APPENDIX A — REPORT ON LEGAL ISSUES

The Dewberry/FEMA Law Associates/EOP Foundation "Final Report on Legal Issues" identified no legal issues that would preclude FEMA from establishing, maintaining and making available to insurance companies and agents, or to the general public an elevation registry. The full report follows.

FINAL REPORT ON LEGAL ISSUES

Prepared for
Dewberry Davis LLC
In Connection with FEMA's

Evaluation of Alternatives in Obtaining Structural Elevation Data

This report summarizes our legal research and analysis on legal issues relevant to a determination by the Federal Emergency Management Agency ("FEMA") of whether it can develop a nationwide registry of structural elevation data for National Flood Insurance Program ("NFIP") purposes. We have sought to identify and evaluate the significance of potential legal obstacles to developing this nationwide elevation registry ("registry") in these areas: (1) the Privacy Act of 1974 and other privacy issues; (2) potential exposure to liability for inaccurate elevation information; and (3) potential ownership rights that third parties may have to elevation data.

We have identified no legal issues that would preclude FEMA from establishing and maintaining an elevation registry and making it available to insurance companies and agents writing NFIP policies, or even to the general public. Creation of the proposed registry is an activity well within the authority granted by the National Flood Insurance Act. An elevation registry as described in the Statement of Work, and in subsequent meetings with FEMA, would not violate federal or state privacy law or policy or significantly expand the liability exposure of participants in the National Flood Insurance Program.

This Report was prepared by Ernest B. Abbott and Maya A. Bernstein of FEMA Law Associates, PLLC. The section on electronic signatures was prepared by Terry Banks of the EOP Foundation. The Section on Strategy D, covering right of entry issues, was prepared by Ernest B. Abbott and Maya Bernstein with research assistance from Terry Banks of the EOP Foundation.

TABLE OF CONTENTS

SUMMARY 177

BACKGROUND 181

1. Content and Structure of an Elevation Registry 182

2. Information Gathering Authority in the NFIP 183

   Program Overview 183

   Risk Identification........ 184

   Risk Reduction 185

   Risk Spreading 187

   Comments on Information Gathering Authority 188

3. Sources of Existing Elevation Data 188

   FEMA and its Contractors 189

   Communities 190

   Insurance Agents and WYO Companies........ 190

CROSS CUTTING LEGAL ISSUES 191

1. Applicability of the Privacy Act of 1974 191

   Retrieval by "Individual Identifiers"........ 192

   "Information about an Individual" 194

   Implications of Added Data Elements 198

   Relationship to Existing FIMA System of Records........ 199

   Linking Databases or Computer Matching Programs........ 201

2. Freedom of Information Act Issues 202

   Overview 202

FOIA Analysis of Risk of Disclosure.. 204

Public Domain Waiver.. 205

Exemption 4 207

Exemption 6 208

"Similar Files" 209

"Invasion of Personal Privacy" 209

Names and Addresses 211

Other Exemptions.. 213

Electronic FOIA 213

3. Liability Issues.. 214

Liability of FEMA Generally 214

Implications of "Horizontal" vs. "Vertical" Mapping Activities 216

Liability of Other Parties 218

Liability Implications of Correct Registry Information 219

Liability Created by Inaccurate Data in Registry.................... 220

Registry Shows Flood Risk Higher Than Actual.................... 221

Registry Shows Flood Risk Lower Than Actual..................... 221

FEMA Engineering and Surveying Contractors..................... 222

Insurance Agents 222

Engineers and Surveyors... 223

Local Governments and Communities..................................... 223

Lenders... 225

Home Sellers & Real Estate Agents.. 225

Liability Summary 226

4. Legal Effect of Electronic Signatures and Verification 227

E-SIGN 227

State E-Commerce Laws 229

California 230

Florida 231

Louisiana 231

North Carolina 231

Modification of Manual Required 232

LEGAL ISSUES RELATED TO STRATEGIES FOR ACQUISITION OF DATA

Strategy A: Maximize use of existing Elevation Certificates to populate the elevation registry.

