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April 18, 2016

Ms. Harriet Tregoning
Principal Deputy Assistant Secretary for the Office of Community Planning and Development
U.S. Department of Housing and Urban Development
451 7th Street, S.W.
Washington, D.C. 20410

Dear Principal Deputy Assistant Secretary Tregoning,

On behalf of the National Association of Home Builders (NAHB), I would like to take this opportunity to update you on the status of the deliverables we discussed at our January 12 meeting on Executive Order (E.O.) 13690 and the new Federal Flood Risk Management Standard (FFRMS). I also want to again state that NAHB is gravely concerned that implementation of E.O. 13690 will impose costly and burdensome requirements on multifamily builders who use federal funds or mortgage insurance for new construction or substantial rehabilitation of apartment communities and offers recommendations to mitigate such effects.

As you know, affordability is a serious problem for families hoping to rent a quality apartment. NAHB's research shows that rents are rising faster than the rate of inflation and wage growth. Similarly, the Harvard Joint Center for Housing Studies estimates that 26.5 percent of rental households in 2013 were classified as rent burdened, paying more than 30 percent of their household income in rent. Additional supply is the solution to rising demand for rental housing, but this cannot occur if builders are saddled with overly restrictive requirements.

There is a well-established relationship between increasing construction costs and affordability for renters. In some cases, project owners can pass along costs in the form of higher rents. In other instances, particularly when the project is intended to serve low-to-moderate income families, costs can't be simply passed along to residents or recovered elsewhere, and the project will not be built. In either case, higher construction costs decrease affordability for renters due to higher rents or insufficient supply.

With the relationship between construction costs and affordability in mind, NAHB respectfully offers several recommendations to follow up on our previous discussions about implementation of E.O. 13690 and the FFRMS. In summary, NAHB strongly urges HUD to use its regulatory flexibility to exempt FHA-insured multifamily properties from the expanded floodplain management requirements of the FFRMS, recognize less-costly alternatives to elevating buildings, and provide a 12 month grandfathering period beyond the date any final rule is published. This letter also reiterates the need for reliable floodplain maps and closes with an update on the status of NAHB's analysis of current Section 221(d)(4) project locations. NAHB is pleased to continue working with HUD toward our mutual goal of providing much needed housing for America's low-and moderate-income families and looks forward to a workable solution for the implementation of E.O. 13690.

Applicability of the Federal Flood Risk Management Standard Should Be Limited

NAHB asserts that any future rulemaking to incorporate E.O. 13690 into agency programs should limit the application of the FFRMS to only those federally funded projects explicitly identified in the order itself and the accompanying final 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 (Implementing Guidelines). For example, both the order and the Implementing Guidelines provide HUD flexibility to exempt its multifamily mortgage insurance programs from the FFRMS and we strongly urge HUD to do so. Likewise, we encourage HUD to use any and all flexibility when implementing all aspects of the order to ensure HUD's rules do not make construction or substantial rehabilitation of HUD-insured or HUD-assisted multifamily housing cost prohibitive.

When the final Implementing Guidelines were released by the Mitigation Framework Leadership Group in October 2015, a distinction was made between "federal actions" and "federally funded projects."[1] This distinction is important, as it ultimately determines which projects must comply.

The long-standing E.O. 11988, Floodplain Management, ties its requirements to the 100-year floodplain and applies to all **"federal actions,"** defined as **"(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.**"[2]

Conversely, the Implementing Guidelines only apply to a subset of those federal actions, as they direct agencies to expand their floodplain management activities from the 100-year base flood elevation and flood hazard area to a higher vertical flood elevation and corresponding horizontal flood hazard area for "**federally funded projects,"** defined as "**actions where Federal funds are used for new construction, substantial improvement, or to address substantial damage to structures and facilities.**"[3] This is consistent with E.O. 13690, which is specifically intended "to create a new flood risk reduction standard for *federally funded projects.*"[4]

Projects insured under the HUD-FHA multifamily mortgage insurance programs, including Section 221(d)(4), have historically been required to comply with E.O. 11988 if they occurred within the 100-year floodplain because HUD determined they met the long-standing definition of "federal action." **However, the FHA multifamily mortgage insurance programs do not meet the definition of "federally funded projects" provided in the Implementing Guidelines. Therefore, projects insured by these programs are not required to meet the**

[1] 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. 81 pages. (October 8, 2015).
[2] 42 Federal Register at 26,951 (May 24, 1977). Emphasis added.
[3] *Id*. at 3. Emphasis added.
[4] 80 Federal Register at 6,425 (February 4, 2015). Emphasis added.

mandates of the FFRMS. HUD does not originate loans through these programs; rather it insures those loans through FHA.

