters,”¹⁷⁸¹ and establishing an “Interagency Working Group on Coal and Power Plant Communities and Economic Revitalization.”¹⁷⁸²

¹⁷⁶⁶ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §201.

¹⁷⁶⁷ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §202.

¹⁷⁶⁸ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §203.

¹⁷⁶⁹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §204.

¹⁷⁷⁰ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §205.

¹⁷⁷¹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §206.

¹⁷⁷² Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §§207-08.

¹⁷⁷³ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §209.

¹⁷⁷⁴ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §210.

¹⁷⁷⁵ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §211.

¹⁷⁷⁶ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §212.

¹⁷⁷⁷ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §214.

¹⁷⁷⁸ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §217.

¹⁷⁷⁹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §213.

¹⁷⁸⁰ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §215.

¹⁷⁸¹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §216.

¹⁷⁸² Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §218.

E.O. 14008 concludes with a policy to secure environmental justice and spur economic growth;¹⁷⁸³ amends E.O. 12898¹⁷⁸⁴ to create a “White House Environmental Justice Interagency Council;”¹⁷⁸⁵ establishes a “White House Environmental Justice Council” within the EPA;¹⁷⁸⁶ directs agency responsibilities in furtherance of the order’s policy¹⁷⁸⁷ to “secure environmental justice and spur economic opportunity for disadvantaged communities,” historically marginalized and overburdened with pollution and underinvestment;¹⁷⁸⁸ and direct certain federal officers to “publish recommendations on how certain Federal investments might be made toward a goal that 40 percent of the overall benefits flow to disadvantaged communities (“Justice40 Initiative”) .”¹⁷⁸⁹

V.B.3.k. Executive Order 14027

On May 7, 2021, President Biden executed E.O. 14027, titled *Establishment of the Climate Change Support Office*,¹⁷⁹⁰ establishing a temporary organization, the Climate Change Support Office (“CCSO”) ¹⁷⁹¹ “to support bilateral and multilateral engagement to advance the United States initiative to address the global climate crisis” consistent with E.O. 14008.¹⁷⁹²

V.B.3.l. Executive Order 14030

On May 20, 2021, President Biden executed E.O. 14030, *Climate-Related Financial Risk*,¹⁷⁹³ establishing a policy “to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk,”¹⁷⁹⁴ “act to mitigate that risk and its drivers, while accounting for and addressing disparate impacts on disadvantaged communities and

¹⁷⁸³ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §219.

¹⁷⁸⁴ Exec. Order No. 12898, 3 C.F.R. 1994 Comp. p. 859.

¹⁷⁸⁵ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §220.

¹⁷⁸⁶ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §221.

¹⁷⁸⁷ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §222; *see also* Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §219.

¹⁷⁸⁸ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §219.

¹⁷⁸⁹ Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021) Pt. II §223.

¹⁷⁹⁰ Exec. Order No. 14027, 86 Fed. Reg. 25947 (May 12, 2021).

¹⁷⁹¹ Exec. Order No. 14027, 86 Fed. Reg. 25947 (May 12, 2021) §1.

¹⁷⁹² Exec. Order No. 14027, 86 Fed. Reg. 25947 (May 12, 2021) §3.

¹⁷⁹³ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021).

¹⁷⁹⁴ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §1 (consistent with E.O. 13707).

communities of color,”¹⁷⁹⁵ “spurring the creation of well-paying jobs;”¹⁷⁹⁶ achieving “our target of a net-zero emissions economy by no later than 2050.”¹⁷⁹⁷

E.O. 14030 directs:

- development of a “Climate-Related Financial Risk Strategy;”¹⁷⁹⁸
- assessment of “Climate-Related Financial Risk by Financial Regulators;”¹⁷⁹⁹
- “resilience of life savings and pensions;”¹⁸⁰⁰
- integration of climate-related financial risk into “federal lending, underwriting, and procurement.”¹⁸⁰¹

E.O. 14030 explicitly reinstates E.O. 13690,¹⁸⁰² thereby reestablishing the FFRMS. E.O. 14030 states, *inter alia*:

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 of October 8, 2015, were never revoked and thus remain in effect.¹⁸⁰³

E.O. 14030 also directs certain federal officers to “identify the primary sources of Federal climate-related financial risk exposure and develop methodologies to quantify climate risk within the economic assumptions and the long-term budget projections of the President’s Budget.”¹⁸⁰⁴

V.B.4. Judicially Enforced Limits on Executive Orders

It has been suggested that Presidents’ broad use of Executive Orders constitutes unilateral executive lawmaking, impacting the interests of private citizens and encroaching on

¹⁷⁹⁵ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §1 (consistent with E.O. 13985).

