



# ASSOCIATION OF STATE FLOODPLAIN MANAGERS, INC.

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**Jan.21, 2019**

## **Comments on FEMA's draft policy: *Floodplain Management Requirements for Agricultural Structures and Accessory Structures***

Thank you for the opportunity to comment on the draft policy. Overall, the response of Association of State Floodplain Managers members who provided comments was positive, and the effort to provide greater clarity and guidance on how to meet floodplain management regulations is appreciated. Some of these comments were also sent directly to FEMA, but are included here since they apply more broadly.

### **Accessory Structures**

Many who reviewed the draft policy were confused about whether the accessory structures policy applies to ALL accessory structures, or to only agricultural structures that are accessories. In Jennifer Tylander's original 11/16/2018 email to NFIP state coordinators it states, "Attached for your review is the draft policy on agricultural and accessory structures." The email also notes the draft policy is intended to provide clarification and technical assistance for agricultural or accessory structures. This implies two very different categories of structures: agricultural structures and accessory structures in general.

Every community deals with accessory structures, so updated policies on accessory structures impacts all communities. FEMA has past policies and guidance regarding "minimal value" accessory structures, including the July 13, 1977 Flood Insurance Administration (FIA) Notice FIA-77-18 on "Applicable Flood Plain Management Requirements for Accessory Structures." The Aug. 6, 1986 FEMA Memo on "Definition of Lowest Floor and Habitable Floor as Applied to Attached and Detached Garages" has a discussion on detached garages and notes the same standards. The 1986 memo also states "In order to permit detached garages which are not elevated or dry floodproofed, the community would have to include these or equivalent provisions in its ordinances or require the issuance of variances."

Many, if not most, states include those standards in state model ordinances, and have negotiated with FEMA on a maximum size for accessory structures to be defined as "minimal investment." Since what is considered a "minimal investment" in dollars varies considerably depending on the wealth of the community or landowner, a size proxy has simplified administration of local ordinances. Commenters are very concerned that the draft policy would preempt FEMA-approved exemptions in state model ordinances already in place for detached two-car garages and other smaller accessory structures,

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and that all the communities would be required to request a community-wide exemption. To now require a variance for even a small (e.g., less than 100 square foot) back yard accessory structure would be very burdensome to property owners and communities.

In follow up discussions with FEMA HQ staff we were told this policy only applies to agricultural accessory structures. If the intent is to only address agricultural accessory structures, that needs to be clarified in the policy title (maybe call it *Floodplain Management Requirements for Agricultural Structures and Agricultural Accessory Structure*). The policy would then need to address which structures are agricultural accessory structures that are not covered by the "minimal investment" accessory structures policies that are already in place.

## **Definition of Agricultural Structures**

In C,1,b (starting on page 5) standards are given for agricultural structures that can be wet flood proofed with a variance (or community-wide exemption).

- In C, 1, b, ii, 2 it states the agricultural structure must represent a minimal investment. Many, particularly local officials, feel more guidance is needed on how to determine what represents a minimal investment.
- In the agricultural structure definition the word "production" is problematic and better guidance on what that includes is needed. Steve Samuelson of Kansas submitted comments on 12/18/2018 that included several good examples of the need for more clarity.
- On page 3 it's noted that that some buildings have an agriculture related purpose, but are not considered agriculture structures. For example, "2. structures used by the public, such as a place of employment or entertainment." More clarification is needed since there are gray areas. For example, if a greenhouse has employees it is not an agricultural structure, but if it's owned and operated by a single family it would be?
- Hoop houses or high tunnels of various types are common nationally. Past informal guidance has indicated these can be treated as development that is not a structure. It would help local regulators if that was clarified in the final policy, specifically if hoop houses and high tunnels could be added as examples in A, 2, b, ii, "Development that does not meet the NFIP definition of a structure, such as a gazebo, pavilion, picnic shelter or carport that is open on all sides (roofed but not walled)."