Only those projects identified as "federally funded" must comply with the FFRMS. NAHB strongly believes HUD has the flexibility and authority to exempt all other "federal actions," including projects completed utilizing Section 221(d)(4) multifamily mortgage insurance and other federally-insured loan programs, from E.O. 11988 and the FFRMS if they occur beyond the 100-year floodplain.

This distinction is salient, as many of HUD's own regulations and public documents differentiate among programs which are "federally funded," "HUD-assisted" or HUD-insured mortgages. Some examples of these distinctions include:

- In 24 CFR 200.853 Applicability of physical conditions standards and physical inspection requirements:
    - Paragraph (a) lists "Housing *assisted by HUD* under the following programs." These include Section 8 project-based assistance, Section 202 Program of Supportive Housing for the Elderly (Capital Advances); Section 811 Program of Supportive Housing for Persons with Disabilities (Capital Advances); and Section 202 loan program for projects for the elderly and handicapped (including 202/8 projects and 202/162 projects).
    - Paragraph (b), however, lists "Housing with *mortgages insured* or held by HUD, or housing that is receiving insurance from HUD, under the following authorities…" These authorities include, but are not limited to, current MAP programs such as Section 220 Rehabilitation and Neighborhood Conservation Housing Insurance, Section 221(d)(4) Housing for Moderate Income and Displaced Families, and Section 231 Housing for Elderly Persons.

- The definition of "federal financial assistance" found at 24 CFR 1.2(e) states, "the term *Federal financial assistance* does not include a contract of insurance or guaranty." This definition pertains to Nondiscrimination in Federally Assisted Programs of HUD—Effectuation of Title VI of The Civil Rights Act Of 1964.
    - It its entirety, the paragraph reads, "The term *Federal financial assistance* includes: (1) Grants, loans, and advances of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. The term *Federal financial assistance* does not include a contract of insurance or guaranty."

- Similarly, HUD's document "Programs of HUD: Major Mortgage, Grant, Assistance, and Regulatory Programs" states:
    - **Community Development Block Grants (CDBG):** [are] *Federal funding* to help entitled metropolitan cities and urban counties meet their housing and community development needs.[5]
    - **Multifamily Rental Housing for Moderate-Income Families (Section 221(d)(3) and (4)):** [is] *Mortgage insurance* to finance rental or cooperative multifamily housing for moderate-income households, including projects designated for the elderly. Single Room Occupancy (SRO) projects are also eligible for mortgage insurance. Section 221(d)(3) and (4) are HUD's major insurance programs for new construction or substantially rehabilitated multifamily rental housing.[6]

Given these distinctions and the flexibility HUD has to implement the FFRMS, NAHB strongly urges HUD to exempt projects completed using FHA multifamily mortgage insurance programs from the requirements of the new standard. Such an exemption would preserve the intent of E.O. 13690 to further protect federally funded projects; honor the intended distinctions between "federal actions" and "federally funded projects;" reduce confusion regarding common programmatic descriptions and regulatory terms, such as "federal funding," "mortgage insurance," and "Federal financial assistance;" and maintain private responsibility for private actions. Most importantly, it would avoid unnecessary cost increases and allow the nation's home builders to continue to provide affordable housing in future 221(d)(4) insured projects.

Estimated Cost to Elevate Multifamily Structures within the Federal Flood Risk Management Standard Floodplain is Significant

As previously noted, the increased floodplain management requirements within E.O. 13690 and the FFRMS could greatly increase the costs associated with many new multifamily projects. HUD has indicated that projects using FHA multifamily mortgage insurance and federal funding for new construction/substantial rehabilitation that are located within the expanded floodplain (as determined by the freeboard value floodplain definition HUD has said it will adopt) could be required to be elevated two or three feet above the base flood elevation. This will add substantial costs to many projects that will make the housing they provide less affordable or infeasible to build.

Preliminary estimates suggest compliance with the new FFRMS will increase construction costs for new HUD-insured or assisted multifamily projects by approximately five percent. Anticipated cost increases are due to the cost of elevating the property's site pad and associated infrastructure two feet above the 100-year base flood elevation. NAHB's estimates include the cost of raising the building, parking areas and driveways. Considering the average profit margin on multifamily projects is only about two percent,[7] it is clear that any delays

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[5] U.S. Department of Housing and Urban Development. Programs of HUD: Major Mortgage, Grant, Assistance, and Regulatory Programs. 2016. At 9. Emphasis added.
[6] *Id*. at 66. Emphasis added.
[7] "Homebuilder and Remodeler Cost Breakdown" by Natalia Siniavskaia, NAHB Eye on Housing Blog; January 7, 2016. See http://eyeonhousing.org/2016/01/homebuilding-costs/?_ga=1.7542962.1073388023.1458141654.

associated with the new requirements, along with the increased construction costs, will pose a serious threat to housing affordability in communities across the country.

