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Docket ID FEMA-2015-0006

*Comments on the Draft Guidelines for Implementing Executive Order 13690 , Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input*

These comments are submitted in response to the notice in the Federal Register seeking comment on the proposed “*Revised Guidelines for Implementing Executive Order 11988, Floodplain Management,*” on February 5, 2015 (hereinafter referred to as the Revised Implementing Guidelines). 80 Fed. Reg. 6530.

Executive Order (EO) 13690 was issued by the President on January 30, 2015, to amend EO 11988. In addition, EO 13690 established the Federal Flood Risk Management Standard (FFRMS or Standard) and requires that federal agencies update their regulations and procedures to be consistent with the new FFRMS. The President’s stated objective in issuing EO 13690 is to “improve the Nation’s resilience to current and future flood risk.” EO 13690 further states that “it is the policy of the United States to improve the resilience of communities and Federal assets against the impact of flooding.” To achieve that goal, EO 13690 sets forth 3 new approaches to establish the floodplain, replacing the long-established 100-year base flood elevation, also referred to as the 100-year flood.

At the outset, it is important to note that it would be entirely appropriate, and good policy, to examine the 100-year BFE to ascertain whether that standard continues to provide the level of safety and protection that is needed to protect the millions of Americans who live and work in low lying areas. Physical infrastructure upgrades and flood risk reduction practices are occurring in numerous places around the country, and for the most part, those costs are being borne by non-federal sponsors. This includes state and local emergency management officials and floodplain managers, working collaboratively with their elected officials. If it is determined, after a careful review, that the 100-year standard does not now, nor will it in the future, provide the needed level of protection, then the determination of a new standard ought to include an open and transparent dialogue with state and local officials and all impacted stakeholders.

Regrettably, that did not occur here. Instead, critical features of the FFRMS were established behind closed doors with no public input. The comment period is merely an after-the-fact exercise that seeks input on how to implement the new Standard. No information has

been provided to explain the process for selection of the expanded vertical elevations and floodplain alternatives in EO 13690, nor has any fact-based analysis been revealed to justify or explain the new FFRMS levels of protection. Moreover, there has been no disclosure of any cost-benefit analysis. Finally, a careful review of EO 13690 and the FFRMS shows numerous inconsistencies and contradictions, setting up what threatens to be an unwieldy, burdensome and costly federal regulatory scheme. Such an outcome will lead to less, not more, protection for the nearly 50% of the country who live and work in the floodplain. As a consequence, the FFRMS and draft implementing guidelines must be set aside.

We urge instead that, consistent with the Presidential Policy Directive for a National Preparedness System (PPD-8), the Mitigation Framework Leadership Group (MitFLG), whose charter calls for the inclusion in its membership of state, local, tribal and other representatives, and for coordination with private industry and nongovernmental organizations, establish a process for stakeholder involvement in the development of a national strategy for reducing flood risk. Our members, many of whom are experts in preparing for and managing risk, are willing and able to work with the MitFLG to identify various alternative processes and to help assess their potential efficacy. The public interest – founded upon the goal of sustaining and improving public safety – requires that such decisions be made in an open and transparent manner.

#### I. General Comments: Approaches in Section 6(c) of the Revised Implementing Guidelines

EO 13690 and the FFRMS, and in particular, the specific approaches under section 6(c) to be used for the establishment of new vertical elevations and corresponding floodplains, were promulgated without comprehensive cost-benefit analysis. This is a profound failure given the sweeping applicability to newly increased numbers of Federal, state, local and wholly private actions. Establishment of an unjustified, arbitrary Standard is in direct conflict with Executive Order 13563, *Improving Regulation and Regulatory Review*, which specifies the need for our regulatory system to:

- Allow for public participation and an open exchange of ideas;
- Promote predictability and reduce uncertainty;
- Identify and use the best, most innovative, and least burdensome tools;
- Take into account benefits and costs, both quantitative and qualitative; and
- Ensure that regulations are accessible, consistent, written in plain language, and easy to understand.