1. FEMA authority to request, but not require, holders to provide data 233

Insurance Companies and Agents 233

State and Local Governments 234

2. FEMA authority to require submission of elevation data 236

FEMA Contractors 236

WYO Companies 236

Insurance Agents 237

State and Local Governments 237

3. Relevance of Ownership of Elevation Certificates 237

Strategies B & C: Maximize use of remote sensing: LIDAR, IFSAR and airborne photogrammetry; mobile photogrammetric vans.

1. Privacy Rights and Remote Surveillance 240

Strategy D: Maximize cost-effectiveness of future ECs.

1. Basic Elements of Trespass 245

California 246

Florida 246

Louisiana 247

North Carolina 248

2. No Trespass if Landowner Consents; Ability to Condition Policy Issuance and Renewal Where On Consent 249

3. Trespass Issues Where Consent Not Obtained 250

No Clear Entry Authority: Federal 250

Varied Entry Authority for Surveys: State 251

Government Right to Conduct Preliminary Surveys 254

Defenses to Trespass Actions 256

4. Common Law Right of Privacy 257

Strategy E: Leverage alternative data sources for an elevation registry.

Sharing Data with the U.S. Census Bureau 258

Sharing Data with other Government Organizations 259

Sharing of Community Tax Parcel Data and/or Other Community Data Bases 260

California 260

Florida 261

Louisiana 261

North Carolina 262

CONCLUSION 263

SUMMARY

We have identified no legal issues that would preclude FEMA from establishing, maintaining and making available to insurance companies and agents, or to the general public an elevation registry.

SUMMARY OF CONCLUSIONS ON CROSS-CUTTING ISSUES

1. The National Flood Insurance Act clearly authorizes FEMA to obtain and distribute to the public information about flood risk and information relevant to the determination of premiums under federal flood insurance policies.

2. An elevation registry taking the form proposed in the Statement of Work, and as further described by FEMA in subsequent meetings, would not be a "system of records" regulated by the Privacy Act, and FEMA is not precluded by privacy principles from remotely surveying elevation data on structures without the consent of the owner. This analysis assumes that the registry includes specific property addresses, but does not include personal identifiers of individuals such as names and policy numbers, or social security numbers. FEMA may maintain individual identifier information in separate data bases, and link to those separate databases for purposes authorized for those data bases.

3. FEMA is not restricted by the Privacy Act or other privacy policy principles from making elevation registry information available to the insurance companies and agents, which are the intended audience of the registry. While WYO companies might assert that disclosure of the addresses of their insured properties would compromise proprietary customer lists, we note that the registry would contain all addresses as to which FEMA had elevation data, from a number of sources, and hence the registry would not disclose any company's customer list or disclose whether a listed property is insured by FEMA directly, insured by a competitor, or, indeed, whether the property is insured at all. Further, when the Arrangement is modified to allow companies to rely on the registry (rather than on Elevation Certificates) for rating of policies, FEMA can evaluate the strength of any "competitive information" argument and, based on that analysis, add language to the Arrangement advising that address and elevation data, without personal or company identifiers, will be available in the registry.

4. Given its proposed content, FEMA would be obligated by the Freedom of Information Act to make information in the registry available to any person on request, and to make it available in an electronic format to anyone who asks, if it is made available to companies in that format. FEMA may, but need not, design the elevation registry to be publicly available and accessible to any person on the Internet.

5. FEMA and any FEMA contractors establishing and maintaining the elevation registry would not incur any significant increased liability exposure from creation of the elevation registry.

6. Creation of the elevation registry will not have a major impact on the liability exposure of other participants in the National Flood Insurance Program. Liability for distributing information about a property is limited to those with an actual relationship to that property or who suffer actual damages as a result of the dissemination of information about the property. Potential plaintiffs meeting these tests would likely have access to direct sources of data to support claims of liability even in the absence of an elevation registry. FEMA can further reduce any potential liability exposure by:

    a. using the registry only for the purpose of rating insurance policies, and continuing to require communities to obtain Elevation Certificates to support construction permits and other floodplain management purposes;
    b. amending FEMA's regulations and manuals to allow WYO Companies and agents to rely on the elevation registry for rating of policies thus supporting the argument that reliance on the registry's data satisfies the professional standard of care (these amendments would in any event be required to achieve the purposes of the registry); and
    c. including in the elevation registry a warning notice that the information in the registry has been developed solely for purposes of determination of premiums for insurance policies and that more accurate elevation determinations may be required for purchase and development decisions by property owners.