¹⁷⁹⁶ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §1.

¹⁷⁹⁷ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §1.

¹⁷⁹⁸ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §2.

¹⁷⁹⁹ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §3.

¹⁸⁰⁰ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §4

¹⁸⁰¹ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §5.

¹⁸⁰² Exec. Order No. 14030, 86 Fed. Reg. 27967 §5(e).

¹⁸⁰³ Exec. Order No. 14030, 86 Fed. Reg. 27967 §5(e).

¹⁸⁰⁴ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May, 20, 2021) §6.

congressional power. The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* established a framework for judicial analysis of valid presidential action on Executive Orders. The framework described by Justice Robert H. Jackson in his concurring opinion has influenced lower courts more than the majority opinion of Justice Hugo L. Black and been employed to analyze controversial presidential actions.

V.B.5. Miscellaneous Executive Orders: Further No Adverse Impact (NAI) Interests

NAI practitioners may also be interested in the following Executive Orders:

- E.O. 12372 of July 14, 1982, titled *Intergovernmental review of Federal programs*,¹⁸⁰⁵ executed by President Reagan;
- E.O. 12699 of January 5, 1990, titled Seismic Safety of Federal and Federally Assisted or Regulated New Building Construction,¹⁸⁰⁶ executed by President Bush.
- E.O. 12898 of February 11, 1994, titled Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,¹⁸⁰⁷ executed by President Clinton;
- E.O. 13112 of February 3, 1999, titled *Invasive Species*,¹⁸⁰⁸ executed by President Clinton;
- E.O. 13423 of January 24, 2007, titled Strengthening Federal Environmental, Energy, and Transportation Management,¹⁸⁰⁹ executed by President Bush;
- E.O. 13514 of October 5, 2009, titled *Federal Leadership in Environmental, Energy, and Economic Performance*,¹⁸¹⁰ executed by President Obama;
- E.O. 13547 of July 19, 2010, titled *Stewardship of the Ocean, Our Coasts, and the Great Lakes*,¹⁸¹¹ executed by President Obama;
- E.O. 13707 of September 15, 2015, titled Using Behavioral Science Insights to Better Serve the American People,¹⁸¹²

¹⁸⁰⁵ Exec. Order No. 12372, 3 C.F.R. 1982 Comp. p. 197, amended by Exec. Order No. 12416, 3 C.F.R. 1983 Comp. p. 186 [date change].

¹⁸⁰⁶ Exec. Order No. 12699, 3 C.F.R. 1990 Comp. p. 269.

¹⁸⁰⁷ Exec. Order No. 12898, 3 C.F.R. 1994 Comp. p. 859.

¹⁸⁰⁸ Exec. Order No. 13112, 3 C.F.R. 1999 Comp. p. 159.

¹⁸⁰⁹ Exec. Order No. 13423, 3 C.F.R. 2007 Comp.

¹⁸¹⁰ Exec. Order No. 13514, 3 C.F.R. 2009 Comp.

¹⁸¹¹ Exec. Order No. 13547, 3 C.F.R. 2010 Comp. p. 227.

¹⁸¹² Exec. Order No. 13707, 80 Fed. Reg. 56365 (Sept. 15, 2015).

- E.O. 13771 of January 30, 2017, titled *Reducing Regulation and Controlling Regulatory Costs*,¹⁸¹³ executed by President Trump;
- E.O. 13777 of February 24, 2017, titled *Enforcing the Regulatory Reform Agenda*,¹⁸¹⁴ executed by President Trump;
- E.O. 13840 of June 19, 2018, titled *Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States*,¹⁸¹⁵ executed by President Trump, revoking and replacing E.O. 13547;
- E.O. 13878 of June 25, 2019, titled *Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing*,¹⁸¹⁶ executed by President Trump;
- E.O. 13985 of January 20, 2021, titled *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*,¹⁸¹⁷ executed by President Biden;
- E.O. 13992 of January 20, 2021, titled *Revocation of Certain Executive Orders Concerning Federal Regulation*,¹⁸¹⁸ executed by President Biden, revoking E.O. 13771 and E.O. 13777, among others;¹⁸¹⁹
- E.O. 14013 of February 4, 2021, titled *Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration*,¹⁸²⁰ executed by President Biden;
- E.O. 14030 of May 20, 2021, titled *Climate-Related Financial Risk*,¹⁸²¹
- E.O. 14052 of November 15, 2021, titled *Implementation of the Infrastructure Investment and Jobs Act*,¹⁸²² executed by President Biden;
- E.O. 14057 of December 8, 2021, titled *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*,¹⁸²³ executed by President Biden;

¹⁸¹³ Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

¹⁸¹⁴ Exec. Order No. 13777, 82 Fed. Reg. 12285 (March 1, 2017).