There has been no public participation or open exchange of ideas on the specific approaches to establish FFRMS floodplains. The so-called “process for further soliciting and considering stakeholder input,” including the nationwide listening sessions and this public notice and comment opportunity, does not provide for official stakeholder engagement on the underlying, fundamental Standard components. In particular, no input was sought from those who will bear the burden of implementing the new Standard, including critical stakeholders from along the Gulf Coast, the Mississippi River and Tributaries, the Missouri and Ohio Rivers, and along the Sacramento Delta, until after the Standard was already developed. The new Standard, as a consequence of the multiple possible floodplain elevations and corresponding lateral

reaches, incomplete nationwide flood insurance mapping data, and extensive climate science uncertainties (especially in non-coastal areas), among other factors, introduces chaos to the relative predictability and certainty that has existed for nearly forty years under the single EO 11988 floodplain definitional standard.

In addition, there has been no disclosure of the science or technical knowledge upon which the Standard is based or the relationship between resource inputs and outputs relied upon in setting the Standard. State and local entities who will bear the burden of implementing the Standard will find no clear rationale supporting it. The Congressional Research Service in its March 25, 2015, *In Focus* write-up, found that there is no evaluation of the Standard's anticipated effects on flood resilience, the floodplains themselves, or the distribution across stakeholders of costs and benefits in the near term and the long term. If some are forced to leave the floodplain as a consequence of the Standard, they will occupy other locations with incremental costs, unknown risks and environmental consequences. The array of alternative impacts could be less desirable in the short-term and long-term than floodplain use without the new Standard.

Fundamental to any notion of cost-benefit analysis is that useful alternatives are evaluated in terms of their contributions to a set of objectives. Such analysis would consider what is "practicable," defined in the Revised Implementing Guidelines as "capable of being done within existing constraints." The test of what is practicable depends upon the situation and "includes consideration of the pertinent factors, such as environment, cost or technology." Unfortunately, there is no discussion of alternatives to the FFRMS, including alternatives for restructuring or improving incentives for floodplain use and occupancy.

The President's *State, Local, and Tribal Leaders Task Force on Climate Preparedness and Resilience*, established by E.O. 13653 and co-chaired by the White House Council on Environmental Quality (CEQ) and White House Office of Intergovernmental Affairs, made recommendations in a November 2014 report related to "the needs of communities nationwide that are dealing with the impacts of climate change." Recommendation 6.2 of the report, that the Federal government should reward resilient investments and consider the benefits of ecosystem services in cost-benefit analysis, specifically suggests the need to "adjust cost-benefit methodologies across Federal programs to fully value the benefits of front-end investments in resilient planning and design, including in ecosystem services, green infrastructure, and post-disaster rebuilding of damaged buildings." The report, published just nine weeks in advance of EO 13690 issuance and identified by the Administration as a pivotal document supporting the need for the FFRMS, is dismissive of contemporary cost-benefit analysis by the Federal government because it "can fail to adequately consider the long-term and accrued economic, environmental, and societal benefits of climate-resilient investments." This portrait of cost-benefit analysis and the decision to promulgate EO 13690 and the FFRMS without rigorous analytic review would trade an alleged shortsightedness for, potentially, an even greater blindness by rejecting an accounting of effects whether quantified, monetized, time-discounted or merely "described."

Numerous critical data and information gaps raise questions about the fundamental practicability of the EO and Standard. No existing mapping sources are suitable to form the

basis of the FFRMS floodplain as a consequence of: (a) the degree of uncertainty in the underlying data (e.g., FEMA 500-year floodplain boundaries); (b) the lack of sufficient geographic coverage; and (c) the lack of incorporation of the effects of climate change on flood hazards. Moreover, available and actionable science does not support the development of a single, nationwide, riverine flood risk management standard that incorporates climate change. The inability to consistently estimate future climate-impacted riverine flooding and the difficulty associated with accounting for future uncertainties in coastal flood modeling are significant impediments for effective implementation of the FFRMS, with or without the alternate Freeboard and 500-year Elevation approaches.

Given these significant shortcomings, the FFRMS should be replaced with an approach that is fact-based, transparent, analyzed for net costs and benefits and closely coordinated with affected state, local and private stakeholders.