7. The validity of the elevation registry for use in determining flood insurance premiums is not impaired by the inability of the elevation registry to reproduce the original signature and seal of the professional engineer or surveyor who measured the elevation of particular properties. Under state and federal law, certification of documents can be effected electronically. Electronic certification has the same legal validity as written certification. FEMA should design and implement the quality control standards, processes, and documentation for populating the registry with data. These processes will specify the types of data sources and the documentation and certification requirements for data before it can be incorporated into the registry.

ISSUES RELATED TO STRATEGIES FOR ACQUISITION OF DATA

STRATEGY A: EXISTING ELEVATION CERTIFICATES:

8. FEMA has authority to *ask* FEMA contractors, insurance agents, WYO companies, and communities participating in the NFIP to make available to

FEMA existing elevation certificates or data used in writing flood insurance policies or in issuing construction permits or other authorizations related to floodplain management. Moreover, communities do not appear to face any prohibitions under state privacy laws from providing this information to FEMA, and, indeed, all communities participating in the Community Rating System already do so.

9. FEMA would face significant legal and practical obstacles in seeking to *require* FEMA contractors, insurance agents, WYO Companies, and communities to provide elevation data for inclusion in the elevation registry without their agreement and without compensation for doing so.

10. It is unclear what party is the actual “owner” of an Elevation Certificate that was paid for by a property owner and provided to an insurance agent or community. However, we do not believe that the issue of ownership affects FEMA’s ability, noted above, to obtain the elevation data contained in that certificate.

STRATEGIES B & C: ELEVATION DATA FROM REMOTE SURVEILLANCE

11. Fourth Amendment principles, which have been developed in some depth in the context of remote surveillance by police of suspected sites for cultivation of marijuana, do not restrict FEMA from obtaining elevation data using airborne surveillance or surveillance from public streets and other public property.

STRATEGY D: ELEVATION DATA FROM SURVEYING ON PRIVATE PROPERTY

12. The potential legal consequences of entry onto private property to collect elevation data are primarily matters of state law. Unauthorized entry onto another’s property may constitute criminal and civil trespass or nuisance. However, if FEMA has obtained consent for entry from the landowner, then actions in trespass or for invasion of privacy will not lie. FEMA can obtain consent from NFIP policy holders by adding to the SFIP, by regulation, a provision under which policy holders consent to inspections for purposes of obtaining the information required for rating of new or renewed policies. This consent will of course not provide authorization for entry on properties not insured by the NFIP.

13. FEMA does not have authority under its statute to enter upon private land without consent. FEMA does have authority to “make arrangements” with state and federal agencies to obtain data that they obtain under their own authorities. However, although there are provisions of both federal and state law that allow rights of entry for survey purposes, these provisions are, except in some states, not available for purposes not related to the specific purpose

(such as the right of eminent domain) for which the authorization was adopted.

14. In certain circumstances, unauthorized entry onto another's property can constitute criminal trespass in the four states we reviewed. However, criminal trespass laws generally require conduct — such as ignoring "no trespassing" signs or ignoring express requests to leave a property — in addition to the mere unauthorized entry upon land. Even if FEMA agents were to enter on land briefly without authorization, risk of criminal prosecution would be low if those agents heeded all no trespassing signs and promptly left the premises on request. FEMA would also be unlikely to suffer significant civil liability for unauthorized entry onto private land for the collection of elevation data, due to the probable absence of any measurable damages.

15. Nonetheless, we would not recommend that FEMA adopt a policy of directing its agents to enter on private land without seeking the landowner's consent or the authorization of a state or local government able to provide it. In the absence of proper authorization, entry upon land would constitute technical trespass and a possibly significant public and customer relations problem.

STRATEGY E: ELEVATION DATA FROM THE CENSUS BUREAU AND OTHER SOURCES

16. The Census Bureau is barred under Title XIII, its data acquisition authority, from sharing any data at the level of individual properties. It may be possible for the Census Bureau and FEMA to work together to acquire data under FEMA's authority, using funds provided by the Census Bureau. Note: FEMA met with Census on April 10, 2003 to discuss potential collaborative efforts to obtain data.