¹⁸¹⁵ Exec. Order No. 13840, 83 Fed. Reg. 29431 (June 22, 2018).

¹⁸¹⁶ Exec. Order No. 13878, 84 Fed. Reg. 30853 (June 28, 2019) (§8 terminates Council on Jan. 21, 2021, absent presidential extension).

¹⁸¹⁷ Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan 25, 2021).

¹⁸¹⁸ Exec. Order No. 13992, 86 Fed. Reg. 7049 (Jan. 25, 2021).

¹⁸¹⁹ Exec. Order No. 13992 also revoked E.O. 13875, E.O. 13891, E.O. 13892, and E.O. 13893.

¹⁸²⁰ Exec. Order No. 14013, 86 Fed. Reg. 8839 (Feb. 9, 2021).

¹⁸²¹ Exec. Order No. 14030, 86 Fed. Reg. 27967 (May 25, 2021).

¹⁸²² Exec. Order No. 14052, 86 Fed. Reg. 64335 (Nov. 18, 2021).

¹⁸²³ Exec. Order No. 14057, 86 Fed. Reg. 70935 (Dec. 13, 2021).



No Adverse Impact Legal Guide for Flood Risk Management

June 2023

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Cover Photos (clockwise from top left):

Hurricane Ian flooded houses in Florida residential area;¹ U.S. Supreme Court;² Untitled image of road inundated with floodwater.³

No Adverse Impact Legal Guide for Flood Risk Management

June, 2023

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The Association of State Floodplain Managers Inc. (ASFPM) published this *Guide* as part of its mission to promote education, policies and activities that mitigate current and future losses, costs and human suffering caused by flooding. Founded in 1977, the organization had over 19,000 members as of 2023, including members in 38 state chapters. ASFPM supports professionals involved in floodplain management, flood hazard mitigation, flood preparedness and flood warning and recovery. Members represent local, state and federal government agencies, citizen groups, private consulting firms, academia, the insurance industry and lenders.

¹ Bilanol. Accessed May 2023. Hurricane Ian flooded houses in Florida residential area. <https://www.canva.com/photos/MAFOfc76ibY-hurricane-ian-flooded-houses-in-florida-residential-area-natural-disaster-and-its-consequences/>. Used under Canva Pro Content License.

² OZinOH. Accessed May 2023. Supreme Court IMG_2952. <https://www.flickr.com/photos/75905404@N00/3049421552/>. Used under Creative Commons Attribution-NonCommercial 2.0 License.

³ bohemianbikini from Pixabay. Accessed May 2023. Untitled. <https://www.canva.com/photos/MAEF8PqH24s/>. Used under Canva Free to Use License.

Suggested Legal Citation:⁴

GERALD MURPHY, THOMAS RUPPERT & EMMA CAMPBELL, ASSOCIATION OF STATE FLOODPLAIN MANAGERS, NO ADVERSE IMPACT LEGAL GUIDE FOR FLOOD RISK MANAGEMENT V.23.06 (2023).

Suggested General Citation:

Association of State Floodplain Managers. June 2023. *No Adverse Impact Legal Guide for Flood Risk Management*. (v.23.06) Madison, WI. no.floods.org/NAI-Legal.

Acknowledgements:

This guide was funded by the Association of State Floodplain Managers Board of Directors and in part by the Federal Emergency Management Agency.

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Special appreciation is extended to the following individuals who assisted in the review and creation of this publication:

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⁴ As a document with legal analyses, this publication utilizes the most common citation format in legal writing, *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 21st ed. 1st.prtg. 2020).

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Introduction to This Guide

This *No Adverse Impact Legal Guide for Flood Risk Management* (a.k.a., the *NAI Legal Guide*) provides legal resources to inform the decisions of community representatives and municipal attorneys who design, implement, and defend NAI programs. It includes:

- Detailed resources for legal professionals, and
- Legal essentials for floodplain managers and community officials.

