



FEMA Seeks Input on Updating the NFIP Program

NOVEMBER 3, 2021

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On October 12, 2021, the Federal Emergency Management Agency (FEMA) issued a [“Request for Information”](#) (RFI) soliciting information and comments from the public on the floodplain management standards enforced by FEMA as part of the National Flood Insurance Program (NFIP). This RFI is the first step in a multi-step process by FEMA to update the NFIP’s minimum floodplain management standards, which have not been substantially revised since their adoption in 1976. The response period runs through December 13, 2021 (Docket ID: [FEMA-2021-0024](#)).

This RFI is both an opportunity and a potential concern. The RFI and subsequent rule making present an opportunity to modernize FEMA’s minimum development standards in ways that protect people, property, and species without stifling communities, development, and industry. It is important that property owners and industries be aware of and engage in this process so that FEMA does not inadvertently add another layer of restrictions to floodplain development without coordination with the myriad layers that have developed at the federal, state and local levels over the last 50 years.

NFIP Background

The National Flood Insurance Act (NFIA) was enacted in 1968 with the goal of reducing federal expenditures on flood-based disasters. The NFIA is based on fundamental bargain: the federal government (through FEMA) will offer federally backed flood insurance for buildings and properties only in communities that adopt development regulations at least as restrictive as FEMA’s minimum floodplain development standards. The NFIA relied on two primary means to achieve its goal: (1) establishing minimum development standards applicable to properties within the 100-year floodplain (the 1% annual floodplain, also known as the Special Flood Hazard Area or SFHA), and (2) requiring owners of properties located in the 100-year floodplain to purchase insurance. FEMA’s minimum floodplain development standards are set forth in 44 C.F.R. §60.3, and require that any development within FEMA-mapped floodplains be located, constructed, and elevated to reduce the risk of flood damage.

While characterized by FEMA as voluntary, most of the communities participating in the NFIP – now more than 22,500 nationwide – consider the program mandatory. That is because in 1973, when only a small number of property owners had begun to purchase flood insurance through the Program, Congress made the purchase of flood insurance mandatory for any federally backed loan for a property in the FEMA-mapped 100-year floodplain. Since NFIP-based flood insurance has dominated the market for the last four decades, it is typically the only option for homeowners to satisfy the requirement.

Since the NFIA’s enactment and adoption of its original implementing regulations, FEMA’s minimum floodplain development standards (44 C.F.R. §60.3) have focused on protecting people and property from flood damage, as a primary purpose of the development restrictions has been to minimize the payouts of flood insurance claims and other post-disaster relief by reducing damage in the first place. A staple of these minimum standards has been the requirement to elevate structures to or above the “base flood elevation” (BFE – the anticipated water level during a 100-year flood), whether through fill, posts and piers, or other structural methods. The minimum standards include special restrictions for “coastal high hazard zones,” known as V and VE zones, where new construction is prohibited waterward of Mean High Tide. While the V and VE standards have been in the NFIP minimum standards for decades, FEMA only recently issued V and VE zones for many coastal jurisdictions. The recent arrival of V and VE mapped areas has rendered numerous overwater structures in coastal areas non-conforming to FEMA’s minimum standards, and has effectively prohibited the development of new overwater structures in areas mapped V or VE except in very limited circumstances (by variance).

In the last two decades, FEMA has faced significant criticism and numerous lawsuits based on its alleged failure to integrate concerns under the Endangered Species Act (ESA) regarding threatened and endangered species and their habitat into its minimum development standards. These lawsuits have resulted in several region-specific biological opinions - in Florida, Washington, Oregon, and forthcoming

in California - restricting development in the floodplain with the intention of protecting various threatened or endangered species and their habitat that utilize or rely on floodplain areas. Concurrently, at the nationwide level, FEMA undertook national programmatic environmental review regarding the effects of the NFIP on threatened and endangered (T&E) species and their habitat. In the Final Programmatic Environmental Impact Statement (FPEIS) and corresponding Record of Decision (ROD), issued in 2018, FEMA implemented a "no take" requirement for all floodplain permits and map revisions. See prior Alert, [FEMA Adopts Significant Changes to the National Flood Insurance Program](#). Since then, FEMA has taken steps to enforce the "no take" standard as part of floodplain map revisions, but has done relatively little to integrate it into the minimum development standards enforced by NFIP-participating jurisdictions.

Current Request for Information

In January 2021, the Association of Floodplain Managers (ASFPM) and National Resources Defense Council (NRDC) filed a petition requesting that FEMA initiate rulemaking to update the minimum development standards and to develop floodplain maps that project future flood risks. In their petition, ASFPM and NRDC asserted that FEMA, through the NFIP, should set stronger minimum development standards "to protect people, property, and infrastructure against increased flood risk, and develop maps that depict the true extent of current and future flooding." ([ASFPM press release](#), January 6, 2021).

In response to this petition, FEMA issued the RFI [Docket ID: FEMA-2021-0024] through which FEMA is seeking public input on two topics:

- Comments/suggestions for revising the NFIP's minimum floodplain development standards "to better align with the current understanding of flood risk and flood risk reduction approaches. Specifically, FEMA is seeking input from the public on the floodplain management standards that communities should adopt to result in safer, stronger, and more resilient communities."
- Comments/suggestions on how the NFIP can better promote protection of and minimize any adverse impact to threatened and endangered species, and their habitats.

Although FEMA states in the RFI that there is no guarantee of further action, this RFI is poised as the first of a multi-step process to revise the NFIP's minimum floodplain development standards, and potentially FEMA's floodplain mapping standards.