## **Community-Wide Exemptions**

A community-wide exemption makes it possible for communities where exemptions to allow wet flood proofing of certain agricultural structures makes sense due to the nature of flooding in that community. It simplifies the process for landowners in that communities by allowing structures that meet those standards to be permitted rather than going through a variance process that adds cost and time without changing the outcome. However, a few notes of concern with the community-wide exemption were noted:

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- With a variance there is an established requirement to inform the landowner of the flood insurance cost implications. There could be guidance to communities that get the exception to inform landowners of those implications as part of the permitting process.
- Some commenters feel community-wide exceptions is a bad idea since elevating is not encouraged, and feel it is better to require variances. There may be regional areas or states that do not support the community-wide exemption for agricultural structures.
- In C, 1, c, iii the draft language process is for FEMA regional offices to complete initial evaluation of the request before submitting to FEMA Headquarters for final approval. Consider authorizing the FEMA regional offices to make final decisions with any appeal going to the FEMA Headquarters.
- It is not clear whether the wet flood proofing allowance applies to agricultural structures that are “new” in addition to “repetitive loss” / “substantially damaged.”

## **Key Term Definitions or Guidance**

Key terms such as “minimal investment,” “low cost” and “small” were noted as problematic by many local and state officials. Either provide definitions or more detailed guidance in the final policy, or provide supplemental guidance. These ambiguous terms make ordinance administration and enforcement difficult.

- Some suggest that maximum square feet or dollar values be used. As noted above, “minimal investment” in dollar values can greatly vary, but square foot maximums and other proxies have been used successfully for the smaller accessory structures.
- How to do anchoring is another key term where local and state officials are looking for more specific guidance. The final policy could help local officials by referencing or defining standards for anchoring. Better guidance on anchoring is problematic for non-agricultural structures as well.

## **Detailed Comments:**

- Acronyms should be spelled out (the first time used). For example, NFIA on page 5.
- Background (page 1) – The draft policy states “portions of existing guidance” found in Technical Bulletins 1 and 7 are superseded by the policy. What portions are superseded? Does this mean states and communities can no longer rely on these Technical Bulletins?
- Definitions (page 2) - 1,a aquaculture – should be acceptable if “conducted in or near water.”
- Definitions (page 3) – 1, b, ii – may leave the impression that development other than structures isn’t regulated and doesn’t require permits (e.g., liquid waste lagoons, tanks, etc.)
- Definitions (page 3) - 2. For accessory structures, it would be clearer to say used only for parking and storage. “Human habitation” implies living space, but could be interpreted to allowing woodworking shops, car repair, etc. Also need to clarify here that development other than structures are regulated and require permits.

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- B, 4 & 6, (page 4) – Needs to clearly state that dry flood proofing is only for non-residential.
- C. 1. a. (page 5) - Exceptions that would allow rebuilding to pre-damage condition of a structure substantially damaged from flood. This appears to say a structure substantially damaged from any other hazard would have to rebuilt higher or flood proofed, but not flood? It is not logical.
- C, 1, b, ii (page 5) - By stating in accordance with criteria in 44 CFR 60.6(a), is the expectation that each applicant would have to demonstrate exceptional hardship? It is not clearly stated that the applicant must demonstrate hardship when requesting a variance.
- C, 1, b, 8, b, iii (page 6) and C, 2, a, ii, 8, b, iii (page 10) - “The bottom of the opening must not be higher than one foot above grade.” Shouldn’t this say not higher than one foot above the exterior grade or interior floor?
- C, 1, b, 8, b, i (page 6) and C, 2, a, ii, 8, b, i (page 10) – “Include at least two openings.” Suggest “a minimum of two flood openings of each enclosed area subject to flooding.”
- C, 1, b, 8, b (page 6) and C, 2, a, ii, 8, b (page 10) – As written, it appears i, iii & iv don’t apply to engineered openings, but it seems they should.

These comments are being submitted on behalf of the Association of State Floodplain Managers, and are compiled from input of the ASFPM Regulations and Insurance policy committees.

Contact if questions about these comments or if you’d like a copy of the 1977 or 1986 notice/memo referenced in the comments: Ceil Strauss, MnDNR, 651-259-5713