This Guide supplements other NAI documents that present tools and guidance for integrating NAI principles into local regulations, policies, and programs. It will help readers to understand, anticipate, and manage legal issues that may arise when a community implements activities that enhance flood resilience, especially when those activities exceed state and federal requirements for floodplain management.

This *Guide* is divided into five sections:

Section I – Introduction to No Adverse Impact

Section II – Introduction to Legal Concepts for No Adverse Impact

Section III – Torts

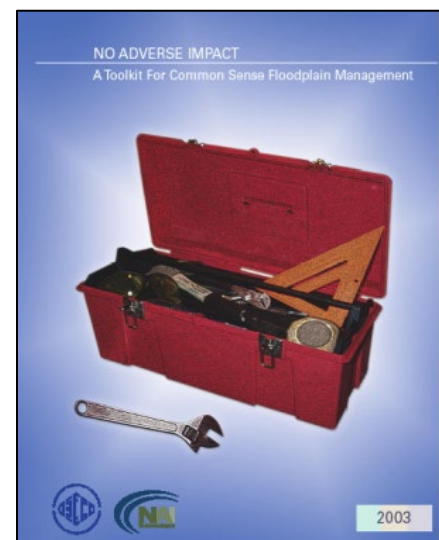
Section IV – The Constitution and Its Protection of Property Rights

Section V – Federal Laws

Section One is an introduction to the concept of No Adverse Impact for those not familiar with its application to flood risk reduction. Section Two focuses on introducing common legal concepts, which is then followed by the detailed legal memos found in Sections Three, Four and Five.

After reviewing this *Guide*, it is recommended that a community conduct an assessment of its flood risk management activities to see if those activities are legally sound, and where they can be improved by using NAI techniques to better protect its population and natural floodplain functions.

[No Adverse Impact Toolkit](#), prepared by the Association of State Floodplain Managers, identifies tools for implementing NAI.



NAI How-to Guides

A series of How-to Guides provide usable information to help communities implement NAI practices:

- [Hazard Identification and Floodplain Mapping](#)
- [Regulations and Development Standards](#)
- [Education and Outreach](#)
- [Emergency Services](#)
- [Planning](#)
- [Mitigation](#)
- [Infrastructure](#)

Common Terminology

Many of the following definitions are derived from NFIP floodplain management; others are specific legal definitions; and yet others relate to NAI tools and approaches. This section is not all-inclusive of the flood risk management and legal terms used in this *Guide*; additional definitions may be provided elsewhere for ease of reference.

Base flood: The flood having a one percent probability of being equaled or exceeded in any given year (previously called the 100-year flood). This is the design flood for the NFIP and is used to map Special Flood Hazard Areas and to determine Base Flood Elevations. Modeling of the base flood uses historic flood data.

Base Flood Elevation (BFE): The modeled elevation of floodwater during the base flood. The BFE determines the level of flood protection required by NFIP floodplain development standards.

Building (structure): A walled and roofed building with two or more outside rigid walls and a fully secured roof that is affixed to a permanent site, as well as a manufactured home on a permanent foundation. The terms “structure” and “building” are sometimes used interchangeably in the NFIP. However, for NFIP floodplain management purposes, the term “structure” also includes a gas or liquid storage tank that is principally above ground.

Within the NFIP, residential and non-residential structures are treated differently. A residential structure built in a Special Flood Hazard Area must be elevated above the Base Flood Elevation. A non-residential structure may be elevated or dry floodproofed so that the structure is watertight to prevent the entry of water.

Climate change: Climate change refers to long-term shifts in temperatures and weather patterns. These shifts may be natural, such as through variations in the solar cycle. But since the 1800s, human activities have been the main driver of climate change, primarily due to the burning of fossil fuels like coal, oil and gas.⁵

Community: The NFIP definition of a community is a political subdivision that has the authority to adopt and enforce floodplain management regulations for the areas within its jurisdiction. The term usually means cities, villages, townships, counties, and Indian tribal governments. For the purposes of this *Guide*, a “community” also includes a neighborhood, unincorporated settlement, or other non-governmental subdivision where people live or work together.

Conservation Zone: An area indicated on a map or plan adopted by a local jurisdiction, municipality, or other governing body within which development is governed by special regulations in order to protect and preserve the quality and function of its natural environment.

Community Rating System (CRS): The NFIP Community Rating System is a program that provides reduced flood insurance premiums for policyholders in communities that go above and beyond the minimum NFIP criteria. For more information see <https://www.fema.gov/floodplain-management/community-rating-system>.