The RFI focuses on community resilience and protection of T&E species. As to community resilience, FEMA "is seeking input from the public on the floodplain management standards that communities should adopt to result in safer, stronger, and more resilient communities." The RFI explains that FEMA hopes to better align these standards with "the current understanding of flood risk and flood risk reduction approaches." As to T&E species, the RFI explains that FEMA is seeking input "to promote protection of T&E species and their habitats," and is planning to "re-evaluate" implementation of the NFIP under the ESA at the national level, including completing a revised Biological Evaluation. Specifically, the RFI explains that FEMA will be "re-examining how NFIP actions influence land development decisions; the potential for such actions to have adverse effects on T&E species and critical habitats; and to identify program changes that would prevent jeopardy to T&E species and/or destruction or adverse modification of designated critical habitats as well as to promote the survival and recovery of T&E species."

The RFI includes 18 questions, many with numerous sub-questions, "the answers to which will assist FEMA in reviewing existing floodplain management standards and also assessing the influence of NFIP implementation on local floodplain development, which subsequently has the potential to impact threatened and endangered species and their habitats." Examples of these questions include:

- Is the "substantial improvement/substantial damage" standard, through which FEMA requires compliance with its minimum development standards for projects or repairs that exceed 50% of the pre-improvement value of the structure, the "best way to address risk for non-conforming buildings?"

- Should FEMA increase the elevations requirements in the minimum standards and, if so, to what levels? Will raising the elevation requirements increase the market value of elevated structures compared to the cost of elevation?
- Should FEMA develop higher standards for “critical actions,” which include “facilities which produce, use, or store highly volatile, flammable, explosive, toxic, or water-reactive materials; hospitals and nursing homes, and housing for the elderly; emergency operation and data storage centers; and power generating facilities”?
- Should FEMA apply the NFIP’s minimum standards to properties and structures outside, but “immediately adjacent to,” the mapped floodplain? Should FEMA expand the SFHA from the 100-year floodplain (i.e., the 1% annual chance flood) to a 500-year or 1000-year floodplain?
- What steps should FEMA take to reduce the disproportionate financial impact of multiple loss properties? Should FEMA consider regulatory changes for properties that have repetitive losses, or should these properties be targeted for managed retreat?
- What additional considerations should FEMA incorporate into the NFIP minimum floodplain management standards to promote the protection and conservation of T&E species and their designated habitat? If there are state-specific environmental requirements and/or standards, how could changes to the NFIP support or interfere with the current state regulatory environment?
- Are there any NFIP minimum floodplain management standards that currently cause hardship, conflict, confusion, or create an economic or financial burden? How could they be modified to reduce the burden while still meeting the NFIP’s objectives?
- Should FEMA base any NFIP minimum floodplain management standard changes on future risk and specifically on projections of climate change and associated impacts, such as sea level rise?
- Should the placement of fill material, defined as material used to raise a portion of a property to or above the Base Flood Elevation within the SFHA, be prohibited by NFIP minimum floodplain management standards?

FEMA is inviting the public to provide information – particularly detailed, specific examples - about their experiences under the existing NFIP minimum standards and to offer new ideas on how to best to manage floodplains and mitigate floodplain impacts going forward both for flood protection and the preservation of T&E species. As part of their analysis, FEMA is considering how floodplain regulations interact with existing federal, state and local programs.

Implications of FEMA Revisiting the NFIP’s Minimum Floodplain Development Standards

This RFI is both an opportunity and a potential concern. It is an opportunity because FEMA has not substantially revised its minimum floodplain development standards for nearly 50 years despite significant changes in land use regulations since then. FEMA’s minimum standards have done much to *try* to keep people safe from flood disasters, but decades of increasing claims (including from Hurricanes Katrina, Sandy, and Ida) have demonstrated that enabling residential development in flood prone areas, even when built in ways intended to avoid damage, may not be a successful long-term strategy for flood protection. At the same time, FEMA’s standards for coastal high hazard areas (V and VE zones) have the effect of significantly limiting important commercial and industrial development along our coast lines by limiting how ports and other maritime operations can use their properties. While the V and VE standards have been in the NFIP minimum standards for decades, the effects of their enforcement are just beginning to become apparent as FEMA only recently issued V and VE zones for many coastal jurisdictions. This RFI presents an opportunity to explain the apparently unintended consequences of FEMA’s standards.

At the same time, this RFI poses potential concerns because FEMA seems poised to add another layer of restrictions to land development – with little acknowledgment of the myriad layers that have developed at the federal, state and local levels over the last 50 years. The multitude of laws, programs and development standards layered on both private and public development – including ecological restoration projects – has created substantial gridlock even for projects that are intended to restore for the actions of the past. FEMA also seems poised to use the NFIP to expand the reach of the ESA from areas designated as critical habitat to the entire floodplain. For example, in Washington and Oregon, due to region-specific

biological opinions regarding the effects of the NFIP, every parcel within the 100-year floodplain is poised to be subject to additional restrictions for the benefit of T&E salmon species and Orca whales, while the actual designated habitat for these species represents only a small fraction of the floodplain.

This RFI and subsequent rule making *could* be an opportunity to modernize FEMA's minimum development standards in ways that protect people, property, and species *without* stifling communities, development, and industry where waterfront locations are core to their functioning. The information and comments provided to FEMA will be important in steering the direction of the subsequent rulemaking.

Written comments are due by December 13, 2021.

For More Information

Van Ness Feldman is at the forefront of developments in floodplain management and the NFIP. If you have questions, or are interested in assistance in developing responses to FEMA's RFI, please contact [Molly Lawrence](#), [Melinda Meade Meyers](#), or [Ani Esenyan](#).

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