## II. Scope and Applicability

### A. Application to Federal Investments

EO 13690 states that the new flood risk reduction standard was created for “federally funded projects.” (Section 1). It further provides that the higher vertical elevation and corresponding horizontal floodplain “ensure that **projects funded with taxpayer dollars** last as long as intended.” *Id.* (emphasis added). Similarly, the press release issued by CEQ on January 30<sup>th</sup> to announce the new EO and FFRMS states that the EO requires “all Federal investments in or affecting floodplains to meet higher flood risk standards.” (CEQ Fact Sheet: Taking Action to Protect Communities and Reduce the Cost of Future Flood Disasters). In addition, the fact sheet states that “the new flood standard will apply when Federal funds are used to build, or significantly retrofit or repair, structures and facilities in and around floodplain.” *Id.* During its recent series of listening sessions, FEMA has echoed this view asserting that “EO 13690 does not apply to private investments in structures, facilities, or homes.”

However, the Standard itself, which must be incorporated into Federal agency regulations and procedures, is much broader. “The FFRMS applies to **all** Federal Actions.” (FFRMS page 2, emphasis added) In turn, a Federal Action is defined as “any Federal activity including: “(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 use resource planning, regulating, and licensing activities.” (FFRMS pp. 2-3). Any assertions that EO 13690 and the FFRMS apply only to Federal investments and do not apply to private investments are belied by the foregoing passage. The clear, unequivocal language in the FFRMS expressly states that it applies to all Federal actions. This could include the issuance of Federal permits, licenses and approvals, which are predicated upon private investment dollars. In addition, as drafted, the FFRMS appears to be applicable to all grants, housing loans, federally-backed mortgages, highway aid, consultation requirements under Section 7 of the Endangered Species Act, and numerous other programs, irrespective of the 50% “substantially improved” proviso. (FFRMS p. 3)

**Recommendation:** The Implementing Guidelines must be amended to specify what federal programs are subject to the FFRMS, and importantly, to what programs, and under what conditions, the FFRMS does not apply. The inherent inconsistency between the assertion that EO 13690, modifying EO 11988, applies only to federal investments, and the broad application of the FFRMS to all federal actions, must be rectified. In addition, delete page 9, lines 302-304: “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.”

#### B. Assertion that the Guidelines are Advisory

The draft Guidelines claim to be advisory. Line 193 states: “These Guidelines are advisory. They provide broad guidance in the implementation of the Order and offer a common point of reference for each agency to prepare implementing procedures for compliance with the Order.” Line 217 similarly states: “These Guidelines are advisory. To the extent permitted by law and consistent with their statutory authority, each agency shall draft or update their own rules and regulations.” Thereafter, the Guidelines contain such directives as “shall,” “must,” and “will.” Therefore, any suggestion that the Guidelines are advisory is limited to which alternative an agency may choose to comply with EO 11988, as amended by 13690 and the FFRMS. Simply put, notwithstanding the characterization of the Guidelines as advisory, the EO and the FFRMS impose new substantive requirements. Our concern is further heightened because, despite the mandatory nature of these requirements, during the FEMA listening sessions, attendees were advised that agencies “may” seek public comment on draft implementing procedures.

**Recommendation:** Explicitly state that compliance with the Guidelines, along with the FFRMS, is voluntary. In the absence of such a statement, any proceeding by an agency to implement these new mandatory requirements would be considered a rule and therefore must be subject to the notice and comment requirements of the Administrative Procedure Act. This recommendation is supported by the clear language of the APA and the case law interpreting it. The APA defines a “rule” to be “the whole or any part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy.” 5 U.S.C. § 551(4). See also, *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir 2000). As such, the final Revised Guidelines must require agencies to adhere to the APA in updating their own rules, regulations, and procedures to implement the requirements of the revised EO and the FFRMS. This requirement applies irrespective of whether an agency used an APA process to implement EO 11988.

#### C. Grandfathering Provisions

Studies and projects conducted under the Corps of Engineers Civil Works’ program often take many years to complete. There are many instances where a nonfederal sponsor has over a long period of time expended significant resources, including for property acquisition and cost-shared infrastructure investment. Nonfederal sponsors choosing to enter into partnership with the Corps of Engineers do so with an understanding of the human and financial resources they are committing to expend. The nonfederal sponsor’s decision is made in part based on requirements

in place at the time a partnership agreement is executed. The FFRMS changes those requirements and essentially alters the terms of existing contractual arrangements.