17. There are significant other sources of data that are relevant and potentially helpful to FEMA's mapping activities in both public (e.g. NASA, USGS and the U.S. Postal Service) and private (phone and utility companies) hands. Much of this data is available for a fee.

18. Community Tax parcel data showing property specific information is required by law in most, if not all, states to be available to the public and hence would be available to FEMA.

BACKGROUND

FEMA's intent in creating a nationwide elevation registry is to expedite and simplify the rating and issuance of flood insurance policies by insurance agents, WYO companies, and the FEMA contractors issuing FEMA flood insurance policies directly. The data will be available to WYO companies and agents in a format capable of linking to their existing computer systems. Further, for purposes of rating and writing policies, FEMA intends that agents and companies be able to rely on elevation data in the registry and that policies properly written and rated consistent with elevation data in the registry will be deemed correct until the registry information is changed.

The registry, at minimum, will provide to insurance agents and companies improved and simplified access to a key element of evaluating flood risk: elevation of the structure as compared to the elevation of the 'base flood' as determined in that area. As noted in the analysis below, registry data will likely also be available and accessible to homeowners, potential homeowners, communities, lenders, and any private companies requesting access to this data. While the registry is not designed for this purpose, homeowners or prospective homeowners might seek to use the data to evaluate flood risk of their homes, or of properties prior to purchase. Communities might use this data in studies of flood prone areas or as part of a building permit process.

However, we understand that elevation information required for use in determining premiums for an actuarially sound flood insurance program need not be as accurate as information required for evaluating the true flood risk of individual structures. An actuarially sound program can average out modest positive and negative errors in elevations of individual buildings, whereas those same errors could hide true flood risk for the owner of a particular structure. Elevation information used for floodplain management purposes must be as accurate as possible for any proposed construction in the floodplain. This elevation information includes the Base Flood Elevation, any topographic information, and the proposed building elevations of all new and substantially improved structures that are provided to the community as part of the application for a development permit. It also includes "as built" elevation information the community must obtain once the structure is completed before it can issue a certificate of occupancy or compliance. Information in a registry cannot properly be used as a substitute for "as built" information because it is generally not available at the time the building is completed and may not be of the required level of accuracy. To ensure that potential users of the registry are aware of its limitations, the registry should include a prominent notice stating that it may be used in lieu of elevation certificates in rating or writing flood insurance policies but that the information may not be sufficiently accurate for other purposes, particularly in determining whether to purchase a structure in the flood plain or to permit new construction or renovation in the floodplain.

1. Content and Structure of an Elevation Registry.

The legal obstacles that FEMA would encounter in creating, maintaining, and publicizing an elevation registry are extremely dependent on the data elements that FEMA chooses to include in the registry. For example, as will become clear in the discussion of the Privacy Act below, the legal analysis would change significantly if this registry were to contain individual identifiers such as social security numbers.

The data included in the registry will be limited to some or all of the following information for each structure:

- One or more unique identifiers of the structure. These identifiers might include the property address, a metes and bounds description of a structure's location, or the geographic coordinates (longitude and latitude) of a structure obtained from Global Positioning System (GPS) or other sources.
- The NFIP flood map panel in which the structure is located.
- The Flood Zone in which the structure is located and the base flood elevation ("BFE"), if one has been determined by FEMA, or as determined by the community in that zone if a base flood elevation has not been determined by FEMA.
- Elevation data for the structure: either (a) the elevation of the top of the bottom floor (including basement or enclosure) of a building and of the next higher floor (from current Elevation Certificate), or (b) the elevation of the lowest floor of the structure (from older Elevation Certificates); or (c) elevation information from remote sensing technology.
- The elevations of the highest and lowest grades adjacent to the structure.
- Selected information about the structure itself:
    - Type: Residential or commercial or industrial
    - Existence of basement and basement type (e.g. walkout or fully underground)
- The source of the elevation data for the structure. For purposes of our analysis, we are assuming that FEMA would not disclose individual identifying information in identifying the source of the elevation data used in the database, but rather would provide general information such as "Elevation Certificate March 20, 1998", or "Remote Survey (LIDAR) by _____ Company, March 20, 2003."

