

Virtual Handout – Appendix 1, 2, & 3 with hyperlinks to pertinent information

TWCA 2021 Fall Conference, San Antonio

TWCA Federal Affairs Committee
October 21, 2021
1:00 – 2:00 pm

Link to [Presentation](#) here.



APPENDIX 1: *Tx Water Day*

Issue Papers: Summary, Request, Progress & Contacts

WATERS OF THE UNITED STATES

ISSUE / REQUEST

- Lack of clarity and the potentially expansive scope of federal Clean Water Act jurisdiction creates undue burden to all property owners
- After multiple trips to the Supreme Court, multiple rounds of rulemaking, and numerous intervening court decisions, we are back where we started – 1980s regulations as interpreted by multiple Supreme Court cases and related guidance
- State primacy on water resources, improved predictability, and maintenance of key exemptions should be foundational principles moving forward

PROGRESS

- November 30 is planned date for rule proposal to restore *Rapanos* era regulatory framework
- Second rulemaking to further redefine WOTUS still anticipated
- Litigation on Navigable Waters Protection Rule resulted in two district court vacatur given nationwide effect
- Water days white paper in progress as foundation for further development of possible consensus points to inform potential comments on future rulemakings

CONTACT

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CLEAN WATER ACT: IMPROVE CERTAINTY AND EFFICIENCY IN 404 PERMITTING

ISSUES / REQUESTS

- Lengthy 404 permit timelines increase cost and delay projects. USACE and EPA should coordinate to revise the 404 permitting regulations and mitigation requirements to:
 - Provide more deference to 404 permit applicants by using information prepared by applicants.
 - Use existing data to increase efficiency in the permitting process.
 - Revise compensatory mitigation requirements to allow applicants to use the benefits of a project and only require mitigation necessary to offset actual unavoidable adverse impacts.
- EPA's broad veto authority over 404 projects allows for abusive decision making. Congress should amend the CWA to eliminate EPA's veto authority.

PROGRESS

- EPA's 404 permitting guidelines were last updated in 2008.
- USACE's 404 permitting regulations were last updated in 2000.
- USACE's compensatory mitigation requirements were last updated in 2008. A 2018 MOA between USACE and EPA concerning wetlands in Alaska can serve as a guide for revising the compensatory mitigation requirements.
- EPA has used its unchecked 404 veto authority both before a permit application has been filed and after a permit has been issued. A veto eliminates any possibility for collaborative project solutions and serves no purpose given the 404 requirements in place aimed at protecting WOTUS.

CONTACT

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512-579-3601

ENDANGERED SPECIES

ISSUE / REQUEST

- The USFWS's charge to conserve species must be performed in consideration of the best available science and should not begin with a presumption of "endangered until proven otherwise."
- There should be more diligence in performing 5-year status reviews.
- Greater weight and consideration should be given to existing state programs and the impacts they may have on candidate species preservation.
- The USFWS should not use FERC to impose requirements during the relicensing process on species that are not afforded protection under the ESA.

PROGRESS

- Issues have been identified and will be finalized/refined during this conference. A template from the previous position paper is being used for the draft.

CONTACT

Glenn Clingenpeel, clingenpeelg@triinityra.org,
(817) 493-5117

FLOOD CONTROL AND COASTAL EMERGENCY ACT (PUBLIC LAW 84-99)

ISSUE / REQUEST

- Waiting for federal assistance to make repairs under PL 84-99 on damaged flood control projects delays restoration of critical infrastructure and either compromises public safety or imposes undue, non-reimbursible expenses on local sponsors of federal projects.
- Revise PL 84-99 for the local sponsor of a federal project to be reimbursed for the federal cost share of repairs to storm damaged flood control projects which would otherwise be eligible for repair by the federal government under PL 84-99.
- Allow the local sponsor of a federal project to make repairs to storm damaged flood control projects under the existing federal project NEPA documents in lieu of obtaining additional Section 10/404 permits.