Federal Emergency Management Agency (FEMA): The federal agency under which the NFIP is administered.

Flood: A community may adopt a more expansive definition of “flood” than is used by the NFIP in order to include additional sources of water damage, such as groundwater flooding of basements or local washouts associated with a drainage ditch. The NFIP definition of a flood is:

- (a) A general and temporary condition of partial or complete inundation of normally dry land areas from:
 - (1) The overflow of inland or tidal waters.
 - (2) The unusual and rapid accumulation or runoff of surface waters from any source.
 - (3) Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in paragraph (a)(2) of this definition and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, as when earth is carried by a current of water and deposited along the path of the current.
- (b) The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water

⁵ Source: United Nations, “What is Climate Change?” webpage, accessed March 2023, <https://www.un.org/en/climatechange/what-is-climate-change>.

exceeding anticipated cyclical levels or suddenly caused by an unusually high water level in a natural body of water, accompanied by a severe storm, or by an unanticipated force of nature, such as flash flood or an abnormal tidal surge, or by some similarly unusual and unforeseeable event which results in flooding as defined in paragraph (a)(1) of this definition.

For NFIP flood insurance claims, a flood must inundate two or more acres of normally dry land area or two or more properties.

Flood Insurance Rate Map (FIRM): An official map of a community on which the Federal Emergency Management Agency has delineated the boundaries of Special Flood Hazard Areas. In some areas, FIRMS (with associated maps and studies) may also indicate Base Flood Elevations and regulatory floodways. FIRMs and other mapping products can be viewed and downloaded at FEMA's Map Service Center – <https://msc.fema.gov/portal/home>.

Floodplain: Nature's floodplain is the land area susceptible to being inundated by water from any source. This includes:

- Special Flood Hazard Areas (SFHAs) mapped by FEMA for the NFIP program;
- Flood-prone areas near waterbodies for which SFHAs have not been mapped;
- Areas outside of the SFHA that are subject to inundation by larger flood events or floods that are altered by debris or other blockages;
- Areas subject to smaller, more frequent, or repetitive flooding;
- Areas subject to shallow flooding, stormwater flooding, or drainage problems that do not meet the NFIP mapping criteria;
- Areas affected by flood-related hazards, such as coastal and riverine erosion, mudflows, or subsidence; and
- Areas that will be flooded when future conditions are accounted for, such as climate-related issues, sea-level rise, and upstream watershed development.

The Special Flood Hazard Area mapped for the NFIP is only part of a community's flood risk area, with 40 percent of flood insurance claims occurring outside of the SFHA.⁶ To represent a community's true flood risk, the term "floodplain" is used in this *Guide* instead of "SFHA."

Floodplain stewardship: Caring for and protecting the beneficial biologic and hydrologic functions of areas where the risk of flooding is expected, while managing human uses to minimize the potential for adverse impacts and flood damage.

Floodproof: Floodproofing means any combination of structural and non-structural additions, changes, or adjustments to buildings or other structures that reduce or eliminate flood damage to real estate or improved real property, water and sanitary facilities, structures, and their contents. This term includes dry floodproofing, in which a structure is watertight, with walls

⁶ Federal Emergency Management Agency, 2021, "Myths and Facts About Flood Insurance," <https://www.fema.gov/fact-sheet/myths-and-facts-about-flood-insurance-1>.

substantially impermeable to the passage of water. NFIP development standards allow dry floodproofing of non-residential structures in lieu of elevating the lowest floor.

Freeboard: A factor of safety, usually expressed in feet above the Base Flood Elevation, that determines the required level of flood protection.

Future conditions flood: The flood having a one percent probability of being equaled or exceeded in any given year based on future-conditions hydrology. Also known as the “1%-annual-chance future conditions” flood.

Liability: A party is liable when they are held legally responsible for something. Unlike in criminal cases, where a defendant could be found guilty, a defendant in a civil case risks only liability.⁷

Mitigation: Hazard mitigation is any sustained action taken to reduce or eliminate any long-term risk to life or property from a hazard event. Mitigation is most often thought of as being applied to existing at-risk development. Examples of flood mitigation activities include: floodproofing, elevating, relocating or demolishing at-risk structures; retrofitting existing infrastructure to make it more flood resilient; developing and implementing Continuity of Operations Plans; structural mitigation measures such as levees, floodwalls and flood control reservoirs; detention/retention basins; and beach, dune, and floodplain restoration.

