



Billing Code [9110-12-P]

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

Docket ID FEMA-2011-0030

Flood Hazard Determinations (including Flood Elevation Determinations) – Change in Notification and Appeal Procedures

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: Pursuant to the Flood Disaster Protection Act of 1973, the Federal Emergency Management Agency (FEMA), via the Federal Insurance Administrator, must publish flood elevation determinations for comment in the Federal Register. Currently, FEMA publishes base flood elevation (BFE) determinations for Flood Insurance Studies (FISs, also referred to as flood studies) as proposed and final rules, and Letters of Map Revision (LOMRs) that include changes to the technical content of a Flood Insurance Rate Map (FIRM) or FIS as interim and final rules. FEMA now plans to publish these determinations as notices rather than as rules. This new procedure will not affect the notice or appeals process for these determinations. FEMA also plans to publish other types of flood hazard determinations in the Federal Register with the opportunity for comment and appeal. These other types of flood hazard determinations include new and modified Special Flood Hazard Areas (SFHAs) and new or modified regulatory floodways.

DATES: The changes in procedure announced in this notice are effective December 1, 2011. The new procedure applies to all proposed flood hazard determinations including

proposed flood elevation determinations published in the Federal Register on or after December 1, 2011.

ADDRESSES: The docket for this notice is available at www.regulations.gov under Docket ID FEMA-2011-0030. You may also view a hard copy of the docket at the Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Lora Eskandary, Program Specialist, FEMA, 1800 South Bell Street, Mail Stop 3030, Arlington, VA 20598, at lora.eskandary@dhs.gov or (202) 646-2717. You may also contact the FEMA Map Information exchange (FMIX) toll free at 1-877-336-2627 (877-FEMA MAP) for information.

SUPPLEMENTARY INFORMATION:

Change in Procedure for Base Flood Elevation (BFE) Determinations and Letters of Map Revision (LOMRs)

The Federal Insurance Administrator must propose flood elevation determinations by publication of the proposed flood elevation determination for comment in the Federal Register, as well as via notification by certified mail to the Chief Executive Officer (CEO) of the community, and publication in a prominent local newspaper at least twice during the ten-day period immediately following the notification of the CEO. See 44 CFR 67.4(a). The proposed determination is appealable pursuant to 44 CFR 67.8. The Federal Insurance Administrator must provide final notice of the flood elevation determination as follows: “The Federal Insurance Administrator's notice of the final flood elevation determination for a community shall be in written form and published in the

Federal Register, and copies shall be sent to the CEO, all individual appellants and the State Coordinating Agency.” See 44 CFR 67.11. A “flood elevation determination” is “a determination by the Federal Insurance Administrator of the water surface elevations of the base flood, that is, the flood level that has a one percent or greater chance of occurrence in any given year.” See 44 CFR 59.1. These elevations are used to determine floodplain management ordinances, set flood insurance rates, and to determine whether mandatory purchase of flood insurance is required in order to obtain a federally-backed mortgage on a home.

Currently FEMA publishes base flood elevation (BFE) determinations for Flood Insurance Studies pursuant to 44 CFR 67.4 and 67.11 as proposed and final rules. However, there is no legal requirement to publish them as rules, and FEMA now plans to publish them as notices, which are administratively less burdensome. The background and legal authority for this change in procedure is explained below.

Sections 67.4 and 67.11 of Title 44 of the Code of Regulations (CFR) were initially promulgated in 1974, pursuant to section 110 of the Flood Disaster Protection Act of 1973, Public Law 93-234, which amended the National Flood Insurance Act of 1968. Section 110 states “In establishing projected flood elevations ... [the agency] shall first propose such determinations by publication for comment in the Federal Register, by direct notification to the chief executive officer of the community, and by publication in a prominent local newspaper.” See 42 U.S.C. 4104. The rule implementing section 110 was promulgated by the Department of Housing and Urban Development (HUD), as HUD was the agency responsible for the National Flood Insurance Program (NFIP) before the NFIP was transferred to FEMA in 1979. The original rules appeared in

HUD's regulations at 24 CFR 1917.4 and 1917.11. The preambles to the proposed and final rules which added sections 1917.4 and 1917.11 to Title 24 CFR did not indicate whether the proposed and final flood elevation determinations would be published as notices or rules. The preamble to the proposed rule simply stated "[t]he proposed new Part 1917 would establish an administrative procedure for reviewing appeals of flood elevation determinations made in the National Flood Insurance Program." See 39 FR 12031 (Apr. 2, 1974). No further explanation was given.