Further, this analysis is based on the description provided by FEMA of its intended plans — that the registry will be maintained by FEMA, or by a contractor under a direct contract with FEMA, rather than maintained by a private company marketing elevation data in its own name.

2. Information Gathering Authority in the National Flood Insurance Program

FEMA, its contractors, WYO companies, state floodplain managers, and communities participating in the NFIP have been gathering, using and making available to the public elevation information — including information about individual structures — from the outset of the program more than thirty years ago. The proposed elevation registry would expand on prior information activities primarily by centralizing in one national database information now generally held in files or databases of individual WYO companies and insurance agents, along with information generally held in land use planning, zoning, and floodplain management records of local communities. In order to evaluate the legal issues associated with this proposed data centralization, it is important first to review the authority under which the National Flood Insurance Program operates.[8]

Program Overview. The National Flood Insurance Program (NFIP) was established in 1968 pursuant to the National Flood Insurance Act (the Act).[9] The NFIP is a federal program that provides flood insurance at, or for certain older properties below, actuarial rates as part of a program of mitigation against flood hazards. The NFIP consists of three distinct elements: risk identification, under which areas susceptible to flooding are identified and publicized; risk reduction, under which communities participating in the NFIP adopt and enforce floodplain management regulations to restrict development in areas susceptible to flood; and risk spreading — that is, insurance — under which the owners of property in communities participating in the NFIP can obtain insurance against loss due to flood.

Elevation data on structures is used in all three components of the NFIP:

- Risk Identification: the NFIP is required by the Act to identify and publicize maps and related information identifying areas or zones, which are at significant, risk of flooding. The elevation of land and the elevation of the estimated high water level of a flood of a specified likelihood (such as the 1% probability per year or "base flood") are the key components of flood risk identification.

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[8] This report is focused on the privacy, ownership, and liability issues associated with the creation of a National Elevation Registry, not on any constraints imposed by the National Flood Insurance Act, as amended. As noted in this background summary, *infra*, the NFIA as enacted into substantive law provides ample authority for an Elevation Registry. We are not aware of any Appropriations riders or Appropriations Committee reports that might limit use of appropriated funds for establishing an Elevation Registry. While we have not reviewed all Appropriations activity from the program's outset, we have reviewed all appropriations for the last 5 years and also for the years 1990 and 1991, when we understand Congress had expressed concern with a previous FEMA proposal to publish certain flood insurance risk information.

[9] *See* 42 U.S.C. § 4001, *et seq.*

- Risk Reduction: any community that wants flood insurance to be available to its residents must join the NFIP and adopt floodplain management regulations restricting development in areas which have been identified (mapped) as special flood hazard areas.
- Insurance: premiums for structures built after a community joins the NFIP, and the premium for a preexisting structure where the owner establishes an elevation above the base flood level, are dependent on elevation certificates establishing the elevation of the lowest floor of the structure and the elevation of the lowest adjacent grade.

Accordingly, the National Flood Insurance Act provides FEMA with authority to collect, use, and publish elevation data in sections dealing with each of these components. This authority is briefly reviewed below.

Risk Identification. Section 1360 of the National Flood Insurance Act,[10] governing the "identification of flood-prone areas," broadly authorizes FEMA to make arrangements with a wide range of data sources — federal agencies, state and local agencies, or persons or private firms — to get information about and to publicize "information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards."[11] This information is gathered and used to "establish or update flood risk zone data" and to "make estimates with respect to the rates of probable flood caused loss." The section also directs the Director to review the flood maps at least once every five

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[10] *See* 42 U.S.C § 4101, which provides:

> (a) Publication of information; establishment of flood-risk zones; estimates of flood-caused loss
>
> The Director is authorized to consult with, receive information from, and enter into any agreements or other arrangements with the Secretaries of the Army, the Interior, Agriculture, and Commerce, the Tennessee Valley Authority, and the heads of other Federal departments or agencies, on a reimbursement basis, or with the head of any State or local agency, or enter into contracts with any persons or private firms, in order that he may--
>
> (1) identify and publish information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards, within five years following August 1, 1968, and
>
> (2) establish or update flood-risk zone data in all such areas, and make estimates with respect to the rates of probable flood caused loss for the various flood risk zones for each of these areas until the date specified in section 4026 of this title.