PROGRESS

- WRDA 2020 provided for credit to local sponsors against their portion of cost share (typically <20%) on repairs but not reimbursement of costs exceeding the local sponsor's share.
- WRDA 2020 included a pilot program to expedite permitting for repairs storm damaged federal flood control projects, but not the ability for the local sponsor to rely on existing project NEPA documents in lieu of additional permitting.
- NWC has expressed interest and support of the requested revisions to PL 84-99

CONTACT

Dawn Pilcher

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INVASIVE SPECIES: LACEY ACT – LIMITING LIABILITY ON INTERSTATE WATER TRANSFERS

ISSUE / REQUEST

- TWCA is concerned about federal regulation of water transfers containing invasive species that may impede water supply operations. TWCA requests for Congress are:
 - Amend the Lacey Act to allow interstate water transfers for water supply and flood control purposes. Support reasonable amendments to the Lacey Act, including H.R. 931 (Gohmert) and S. 277 (Cruz), that would ensure the continued ability for Texas and western state water managers to make interstate water transfers.
 - Support additional federal funding for research, development, and implementation of invasive species control programs.

PROGRESS

- Issue Paper Complete.
- Only minor revisions to 2020 Issue Paper.

CONTACT

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(512) 322-5876

REGULATION OF PER- AND POLYFLUOROALKYL SUBSTANCES

ISSUE / REQUEST

- TWCA is concerned about new regulatory requirements for PFAS that may affect water and wastewater management in Texas. TWCA requests that are currently under review:
 - **Congress:** (1) Refrain from enacting legislation to regulate PFAS; and (2) Enact legislation to fund PFAS clean-up.
 - **EPA:** (1) Establish standardized analytical methods for quantifying PFAS concentrations; (2) Improve monitoring and research of PFAS; and (3) Utilize national science for establishing risk-based PFAS standards under multiple state and federal statutory authorities.

PROGRESS

- Currently revising the specific requests for Congress and addressing other minor revisions.
- Need to draft talking points/executive summary.

CONTACT

Sara Thornton, sthornton@lglawfirm.com,
(512) 322-5876

PRINCIPLES, REQUIREMENTS AND GUIDELINES

ISSUE / REQUEST

- The 2007 Water Resources Development Act directed the Secretary of the Army to issue revisions to the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies first created in 1983 (known as the Principles and Guidelines of P&G). The Obama Administration reassigned the work to the Council on Environmental Quality that issued new guidelines in 2013 known as the Principles, Requirements and Guidelines (PR&G). Going forward, TWCA and other organizations opposed the revisions and until last year successfully obtained a rider in the Congressional Budget blocking the use of any funds for the implementation of the new guidelines.

PROGRESS

- The Assistant Secretary of the Army wrote a memorandum on April 3, 2020 to the Commanding General of the U.S. Army Corps of Engineers notifying him that USACE staff were finalizing the Agency Specific Procedures directing him to begin drafting the details of how future studies would assess environmental, social and economic values would be established for future planning studies across all federal water and land infrastructure programs during the scoping period to ensure that all factors have been considered. Notably, the memo outlines the expectation that all planning studies should be subjected to some level of the new PR&G standard, whether nearly complete, in progress or those that will be in the future.
- At the recent NWC conference, a representative of USACE informed the attendees that rules were being drafted and could be ready for release as early as spring 2021. TWCA needs to actively engage in the stakeholder process and update the Congressional Delegation that little coordination has occurred to date, with rules being drafted internally and see if we can get more information before a draft is released.

CONTACT

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wardk@trinityra.org 817-493-5112

REALLOCATION OF STORAGE

ISSUE / REQUEST

- The purpose of this issue paper is to request funding and policies that promote the use of reallocation of storage at USACE reservoirs for water supply purposes.

PROGRESS

- This is an ongoing issue. Individual reallocation studies have been approved and are in process. TWCA will continue to promote this issue generally as a water supply source for the State in the future.

CONTACT

Matt Phillips, matt.Phillips@brazos.org

Ray Russo, russo4636@gmail.com

ENACT WATER CONSERVATION REBATE TAX PARITY

ISSUE / REQUEST

- Water conservation is critical to meet the water needs for Texans today and into the future – providing approximately 29 percent, or 2.2 million acre-feet per year, of all recommended water management strategy volumes in 2070
- A simple amendment to Section 136 of the tax code would give water rebates the same status as energy rebates.
- HR 4647 (117th), introduced in July 2021, would provide needed changes to the tax code to exempt conservation rebates.
- Request: Support HR 4647 (117th), The Water Conservation Rebate Tax Parity Act, or other legislation that would amend Section 136 of the Internal Revenue Code to exempt water conservation rebates from income tax and remove the tax burden for customers who receive water conservation rebates.