**Recommendation:** Explicitly state that the FFRMS does not apply to the Corps of Engineers' Civil Works studies or projects that are currently underway in partnership with nonfederal sponsors. This would include projects cost-shared by the Inland Waterways Trust Fund and the Harbor Maintenance Trust Fund. Similar provisions may be needed for other federal agency programs where a cost-sharing nonfederal partner is involved.

D. Explicitly State that the FFRMS does not apply to any aspect of the NFIP

During the FEMA listening sessions, attendees were advised that the Standard will not affect flood insurance premiums or the requirements for participation in the NFIP, and that there will be no change to: community floodplain management requirements, FEMA's flood mapping standards, FEMA's levee accreditation regulations (44 CFR 65.10), or rating/pricing practices of the NFIP. However, such changes are not precluded by the FFRMS, and indeed, coverage requirements could extend to areas not previously required to purchase flood insurance. In addition, those areas could be subject to new building restrictions.

**Recommendation:**

Pg. 6, Line 193: At the end of the first sentence, after, "These Guidelines are advisory" insert, "and are not to be applied to any aspect of the NFIP."

E. Explicitly state that the FFRMS does not apply to the Corps of Engineers' PL 84-99 Civil Emergency Management Program and its Levee Rehabilitation and Inspection Program

Application of the FFRMS to the Corps' Public Law 84-99 program is uncertain, fueled by inconsistent statements during the listening sessions. Similarly, assurances that "the FFRMS is not expected to impact Public Law 84-99 or emergency actions" are not sufficient. In fact, there is a very real concern that applying FFRMS could prevent critical rehabilitation from occurring after a flood event, resulting in an increased and unnecessary threat to life, public safety and property. We recommend an affirmative statement precluding application of the FFRMS so as not to interfere with the efficient and expeditious rehabilitation of damaged levees and other flood control works. This is necessary to assure that flood protection benefits already in place are not reduced, or entirely lost as agencies implement the FFRMS.

**Recommendation:**

Pg. 6, Line 193: Insert after the first sentence, "These Guidelines do not apply to any aspect of the Corps of Engineers Civil Emergency Management Program including its Rehabilitation and Inspection Program under Public Law 84-99."

F. Include in implementation of the FFRMS a fourth alternative that requires the selection of a local, state or tribal approach when it is in place

Across the nation, numerous cities, towns and counties have established their own floodplain management plans as they work diligently to protect their communities. Many have

formally adopted these plans through an open and transparent public process involving communication of current and future flood risk. Unfortunately, these efforts are not recognized by the FFRMS. To help achieve the Administration’s stated objective of supporting communities, and to ensure that locally led flood risk management efforts are not usurped by Federal regulation, the implementing guidelines must recognize these local efforts.

**Recommendations:**

Pg. 3 Line 88 – 101, and Pg. 23, Line 795: After the “500-year” Elevation Approach insert the following: Local, State or Tribal Approach – The elevation and flood hazard area resulting from the standard established through adoption by a local, state or tribal government, developed through an open and transparent public process involving communication of current and future flood risk, that is equal to or greater than the area subject to a one percent or greater chance of flooding in any given year.

Similar changes will need to be made throughout the Guidelines to require selection of the local alternative.

**G. Require the MitFLG to develop a transparent and efficient process by which to expeditiously resolve conflicts over Standard implementation**

Numerous times during the recent FEMA listening sessions, attendees expressed concern about the method by which interagency conflicts over Standard implementation would be resolved. It was not apparent during the sessions that a clear, effective approach to this problem had been formulated. Balancing flexibility and consistency in application of the Standard, like most any other government standard, will be burdensome for the MitFLG and individual implementing agencies. It will be difficult, too, for state, local and private entities to comply in a predictable, cost-effective fashion.

**Recommendation:**

At the appropriate place in Section 6, require the MitFLG to develop a process to resolve interagency implementation conflicts. Ensure that this process is practicable and effective prior to the date by which requirements of the Standard take effect.