[11] An "area of special flood hazard is the land in the flood plain within a community subject to a one percent or greater chance of flooding in any given year." 44 C.F.R. § 59.1.

years,[12] and to revise and update flood maps whenever new data requires it or at the request of a State or local government.[13] An important element of the program is the public dissemination of these flood maps: the Director is required to make "flood insurance rate maps and related information" available free of charge to local communities, state floodplain management agencies, federal agency lenders, and federal entities for lending regulation; this information must be made available "at reasonable cost" to everyone else.[14] Further, the Director is required to give public notice of any changes in the maps caused by letters of map amendment or letters of map revision.[15]

Recognizing the regulatory and financial significance of a special flood hazard area ("SFHA") designation, Section 1363 ("Flood Elevations Determinations") mandates that FEMA provide notice to communities of a proposed designation, and further provides specific procedures by which communities can challenge (on technical grounds alone) and ultimately appeal this designation.

Section 1364 ("Notice Requirements") requires that federally supported mortgage lenders[16] notify the borrower/owner if the property is located in a special flood hazard area. The statute requires that this notice include a "warning" that the property is subject to flood risk and information about insurance purchase requirements, but FEMA is permitted to require that the notice also include "any other information that the Director considers necessary to carry out the purposes of the National Flood Insurance Program."[17] Lenders must document their determination that a property was within or without the SFHA on a form mandated by FEMA.[18]

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[12] *See* 42 U.S.C. § 4101(e).

[13] *See* 42 U.S.C. § 4101(f) which provides:

> (f) Updating flood maps
> The Director shall revise and update any floodplain areas and flood-risk zones--
> (1) upon the determination of the Director, according to the assessment under subsection (e) of this section, that revision and updating are necessary for the areas and zones; or
> (2) upon the request from any State or local government stating that specific floodplain areas or flood-risk zones in the State or locality need revision or updating, if sufficient technical data justifying the request is submitted and the unit of government making the request agrees to provide funds in an amount determined by the Director, but which may not exceed 50 percent of the cost of carrying out the requested revision or update.

[14] 42 U.S.C. § 4101(g).

[15] 42 U.S.C. § 4101(h); *see also* 42 U.S.C. § 4101(i)(requiring that a compendium of map changes be published semi-annually).

[16] We use this term to include both Federal agency lenders and regulated lending institutions as defined in 42 U.S.C. § 4003(7) and (10).

[17] Id.

[18] Section 1365, 42 U.S.C. § 4104b. (establishing standard flood determination forms)

Risk Reduction. Section 1361(c) provides that, after conducting studies and investigations, and gathering "such other information as he deems necessary," the Director shall develop comprehensive criteria encouraging the adoption of adequate State and local measures restricting development of land exposed to flood damage and guiding construction away from locations threatened by flood hazards.[19] These criteria carry real teeth: under Section 1315, no new federal flood insurance may be issued in any area unless "an appropriate public body" has adopted adequate land use and control measures, with effective enforcement provisions, that are consistent with the criteria adopted under Section 1361(c).[20]

Elevation data is critical to the criteria developed by FEMA under these sections. Communities participating in the NFIP must obtain the elevation of proposed developments and of proposed new or substantially improved structures whenever there is some information about the base flood elevation with which building elevations can be compared. Depending on the nature of the proposed development or construction and the elevations involved, communities must either prohibit the construction, or require that the structure be built with various flood mitigation measures (such as elevation).[21] Although FEMA publishes an Elevation Certificate Form[22] and recommends that it be used for floodplain management purposes, FEMA's regulations do not require that a community obtain and maintain elevation data on this Form. However, communities are required to obtain the elevation of the lowest floor (including the basement) of all new and substantially improved structures and maintain a record of all such

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[19] *See* § 1361(c) (codified at 42 U.S.C. § 4102(c)).

> On the basis of such studies and investigations, and such other information as he deems necessary, the Director shall from time to time develop comprehensive criteria designed to encourage, where necessary, the adoption of adequate State and local measures which, to the maximum extent feasible, will — (1) constrict the development of land which is exposed to flood damage where appropriate, (2) guide the development of proposed construction away from locations which are threatened by flood hazards, (3) assist in reducing the damage caused by floods, and (4) otherwise improve the long-range land management and use of flood prone areas, and he shall work closely with and provide any necessary technical assistance to State, interstate, and local governmental agencies, to encourage the application of such criteria and the adoption and enforcement of such measures.