PROGRESS

- Complete

CONTACT

Susan Butler, Susan.Butler@Jacobs.com; 210-422-8958

WATER INFRASTRUCTURE INVESTMENT

ISSUE / REQUEST

- In light of booming population growth and aging systems in need of repair, Texas has increasing demand for water infrastructure projects, but lacks sufficient funding capacity to support these projects. Too many bureaucratic requirements tied to federal funding keep communities from accessing federal funds for their projects, especially in smaller communities, which experience higher numbers and more serious violations in Texas than in other states.

Requests:

- Ensure sufficient, low-cost financing and funding options for water infrastructure projects.
- Reduce bureaucratic hurdles associated with federal infrastructure funding.

PROGRESS

- Working with team to determine how detailed the paper should get on identifying/supporting specific federal infrastructure funding programs that are most beneficial to Texas.

CONTACT

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USGS NATIONAL STREAMFLOW NETWORK FUNDING AND MODERNIZATION

ISSUE / REQUEST

- TWCA members rely on the data collected from USGS stream gages to protect their communities from flood and drought which threaten both life and property.
- The USGS Cooperative Agreements for streamgaging were originally a 50-50 cost-share match. This 50-50 cost share has eroded away, and cooperators are now shouldering 65% of the cost.
- Support full funding of USGS Cooperative Matching Funding to restore 50/50 cost share
- Support full funding for USGS Federal Priority Streamgages to increase from 158 to 430 in Texas
- Support Full Funding for Next Generation Water Observing System to enhance data collection and data base modernization

PROGRESS

- Requested and received updated budget numbers from USGS
- 2021 paper updated
- Ready for final formatting

CONTACT

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APPENDIX 2: *WOTUS* slides

Kerry McGrath

Hunton Andrews & Kurth

Use this [hyperlink](#) to Kerry's presentation on TWCA's website.

APPENDIX 3: *Federal Issues*

Slides, Information, Links

Congressional Update

- Closing of 1st Session (117th Congress)
 - [Continuing Resolution](#) – Dec 3rd
 - Infrastructure Bill drama



Oct
31st

Dec
3rd

Jan
2022

Congressional Update

- WRDA 2022
 - Schedule
 - Senate requests
- WRDA 2020 Implementation Guidance
 - Guidance needed

Federal Issues

| Issue | Reference (link) | Open for comment | TWCA FAC recmd |
|---|---|--|----------------|
| EPA/USACE RULE. Waters of the U.S. revision sent to OMB for review | Appendix 2 slides & info below | No, at OMB  | |
| Request for Information of the National Flood Insurance Program's Floodplain Management Standards | Federal Register notice | Dec 13, 2021 | |
| National Environmental Policy Act Implementing Regulations Revisions (CEQ) | Federal Register Notice | Nov 22, 2021 | |
| FEMA Risk Rating 2.0 | See slides below & embedded links | | |
| House T&I Cmt Chair request to halt Nationwide Permit Actions | Letter  | | |
| Timeline for FFRMS modifications | See Appendix 3 slides below | | |
| U.S. Army Corps of Engineers Climate Action Plan (Executive Order 14008) | Read Plan  | | |

Federal Issues

| Issue | Reference (link) | Open for comment | TWCA FAC recmd |
|---|--|------------------|----------------|
| Biden Administration Roadmap to Build an Economy Resilient to Climate Impacts | Agency wide Fact Sheet | | |
| Biden Administration Makes Climate Information and Decision Tools More Accessible | Website Fact Sheet | | |
| FEMA potential rulemaking on updating construction and land-use requirements under the NFIP | Petition; FEMA's RFI | | |
| Biden Administration – Climate change & Environmental Justice plans (Env Justice Advisory Group recommendations) | Biden climate plan; Env justice | | |
| FFRMS Timeline | See Appendix 3 slides below | | |
| Center for Biological Diversity v. United States Maritime Administration | Read complaint | | |
| Ongoing Cyber Threats to U.S. Water and Wastewater Systems (Agency warning) | Read Joint Advisory | | |