NAHB members are proud to provide safe and affordable rental housing to low-and-moderate-income families. We are concerned that the cost of complying with the new FFRMS will be significant and impair the ability to provide affordable housing – especially in those areas where it is most needed. NAHB strongly urges HUD to limit the applicability of the FFRMS, streamline the process that must be followed to comply, and produce risk-reward analyses that assess whether the cost of flood risk mitigation as required under the FFRMS is reasonable relative to the expected life of the project and the potential reduction in new affordable rental units. NAHB also suggests that such analyses be published for public comment prior to HUD issuing a proposed rule to implement the FFRMS.

A Grandfathering Provision Should be Provided

NAHB has expressed serious concerns to HUD about the challenges that the FFRMS could create for projects already in process. In most instances, the planning process takes years, during which the builder has invested significant dollars that could be lost if the expanded requirements necessitate substantial revision or make the project infeasible.

During our January 12 meeting, we urged HUD to provide a reasonable transition period and grandfathering provision for projects that are under development or in the process of being reviewed/approved. In response, HUD requested that NAHB recommend options for grandfathering provisions under a future flood risk management rule.

NAHB recommends that the final rule take effect one year after publication in the *Federal Register* for new pre-applications for FHA mortgage insurance and new awards of CDBG or HOME by state allocating agencies or municipalities. We believe 12 months provides the necessary time for builders and developers who have already initiated projects to submit pre-applications for FHA mortgage insurance or apply for HUD funding under current rules and for those considering prospective projects to determine whether those projects would still be economically feasible under the new FFRMS requirements.

Flood Risk Management Alternatives to Elevating Existing Structures Should be Recognized

It remains NAHB's strong contention that elevating existing structures above the FFRMS flood elevation in the course of substantial rehabilitation is highly infeasible and HUD should not propose any such requirement. Per HUD's request, NAHB has examined alternative means of mitigating flood risk in lieu of elevation and although we emphasize that NAHB is not endorsing the options outlined below, they are *preferable* alternatives to elevation. Of course, they will still have an impact on construction costs, which could have an adverse impact on affordability.

Clearly, elevating existing multifamily structures in the newly expanded floodplain would be cost prohibitive and impractical. Supporting this notion, in "FEMA Publication 551: Selecting Appropriate Mitigation Measures for Floodprone Structures" the Federal Emergency Management Agency (FEMA) notes "larger, heavier, more complex shaped buildings are more difficult and expensive to elevate," and, "multi-story structures are difficult to elevate."[8] And, in "Reducing Flood Risk to Residential Buildings That Cannot Be Elevated" FEMA recognizes, "oftentimes . . . elevation may not be an option" for buildings with certain structural characteristics including multi-family buildings.[9] NAHB agrees.

Additionally, the Implementing Guidelines note that the FFRMS is not meant to be an elevation standard, as they state, "The FFRMS is a resilience standard. The vertical flood elevation and corresponding horizontal floodplain . . . 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."[10]

Considering the infeasibility of elevating existing multifamily structures and the flexibility the Implementing Guidelines provide agencies for complying with the FFRMS using non-elevation approaches, HUD should permit reasonable alternative measures to manage flood risk for existing multifamily structures. Examples of non-elevation techniques include:

Outreach and Education

- Notifying building occupants and prospective purchasers / renters about the flood hazard, flood protection measures, and/or the natural and beneficial functions of floodplains.
- Posting floodplain elevation reference markers on the property and structure.

Mitigation

- Offsetting existing floodplain development through acquisition and preservation of currently vacant floodplain parcels.
- Mitigating stormwater runoff using low-impact development (e.g., rain gardens, rain barrels, green roofs, bioswales, etc.) and/or additional hydrologic storage (e.g., cisterns, larger retention basins, etc.).
- Improving existing drainage systems.
- Regularly inspecting and maintaining all drainage systems to ensure proper function.

Floodproofing

- Installing flood openings in the foundation and enclosure walls that allow automatic entry and exit of floodwaters to prevent collapse from the pressure of standing water.