Sections 1917.4 and 1917.11 were finalized as proposed on July 24, 1974. The preamble to the final rule noted that one commenter had requested that the notification by newspaper could be more effective by increasing the number of days of publication. HUD did not alter the proposed regulatory text, however, because the publication standard had been set by the Flood Disaster Protection Act and could not be altered by regulation. Other commenters requested that communities who entered the flood insurance program prior to the passage of the Flood Disaster Protection Act of 1973 be allowed to appeal past flood elevation determinations. Again HUD declined to alter the proposed regulatory text because the Act did not apply retroactively. Further, HUD noted "an attempt to include such regular flood insurance program communities in this [*sic*] new appeals procedures could curtail the right of judicial review available to them under the National Flood Insurance Act of 1968 and Title 5 of the United States Code." See 39 FR 26904 (July 24, 1974). There were no other comments addressing part 1917, and the preamble did not mention whether the flood elevation determinations would be published as notices or as rules in the Federal Register.

The text of sections 1917.4 and 1917.11 has not changed since they were finalized in 1974.¹ In 1979 these sections were transferred to 44 CFR sections 67.4 and 67.11, respectively, when the NFIP was transferred to FEMA. In 1981, an editorial note was added at the end of 44 CFR 67.11, stating “Note: For the list of communities issued under this section, and not carried in the CFR, see the List of CFR Sections Affected and appearing in the Finding Aids section of this volume.” A similar note was added to section 67.4 in 1989, stating “Note: For references to FR pages showing lists of flood elevation determinations, see the List of CFR Sections Affected appearing in the Finding Aids section of this volume.” The notes have since been revised to direct the reader to the Finding Aids section “of the printed volume and on GPO Access.”

Since the applicable regulations were promulgated in 1974, base flood elevation determinations listed in feet or meters for specific localities have been published in the Federal Register as proposed and final rules. Neither the statute nor the regulations indicate that these elevations must be published as rules, however. Both the statute (42

¹ The text reads as follows:

§ 67.4 Proposed flood elevation determination.

The Federal Insurance Administrator shall propose flood elevation determinations in the following manner:

- (a) Publication of the proposed flood elevation determination for comment in the Federal Register;
- (b) Notification by certified mail, return receipt requested, of the proposed flood elevation determination to the CEO; and
- (c) Publication of the proposed flood elevation determination in a prominent local newspaper at least twice during the ten day period immediately following the notification of the CEO.

§ 67.11 Notice of final determination.

The Federal Insurance Administrator's notice of the final flood elevation determination for a community shall be in written form and published in the Federal Register, and copies shall be sent to the CEO, all individual appellants and the State Coordinating Agency.

U.S.C. 4104) and the regulations (44 CFR 67.4, 67.11) state only that the agency must publish a “notice.” Section 67.3 also refers to a notice, not a rule. It states that the official docket must include “[a] copy of the notice of the proposed flood elevation determination published in the Federal Register.” See 44 CFR 67.3(d).

Nowhere is it mentioned that the flood elevation determinations were to be published as rules. The extensive Congressional hearings from October 1973 regarding the proposed legislation focus on notice of the elevation determinations, and do not mention anything about issuing them as regulations. See Flood Disaster Protection Act of 1973 hearings, Ninety-third Congress, first session, on S. 1495 and H.R. 8449, October 31, 1973. A major issue at the hearings focused on the desire for communities to have notice of the flood elevation determinations and an opportunity to contest them – to be part of the administrative process, to ensure that communities have the opportunity to present their own evidence of flood elevations that may contradict the Federal government’s findings. There was a concern that if the Federal government acted independently, without input from the impacted communities, there would be a violation of due process because the government would be forcing residents to buy flood insurance without any access to the decision process. These concerns were remedied by the final legislation, which allowed for notice and appeal, allowing for communities to present scientific and technical data regarding the proposed flood elevations. But whether the proposed flood elevations needed to be issued as regulations was never mentioned in the extensive hearings.

The evidence indicates that publication in the Federal Register, which is just one means of the required notice (the other two being letter to the CEO and publication in the

local newspaper), was being used to ensure all stakeholders had notice, since publication of a document in the Federal Register is considered constructive notice to anyone subject to or affected by the document so published. See 44 U.S.C. 1507. Viewing this issue in context of the hearings, and within the context of the statute (42 U.S.C. 4104) and the regulatory text of section 67.4 (both of which list 3 types of notice), the main reason for publication in the Federal Register was clearly for notification purposes only. Further, the flood elevation determinations are very specific to a certain locality; regulations usually apply more broadly.