Federal Issues

| Issue | Reference (link) | Open for comment | TWCA FAC recmd |
|--|---|------------------------|----------------|
| SECTION 401 WATER CERTIFICATION RULE INVALIDATED BY COURTS | See report | | |
| Recent PFAS & related GenX chemicals – toxicity report and roadmap | Report, Oct 2021; Roadmap | | |
| FWS Proposes to rescind Trump era regulations on designating critical habitat | Remove definition; Proposed Rule | Nov 26 th ! | |
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Federal Issues

Waters of the U.S. revision sent to OMB for review

On October 13, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineer (USACE) sent a revised “Waters of the U.S.” (WOTUS) definition to the White House’s Office of Management and Budget (OMB) for review. The term WOTUS has been around since the 1899 Rivers and Harbors Act but in 1972 was added to the Clean Water Act to differentiate between which waters are regulated at the state versus federal level. In recent years, due to several controversial Supreme Court decisions, the WOTUS definition has become increasingly murky, leading to confusion in the field about what is and is not a WOTUS. The past several administrations have attempted to redefine WOTUS but have run into legal challenges. During the Trump administration, they rewrote the WOTUS rule finalized under the Obama administration, however, that rule ran into legal challenges. In August, Trump’s Navigable Waters Protection Rule was struck down by a federal district court in Arizona. In response, the EPA and USACE reverted to its previous 1986 definition as they worked to rewrite the rule. Under Executive Order 12866 on Regulatory Planning and Review, all proposed rules must be sent to OMB’s Office of Information and Regulatory Affairs (OIRA) for interagency review. While EO 12866 limits a review to 90 days, in the case of more controversial rules, the review can (unofficially) take longer before the rule is published in the Federal Register for public comment. *Julie Ufner, NWC*



Federal Issues

NFIP Risk Rating 2.0

Why Risk Rating 2.0: Equity in Action

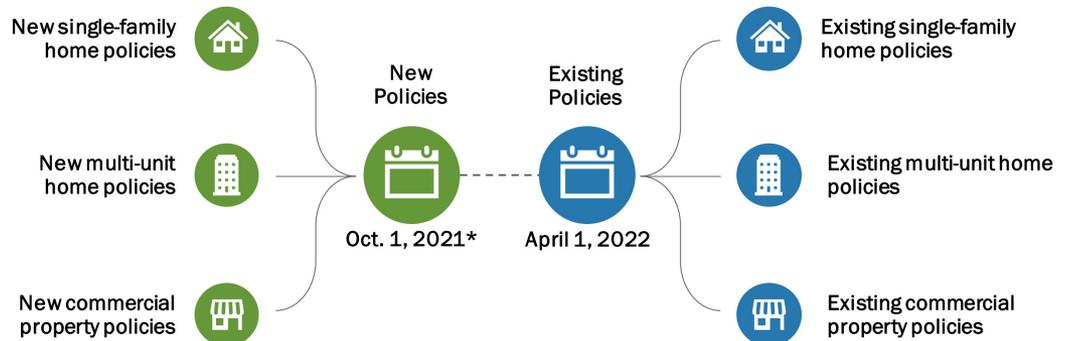
Equity:

Individuals will **no longer pay more than their share** in flood insurance premiums based on the value of their homes.



Roughly 2/3 of policyholders with older pre-FIRM homes will see a premium decrease.

Equity in Action – Phased Approach



**Also beginning Oct. 1, 2021, existing policyholders eligible for renewal will be able to take advantage of immediate decreases in their premiums.*



Federal Issues *Climate & Environmental Justice*

Impacts on Water Resources Infrastructure

HOW WILL FEDERAL CLIMATE/ENVIRONMENTAL JUSTICE POLICIES IMPACT WATER RESOURCE INFRASTRUCTURE

In January 2021, President Biden signed several Executive Orders that directed federal agencies to address both climate change and environmental justice issues. **Ms. Robyn Colosimo**, Director of Policy and Legislation for the ASA's (Civil Works) office, discussed the actions that USACE is taking to comply with the Administration's directive, along with how these pending policies may impact water resource infrastructure and projects both now and in the future.