National Flood Insurance Program (NFIP): Federal program that maps flood hazard areas and provides flood insurance in participating communities that agree to regulate new construction in mapped high flood hazard areas. Most community floodplain maps and floodplain management standards have been adopted to meet the NFIP’s criteria. Learn more at www.fema.gov.

Natural floodplain functions: The functions associated with the natural or relatively undisturbed floodplain that moderate flooding, maintain water quality, recharge groundwater, reduce erosion, redistribute sand and sediment, and provide fish and wildlife habitat. One goal of NAI floodplain stewardship is to preserve and protect these functions, in addition to protecting human development.

Police powers: Police powers are the fundamental ability of a government to enact laws to coerce its citizenry for the public good, although the term eludes an exact definition. The term does not directly relate to the common connotation of police as officers charged with maintaining public order, but rather to broad governmental regulatory power. *Berman v. Parker*, a 1954 U.S. Supreme Court case, stated that “[p]ublic safety, public health, morality, peace and quiet, law and order. . . are some of the more conspicuous examples of the traditional

⁷ Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/liability>. Liability is “[t]he quality or state of being legally obligated or responsible.” BLACK’S LAW DICTIONARY: NEW POCKET EDITION (1996).

application of the police power;" while recognizing that "[a]n attempt to define [police power's] reach or trace its outer limits is fruitless."⁸

Regulatory floodway: The channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood (with a 1% annual probability) without cumulatively increasing the water surface elevation more than a designated height.

Resilience: "The ability to prepare for and adapt to changing conditions and withstand and rapidly recover from disruptions," as defined in [FEMA's National Disaster Recovery Framework](#).

Riparian buffer: Zone of variable width along the banks of a stream, river, lake, or wetland that provides a protective natural area adjacent to the waterbody.

Sovereign immunity: Sovereign immunity refers to the fact that the government cannot be sued without its consent.⁹

Special Flood Hazard Area (SFHA): An area mapped on the NFIP FIRM that shows the area subject to inundation by the base flood (with a one percent or greater probability of flooding in any given year). SFHAs have been mapped for flooding caused by rivers, lakes, oceans, and other larger sources of flooding.

Standard of care: The watchfulness, attention, caution, and prudence that a reasonable person in the circumstances would exercise. If a person's actions do not meet this standard of care, then their acts fail to meet the duty of care, which all people (supposedly) have toward others.¹⁰

Substantial damage: Damage of any origin sustained by a structure (building) whereby the cost of restoring the structure to its before damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred.

Substantial improvement: Any reconstruction, rehabilitation, addition, or other improvement of a structure (building), the cost of which equals or exceeds 50 percent of the market value of the structure before the start of construction for the improvement. This term includes structures that have incurred substantial damage, regardless of the actual repair work performed. NFIP

⁸ Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/police_powers. Police power has also been defined as "1. [a] state's Tenth Amendment right, subject to due process and other limitations, to establish and enforce laws protecting the public's health, safety, and general welfare, or to delegate this right to local governments. 2. Loosely, the power of the government to intervene in privately owned property, as by subjecting it to eminent domain." BLACK'S LAW DICTIONARY: NEW POCKET EDITION (1996).

⁹ Source: Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/sovereign_immunity.

¹⁰ Source: Law.com Dictionary, <https://dictionary.law.com/Default.aspx?selected=2002>.

development standards require that a substantially improved building be regulated as new construction.

Sustainable: Able to “meet the needs of the present without compromising the ability of future generations to meet their own needs,” as defined by the [United Nations](#).

Takings: A taking is when the government seizes private property for public use. A taking can come in two forms. The taking may be physical, meaning the government physically interferes with private property; or the taking may be constructive (also called a regulatory taking), meaning that the government restricts the owner's rights to such an extent that the governmental action becomes the functional equivalent of a physical seizure.¹¹

Tort: A tort is an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, “injury” describes the invasion of any legal right, whereas “harm” describes a loss or detriment in fact that an individual suffers.¹²

Watershed: The land area that channels rainfall and snowmelt to creeks, streams, and rivers, and eventually to outflow points, such as reservoirs, bays, and the ocean. Also known as a basin or catchment area.

¹¹ Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/takings>. A taking may also be defined as “[t]he government’s actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility.” BLACK’S LAW DICTIONARY: NEW POCKET EDITION (1996).

¹² Source: Cornell Law School, Legal Information Institute, <https://www.law.cornell.edu/wex/tort>.