**III. Water Resources Council**

The Water Resources Council (WRC or Council) may not lawfully conduct federal business, because Congress took purposeful action to defund this body. Further, as explained below, it is not lawful to use the funds or resources of other agencies to conduct Council business. In addition, there are specific procedural and public participation requirements in both the Council’s organic statute and regulations and in other laws of general applicability. The Administration has effectively ignored those requirements and, in so doing, has violated federal law and the rights of water resources stakeholders.

## A. Background

EO 13690 mandates that the Water Resources Council, upon the recommendation of the MitFLG, shall issue amended Guidelines to provide guidance to agencies to implement amended EO 11988 consistent with the FFRMS. (Section 3b). EO 13690 directs agencies to consult with the WRC when issuing or amending existing regulations and procedures to comply with the EO. (Section 3c). The EO further provides that the Council shall issue amendments to the Guidelines as warranted (section 4a), that it shall update the FFRMS every 5 years (section 4b), and that it shall carry out its responsibilities in consultation with the MitFLG (section 5d).

The Council was established by the Water Resources Planning Act of 1965, Publ. Law 89-80, as amended (42 U.S.C. § 1962a). In setting forth the powers and duties of the Council, the Act provided for the authority to meet, 42 U.S.C. § 1962a-4(a); the requirement that all appropriate papers and records be made publicly available, 42 U.S.C. § 1962a-4(c); and the ability to request assistance, on a reimbursable basis, from personnel at other agencies in order to carry out the functions of the Council. 42 U.S.C. § 1962a-4(d). The Act further provided an authorization for appropriations to fund the WRC. 42 U.S.C. § 1962d. Finally, the Act authorized the Council to make such rules and regulations as necessary to carry out the provisions of the Act. 42 U.S.C. § 1962d-1.

The rules and regulations governing the WRC, at 18 C.F.R. § 701.1, et seq., describe how the Council is to discharge its duties and responsibilities. Of importance here are the provisions governing decisions of the Council, at 18 C.F.R. § 701.53. Members may make decisions by direct vote at Council meetings or by written communication, often referred to as notational voting. Moreover, the regulations provide that “official decisions of the Council shall be of record,” and that such decisions shall be recorded in minutes of duly called meetings, 18 C.F.R. 701.57. Within the Council, the regulations provide for an Interagency Liaison Committee, whose function is to provide a forum for discussion among representatives of each Council member of agenda items prior to Council meetings. All such meetings must be open, except where privileged information is discussed, 18 C.F.R. § 701.54(f). Notably, the regulations provide that all WRC records and informational materials shall be available to the fullest extent of the law, consistent with the Freedom of Information Act, (5 U.S.C. § 552), and will be promptly furnished to the public, 18 C.F.R. § 701.200. The regulations go even further, encouraging the “widest possible distribution of information” at no cost. 18 C.F.R. § 701.203.

These requirements, implemented in 1978 (43 Fed. Reg. 25945, June 15, 1978), correspond to the requirements of the Government in the Sunshine Act, enacted in 1976, Publ. Law 94-409. 5 U.S.C. § 552b. As explained by the Administrative Conference of the United States, the Sunshine Act focused specifically on the transparency of multi-member agencies, of which the Council is one. The Sunshine Act requires notice of public meetings, in the Federal Register, at least seven days in advance, and mandates that meetings be open to public observation. Limited exceptions where meetings may be closed include in cases where it would be in the interest of national security, in order to prevent disclosure of information compiled for law enforcement purposes, and other enumerated reasons. 5 U.S.C. § 552b(3)(b). The presumption is that meetings will be open to the public, particularly where the subject involves rulemakings and similar policy considerations.



The resurrection of the Water Resources Council and the exercise of its authorities violate both federal appropriations laws and the Government in the Sunshine Act.

#### B. Lack of Appropriations for the Water Resources Council

The Water Resources Council last received federal appropriations in 1982.<sup>1</sup> According to the U.S. National Archives and Records Administration, the Council “terminated” October 31, 1982. <http://www.archives.gov/research/guide-fed-records/groups/315.html>. In addition, the Congressional Research Service states that the “WRC became inactive in 1983.” (E.O. 13690 and the Federal Flood Risk Management Standard, March 25, 2015, by N. Carter, R. King, and F. McCarthy). While there is no evidence that the Council itself was statutorily abolished, nor any evidence that the Council’s implementing regulations were repealed, the Council has no authority to conduct any business because it has received from the Congress neither authorization nor appropriations. There is an absence of authority to appropriate funds as required by section 1962d of the Water Resources Planning Act. *See, e.g.*, 42 USCS § 1962d for the history of the Congressional renewals of the authority to appropriate funds. In addition, no appropriations have been made available to fund activities of the Council in more than three decades. According to fundamental principles of federal appropriations law, the Water Resources Council has no authority to expend any funds.