Resources available:

- [Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis](#) (Jan. 20, 2021)
- [White House Environmental Justice Advisory Council Report on Justice 40](#) (May 21, 2021)
- [Biden's Plan to Secure Environmental Justice and Equitable Opportunity](#) (July 2020)



From presentation, NWC 2021 Annual Conference

Env Justice

WHEJAC Final Report Executive Order 14008

WHITE HOUSE ENVIRONMENTAL JUSTICE ADVISORY COUNCIL

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Viola Waghiyi

Dr. Kyle Whyte

Dr. Beverly Wright

Hil Xyooj

Miya Yoshitani

May 21, 2021

The Honorable Ms. Brenda Mallory, Chair
The Council on Environmental Quality
Executive Office of the President
Washington, DC 20500

Dear Chair Mallory:

The White House Environmental Justice Advisory Council (WHEJAC) enthusiastically submits its final report to you and President Biden. This report is a response to a charge issued in March 2021, from The Council on Environmental Quality to provide recommendations on Justice40, Climate and Economic Justice Screening Tool, and Executive Order 12898 Revisions. Over the next few months, the WHEJAC will also consider and submit recommendations on the Scorecard for administration and implementation of Justice40, and final recommendations on the Climate and Economic Justice Screening Tool.

The WHEJAC urges President Biden, Vice President Harris and the CEO to take the following requests:

- The careful administration of Justice40 is paramount to the effectiveness of the Biden Administration's signature Environmental Justice initiative. WHEJAC members strongly believe that there must be a transformative, accountable process developed for the fair and just distribution of 40% more of the benefits to be invested in frontline communities. Otherwise, investment will not reach frontline communities, given the bias and ambivalence of many state and local governments, and the systemic racism, bias, inertia, and resistance to change that we must never underestimate in order to avoid primarily helping those communities that already have an advantage. Transformative investments must be made in capacity building, technical assistance, and consultation, and creating a user-friendly feedback process for the administration of funding and other support.
- Justice40 must start today. All local investments from energy benefits (such as through The American Jobs Plan) must utilize a Justice40 framework as outlined in the WHEJAC recommendations.

- Begin regular meetings between the WHEJAC and the White House Environmental Justice Interagency Council (WHEJIC), and that the WHEJAC receive a copy of the Interim Guidance to the relevant agencies. We will follow up on this request by letter.
- Environmental Justice advisors should immediately begin working with relevant federal agencies as they develop their budget data requests to identify programs for Justice40.
- Justice40 must ensure that 100% of the investments do no harm to frontline communities. Using funds to add to cumulative pollution only to use other funds to mitigate the impacts is a losing proposition for our communities.
- Justice40 must include taking bold action to sunset investment by 2030 in fossil fuels, plastics, dangerous chemicals and nuclear energy and to set requirements for 100% renewable electricity by 2030.
- Justice40 must ensure safe drinking water by replacing all lead water pipes in frontline communities across America by 2030.
- The Executive Order must include compliance by several federal agencies that have not been named in the current order: The Federal Emergency Management Agency, The Federal Energy Regulatory Commission, The Appalachian Regional Commission, The U.S. Department of Education, The U.S. Department of Homeland Security, The U.S. Department of State, The Tennessee Valley Authority, and The U.S. Department of Veteran Affairs.

Floodplain Regulation & NFIP

HOW UPCOMING FLOODPLAIN REGULATIONS WILL IMPACT WATER RESOURCE

FACILITIES AND INFRASTRUCTURE (*NWC's Flood Control Caucus thanks Trinity River Authority of Texas for their sponsorship*)

Waterway infrastructure, whether it be rivers and harbors, port facilities and the entities they service, water and wastewater infrastructure, flood control and levees, hydropower and dams, are usually located within floodplains. **Ms. Molly Lawrence**, partner with Van Ness Feldman gave a high-level overview of some of the floodplain related issues coming down the pike that may impact water resource infrastructure, including the status of National Flood Insurance Program (NFIP) reauthorization, the intersection between NFIP and the Endangered Species Act, Federal Flood Risk Management Standard (FFRMS), what to expect from Risk Rating 2.0 and changes in coastal high hazard zones.