FEMA concludes that the statute does not require that the determinations must take the form of a regulation; rather, the requirement of publication in the Federal Register is for notice purposes only. The statute and regulations give FEMA the authority to issue flood elevation determinations that are legally binding on the affected communities, as long as there is notice and comment afforded to those communities. It is not necessary to include specific flood elevations for affected flooding sources in feet/meters in the Code of Federal Regulations. The flood elevations themselves do not need to be codified as regulations for them to have legal effect. Absent a legal requirement to publish flood elevations as rules, FEMA now plans to publish proposed and final flood elevation determinations as notices rather than as rules, which is administratively less burdensome.

The information provided in the BFE notices will be less detailed than the information FEMA currently provides in the BFE rules. FEMA will no longer list in the Federal Register specific location descriptions (e.g., Sawmill Creek approximately 400 feet upstream of Laurel Fort Meade Road) or specific flood elevations of the base flood

(e.g., + 613 feet) for each flooding source. Instead, the Federal Register notice will indicate which geographical areas are affected (county, town, etc.) and provide both a physical address and an internet address where the specific flood elevations (as depicted in a Flood Insurance Rate Map (FIRM) and/or a Flood Insurance Study (FIS) report) can be viewed for that geographical location.

This new procedure will not apply to any proposed BFE rules that are outstanding as of the effective date of this notice (December 1, 2011). FEMA will close those proposed rules out with final rules, as required by the Administrative Procedure Act, 5 U.S.C. 553.

This new procedure will also apply to certain Letters of Map Revision (LOMRs). A LOMR is a type of determination that FEMA issues under the authority of 44 CFR part 65. It may include changes to the technical content (e.g., additions or modifications to BFEs) or changes to the administrative content (e.g., corrections to typographical errors) of a published FIRM or FIS report. The flood elevation determinations associated with LOMRs that affect the technical content of the FIRM or FIS report are published in the Federal Register pursuant to 44 CFR part 67. As explained above, the notice required by part 67 does not require that the notice take the form of a rule. Notice of changes in flood elevation determinations may be published as notices rather than rules. Therefore, as with BFE determinations for Flood Insurance Studies, FEMA will issue flood elevation determinations associated with LOMRs as notices rather than rules as of December 1, 2011.

Change in Procedure for Other Types of Flood Elevation Determinations (Special Flood Hazard Areas and regulatory floodways)

In addition to BFE determinations, FEMA also issues other types of flood hazard determinations including new and modified Special Flood Hazard Areas (SFHAs) and new and modified regulatory floodways. SFHAs are areas subject to inundation by the base flood and include the following flood insurance risk zone designations: A, AO, AH, A1-30, AE, A99, AR, AR/A1-30, AR/AE, AR/AO, AR/AH, AR/A, VO, V1-30, VE, and V. The various flood insurance risk zones represent different levels of risk and the type of flood hazard (e.g., coastal, riverine, ponding areas, etc.). The regulatory floodway is the channel of a river or other watercourse and the adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water-surface elevation more than a designated height.

Under current practice, new or modified SFHAs or regulatory floodways not specifically related to changes in BFE determinations are not appealable under 44 CFR 67.8. For that reason, FEMA has not published notification of new and modified SFHAs and regulatory floodways in the Federal Register pursuant to 44 CFR 67.4 and 67.11.

As of the effective date of this notice (December 1, 2011), FEMA will publish notification of new or modified SFHAs or regulatory floodways in the Federal Register pursuant to 44 CFR 67.4 and 67.11, and will allow appeals of those notices pursuant to 44 CFR 67.8. As with the BFE notices, the Federal Register notices for new or modified SFHAs or regulatory floodways will indicate which geographical areas are affected (county, town, etc.) and provide both a physical address and an internet address where the specific flood hazards (as shown in a Flood Insurance Rate Map (FIRM) and/or a Flood Insurance Study report) can be viewed for that geographical location.

As with appeals of BFE determinations, appeals of SFHA and regulatory floodway determinations must include supporting scientific and technical data certified by a registered professional engineer or licensed land surveyor pursuant to 44 CFR 67.6.

Authority: 42 U.S.C. 4104; 44 CFR parts 65 and 67.

Dated:

Sandra K. Knight,

Deputy Associate Administrator for Mitigation,

Department of Homeland Security,

Federal Emergency Management Agency.

**[FR Doc. 2011-30545 Filed 11/25/2011 at 8:45 am; Publication Date:
11/28/2011]**