The U.S. General Accountability Office (GAO) provides a comprehensive analysis of federal fiscal law in what is known as the “Red Book.” United States General Accountability Office, Office of the General Counsel, Principles of Federal Appropriations Law, Third Edition, January 2004. <http://www.gao.gov/legal/redbook/redbook.html>.

As a starting point, GAO points to the firmly established proposition that “Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed.” 13 Op. Att’y Gen. 288, 292 (1870). Under the Constitution, Congress makes the laws and provides the money to implement them; the executive branch carries out the laws with the money Congress provides. Under this system, Congress has the “final word” as to how much money can be spent by a given agency or on a given program. Congress may give the executive branch considerable discretion concerning how to implement the laws and hence how to obligate and expend funds appropriated, but it is ultimately up to Congress to determine how much the executive branch can spend.

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<sup>1</sup> The Council was last authorized in 1978, Pub. L. 95-505. Appropriations were provided through various measures after that: Pub. L. 96-367, 94 Stat. at 1345, Oct. 1, 1980; Pub. L. 97-12, 96 Stat. at 34, June 5, 1981; Pub. L. No. 97-35, § 1807(a), 95 Stat. at 765, Aug. 13, 1981; Pub. L. No. 97-88, 95 Stat. at 1148, Dec. 4, 1981; Pub. L. No. 97-276, 96 Stat. at 1191, Oct. 2, 1982), with no further funding after that. Of note, in 1982, there was a proposal to provide funding through FY84 subject to enactment of a National Board on Water Resources Policy, to which would be transferred all unobligated funds of the Council. An amendment was passed on the Senate floor to eliminate any funds for the Council, along with the termination of its activities or transfer to the new board. It was expected that the matter would be further discussed in conference. 128 Congr. Record 25705, Sept. 29, 1982. No further funding was provided and legislation to establish the board was not enacted.

One of the primary appropriations laws is the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and apportionments, 31 U.S.C. § 1517(a). The key provision of the Antideficiency Act is 31 U.S.C. § 1341(a)(1):

“(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

“(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or “(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.”

As GAO points out, the importance of the Antideficiency law is underscored by the fact that it is the only one of the fiscal statutes to include both civil and criminal penalties for violation. Its importance, when combined with other funding statutes, is reflected in an authoritative 1962 decision which stated the following:

“These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made.” 42 Comp. Gen. 272, 275 (1962).

The Administration’s actions to resurrect the Water Resources Council and the directive set forth in EO 13690 to issue amended guidelines to implement the FFRMS are contrary to basic principles of federal appropriations law, as articulated above. The Congress has provided no appropriations to fund any activities of the Council. Nor has the Administration requested any funds to carry out these activities.

During the recent series of listening sessions conducted by FEMA to solicit input on how to implement the new FFRMS, FEMA attempted to dismiss these concerns by claiming that the eight principal members of the Council were paid by their individual agency appropriations. It is accurate to state that the designated members of the Council participate in their *ex officio* capacities without additional pay. However, this is not a complete response to those concerns. Congress has not authorized or provided any funds to support any other federal agency employees in the exercise of any authorities carried out in accordance with the Water Resources Planning Act (42 U.S.C. §§ 1962a, 1962d), the rules and regulations of the Council, or any other laws, rules, regulations, and orders applicable to the Water Resources Council (18 C.F.R. §

701.76). Moreover, the Act provides that the Council may only utilize officers and employees of other departments or agencies to carry out the provisions of the Act “**on a reimbursable basis.**” 42 U.S.C. § 1962d-3 (emphasis added). It would be impossible to meet that condition here because no appropriations were provided in the first place. As a result, any activities in furtherance of carrying out authorities granted to the Water Resources Council must cease until Congress determines to provide appropriations to carry out its authorized purposes.