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[8] FEMA Publication 551. Selecting Appropriate Mitigation Measures for Floodprone Structures. March 2007.
[9] FEMA Publication P-1037. Reducing Flood Risk to Residential Buildings that Cannot be Elevated." Sept 2015.
[10] Guidelines for Implementing Executive Order 11988, Floodplain Management, and Executive Order 13690, Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input. October 2015. At page 4.

- Elevating building utility systems to protect them from damage or loss of function from flooding.
- Using flood damage-resistant materials (e.g., non-paper-faced gypsum board, terrazzo tile flooring) for building materials and furnishings for portions of the building subject to flooding.
- Sealing floodprone portions of the structure using waterproof coatings / coverings to prevent floodwaters from entering.
- Installing a reinforced concrete floodwall or earthen levee around the structure.
- Filling the basement of the structure.
- Abandoning the lowest floor of a slab on grade structure.

The following publications and programs serve as valuable references for flood risk management alternatives to structural elevation:

- The National Flood Insurance Program Community Rating System Coordinator's Manual.
- FEMA Publication P-1037: "Reducing Flood Risk to Residential Buildings that Cannot be Elevated".
- FEMA Publication 551: "Selecting Appropriate Mitigation Measures for Floodprone Structures".
- The National Nonstructural Flood Proofing Committee.
  The National Flood Insurance Program High Water Mark Initiative.

Extent of Flood Hazard Area Associated with the Freeboard Value Approach is Unknown

For decades, FEMA's flood insurance rate maps (FIRMs) have depicted the 100-year floodplain in countless communities across the nation. Importantly, many federal, state, and local regulations are tied to the 100-year floodplain, and FEMA's maps have long provided property owners the necessary information regarding when and where they must comply with a multitude of rules, codes, and ordinances.

Now, because E.O. 13690 and the FFRMS have been established before maps identifying the new floodplains have been produced, that certainty is at risk. This is perhaps the most fundamental practical concern surrounding the expanded floodplain definitions. There are no maps that show the extent of the floodplain according to the freeboard value approach HUD has stated it will adopt.

Without maps of the freeboard value floodplain, there is no way for HUD or private land owners to know if a property lies within the newly defined floodplain or if the requirements of E.O. 11988 apply. The home building industry, just like all industries, relies on regulatory schemes that are predictable. And yet there is no way for a home builder or developer who may be considering taking options on a property to know with certainty that the land he or she is considering for purchase is within this undefined floodplain. This uncertainty leads to project delays and increased project costs which are ultimately passed on to home buyers and renters, decreasing housing affordability.

It is the responsibility of the Administration to make publicly available maps depicting the floodplain based upon the freeboard value approach that HUD has indicated it will use prior to implementing the FFRMS. Until then, all efforts to apply the FFRMS should cease.

In lieu of the necessary floodplain maps, NAHB is using the best available geographic information system (GIS) data coupled with the locations of existing HUD Section 221(d)(4) projects in order to assess how many projects could potentially be impacted by the new FFRMS. We greatly appreciate the assistance we received from the Office of Housing in providing the locations of FHA-insured new construction and substantial rehabilitation projects that received initial endorsements in the last five years.

We have retained an engineering/environmental consulting firm to analyze the locations of more than 800 Section 221(d)(4) projects initially endorsed by HUD in the last five years (FY 2010 through FY 2015). The floodplain mapping analysis will determine how many of these projects:

- Fall within the 100-year floodplain;
- Fall within the 500-year floodplain; and
- Are likely to fall within the expanded floodplain according to the freeboard value approach.

We expect the analysis to be completed in the near future.

Importantly, this analysis will not serve as a substitute for national maps or show the extent of the floodplain using the freeboard value approach or the 500 year floodplain. It will, however, provide a greater understanding of the potential impact of the new FFRMS on HUD's largest FHA mortgage insurance program used for the production of new multifamily housing.

Conclusion

NAHB reiterates its strong belief that HUD has the flexibility to exempt Section 221(d)(4) and other FHA-insured projects from the FFRMS and urges HUD to do so. Further, any rule designed to fulfill the requirements of E.O. 13690 should not be implemented until maps depicting the referenced floodplain and base flood elevations are produced and made available to the public.

Thank you for considering NAHB's recommendations. Please do not hesitate to contact me or NAHB staff members Owen McDonough (omcdonough@nahb.org) or Michelle Kitchen (mkitchen@nahb.org) if you have any questions or would like additional information. We would also appreciate the opportunity to meet with you again to discuss these recommendations.

Sincerely,

David L. Ledford

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cc:

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