Resources available:

- To see Ms. Lawrence's comprehensive powerpoint presentation, [click here](#).



From presentation, NWC 2021 Annual Conference

NFIP Reauthorization

- NFIP Extension Act of 2021 introduced on Sept. 13, 2021.
 - Authored by Senators Bill Cassidy, (R-LA), John Kennedy (R-LA), Cindy Hyde-Smith (R-MS), and Bob Menendez (D-NJ). One year extension.
- Short term extension through December 3, 2021 approved as part of House Continuing Resolution
- NFIP provisions in Infrastructure Bill: House Financial Services Reconciliation Text
 - Cancel outstanding NFIP debt
 - \$3 billion for floodplain mapping



From presentation, NWC 2021 Annual Conference

Flood Risk Management Standard (FFRMS)

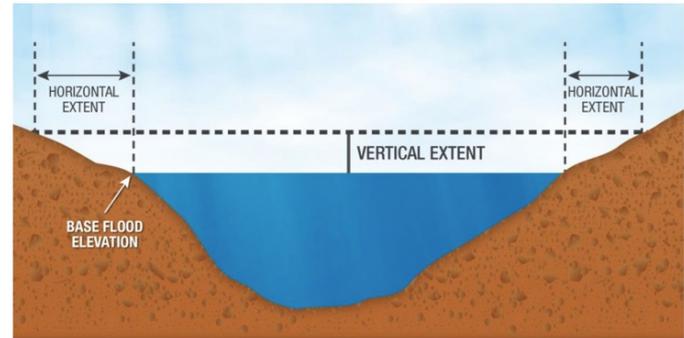
Timeline of the Federal Flood Risk Management Standard (FFRMS)

- January 2015: Obama issued EO 13690 establishing the FFRMS; amended EO 11988
- October 2015: Water Resource Council approved final implementing Guidelines
- August 2017: Trump withdrew the FFRMs in EO 13807 regarding infrastructure permitting
- January 2021: Biden withdrew EO 13807 effectively reinstating EO 13690
- May 2021: Biden issued EO 14030 regarding Climate-Related Financial Risk
 - Expressly reinstated EO 13690 (FFRMs)
 - Affirmed Guidelines for implementing FFRMS

Expanded Definition of the Floodplain

Gives federal agencies three options for defining the FFRMS floodplain.
All EXPAND the floodplain compared to FEMA 1% floodplain

- Climate Informed Science Approach (CISA)
- Freeboard approach (BFE + 2-3 feet)
- The 0.2% annual chance or “500 year” floodplain approach



Status of Implementation

USACE:

- Section 404 and Section 10 permits not subject to EO 13690's higher floodplain standards.
- Continue to use EO 11988 = the 1% annual chance floodplain.

FEMA:

- Interim policy (effective until August 2022) implementing the FFRMS
- Requires the use of freeboard approach for non-critical actions funded with HMA dollars
- Sets ASCE 24-14 as the minimum design and construction standards (BFE + 1 to 2 ft)
- Notes need to update 44 CFR Part 9 for complete implementation of the FFRMS



FEMA

Risk Rating 2.0

Equity in Action premiums will more accurately reflect a property's unique flood risk by considering a broader range of variables.

Current Rating Methodology

FEMA-sourced data

Rating Variables

- Flood Insurance Rate Map Zone
- Base Flood Elevation
- Foundation Type
- Structural Elevation (Special Flood Hazard Area Only)

1% Annual Chance of Flooding (Frequency)

Fees and Surcharges



Risk Rating 2.0 Methodology*

FEMA-sourced data

Additional data sources: Federal government-sourced data, commercially available third-party

Cost to Rebuild

Rating Variables

- Distance to Coast/Ocean/River
- River Class
- Flood type — Fluvial/Pluvial
- Ground Elevation
- First Floor Height
- Construction Type/Foundation Type

Broader Range of Flood Frequencies

Fees and Surcharges

*Additional variables are not shown here

Federal Emergency Management Agency



FEMA

Resources available:

- [About Risk Rating 2.0: Equity in Action](#)
- [Who will Risk Rating 2.0 impact? State Profiles](#)
- [Concerns about rates rising under Risk Rating 2.0 \(article\)](#)



From presentation, NWC
2021 Annual Conference