C. The Water Resources Council Must Comply with the Requirement of the Government in the Sunshine Act

The Water Resources Council’s enabling legislation, 42 U.S.C. § 1962a, and its implementing regulations, 18 C.F.R. § 701.1, et seq., govern the manner in which it conducts its activities. Council meetings must comply with the open meeting requirements of the Government in the Sunshine Act and council records must be publicly available. See 5 U.S.C. § 552b and 42 U.S.C. §§ 1962a-4(c). Ample evidence exists to demonstrate that in the past, when the Council received appropriations and functioned properly under the law, it conducted its activities consistent with the open meeting requirements of the Sunshine Act, and, significantly, it conducted open meetings in accordance with its own regulations even before the enactment of the Sunshine Act. See, 43 Fed. Reg. 32206 (July 25, 1978)(Notice of Council Members Meeting, a regular meeting of the Council). See also, 34 Fed. Reg. 11607 (July 15, 1969)(Notice of Public Hearing); 40 Fed. Reg. 26739 (June 25, 1975)(Meeting Notice: Standing State Advisory Committee); 43 Fed. Reg. 6030 (February 10, 1978)(Notice of Adoption of Guidelines to Implement EO 11988, with, importantly, a section-by-section analysis); 45 Fed. Reg. 76682 (November 20, 1980)(Final Rules).

At this juncture, it is unclear whether the Water Resources Council has convened to consider any matter related to carrying out its statutory authorities under the Water Resources Planning Act, or any other discussion related to EO 11988, EO 13690 or the FFRMS. No public information has been provided as is required for such meetings under the Sunshine Act. In accordance with the requirement of the Act, we urge the Administration to make publicly available all transcripts, recordings or minutes of any such meetings. 5 U.S.C. § 552b(h)(1). Even if it were determined that any meetings could be closed to the public in accordance with the narrow provisions of the Act, 5 U.S.C. § 552b(c), which decision would appear contrary to those exemptions, the existence of the meeting itself, and the reasons supporting closure, must be made publicly available. 5 U.S.C. § 552b(d)(3). In such instance, a list of all persons attending the meeting, along with their affiliation, must be provided. Id. It is worth noting that the burden is on the government to sustain its actions under the Sunshine Act and, should litigation be necessary in order to obtain information that should be publicly available, reasonable attorney fees and costs may be assessed against the government. 5 U.S.C. §§ 552b(h) and (i).

Regrettably, this is not the first time that the requirements of the Sunshine Act have been disregarded. When the Water Resources Council was convened to issue the final Principles and Requirements, we raised our concerns directly with the CEQ that it was in violation of the public notice requirements of the Sunshine Act. Although conversations with CEQ staff confirmed that meetings occurred, no public notices were provided, and requests for any information were rejected. As stated at that time, [g]iven this dearth of information, it is impossible to determine

whether the WRC was properly convened or whether it followed any sort of rules or procedures in issuing the Final P&R.” As stated then, and unfortunately it still holds true today, “[t]his astonishing lack of transparency undermines the stability of the planning process and is patently unfair to non-federal sponsors and the public alike.”

For any future meetings of the Council that are contemplated, we again urge that such meetings be conducted in accordance with the Sunshine Act and the Council’s regulations.

Thank you for the opportunity to provide comments. We look forward to continued involvement in the discussions to address critical risk reduction measures nationwide.

Sincerely,

National Waterways Conference, Inc.  
National Levee Issues Alliance  
Missouri and Associated Rivers Coalition (MOARC)  
Mississippi Valley Flood Control Association  
Upper Mississippi, Illinois, and Missouri Rivers Association  
Big River Coalition  
Fort Bend Flood Management Association  
Fort Bend Levee Improvement District 2  
Kansas City Industrial Council  
Little River Drainage District  
Mississippi Levee Board  
Missouri Levee and Drainage District Association  
Oklahoma Department of Transportation  
Ouachita River Valley Association  
Pacific Northwest Waterways Association  
Red River Valley Association  
Red River Waterway Commission  
Sny Island Levee Drainage District  
St. Francis Levee District  
Tensas Basin Levee District  
Texas Water Conservation Association  
Yazoo Mississippi Delta Levee Board