[20] *See* NFIA § 1315 (codified at 42 U.S.C. § 4022(a)(1))

> [N]o new flood insurance coverage shall be provided under this chapter in any area (or subdivision thereof) unless an appropriate public body shall have adopted adequate land use and control measures (with effective enforcement provisions), which the Director finds, are consistent with the comprehensive criteria for land management and use under section 4102 of this title.

[21] *See* 44 C.F.R. § 60.3.

[22] *See* FEMA Form 81-31, July 2000, O.M.B. No. 3067-0077(visited Mar. 31, 2003) http://www.fema.gov/nfip/pdf/manual10_02/08ce1002.pdf, pages CERT 7-11.

information. Thus, a community's permit files must have an official record that documents how high new and substantially improved buildings were elevated.

Elevation data in a particular format is, however, critical to another NFIP risk reduction program — the Community Rating System ("CRS"). Under the CRS, flood insurance premium rates are adjusted to reflect the reduced flood risk resulting from community activities that meet the three goals of the CRS: (1) reduce flood losses; (2) facilitate accurate insurance rating; and (3) promote the awareness of flood insurance. In order to participate in the CRS program, CRS communities must require and maintain in its files the FEMA Elevation Certificate for all new and substantially improved structures in the SFHA, and must make the certificates available to any requester.[23] Although the CRS was created using other broad authorities of the NFIP, Congress amended the NFIA in 1994 to give express authority for the CRS program.[24]

Risk Spreading. Congress specified in three sections of the statute that the Director establish and administer the flood insurance program through uniformly applicable rules and regulations. Section 1306(a) provides:

> The Director shall from time to time... provide by regulation for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage under section 4012 of this title, including
> (1) the types, classes and locations of any such properties which shall be eligible for flood insurance; [and]
> (2) the nature and limits of loss or damage (or subdivisions thereof), which may be covered by insurance.[25]

Section 1307 of the NFIA authorizes the Director to

> undertake and carry out studies and investigations, and receive or exchange such information as may be necessary to estimate, and shall from time to time estimate, on an area, subdivision, or other appropriate basis (1) the risk premium rates for flood insurance.[26]

Section 1313 authorizes the Director

> to take such action as may be necessary in order to make information and data available to the public, and to any State or local agency or official, with regard to (1) the flood insurance program, its coverage and objectives; and (2)

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[23] FEDERAL EMERGENCY MANAGEMENT AGENCY, COMMUNITY RATING SYSTEM MANUAL, Series 300, Section 311(a)(1999) (visited Mar. 31, 2003) <http://www.fema.gov/nfip/pdf/crsentire.pdf>.

[24] NFIA § 1315(b)(codified at 42 U.S.C. § 4022(b)).

[25] 42 U.S.C. § 4013(a).

[26] 42 U.S.C. § 4014(a).

> estimated and chargeable flood insurance premium rates, including the basis for and differences between such rates.[27]

In setting these rates, the Director is expressly (and perhaps obviously) authorized to consider "the respective risks involved" — which, of course, includes information on relative elevations.[28] And indeed, information on the elevation of structures, taken from Elevation Certificates, is used to calculate NFIP insurance premiums.[29]

Comments on Information Gathering Authority. Based simply on this brief review of the principal statutory provisions that support FEMA's ability to obtain and publish elevation data, the following assertions can be made:

1. Congress expressly provided exceptionally broad authority to collect and maintain data in order to create and maintain "maps and related information" of flood prone areas and zones.[30]
2. While dedicating less attention to the flood risk of individual structures than to the mapping program on which the regulatory program of the NFIP is based, Congress also gave FEMA authority to collect and disseminate data on flood risk of individual structures.[31]
3. Congress expressly bestowed on FEMA broad authority to obtain data from a wide variety of sources: other federal agencies (on a reimbursement basis), state and local communities; and under contracts with any persons or private firms.[32]
4. Congress expressly authorized and, for "maps and related information," directed the agency to make available to the public information that it collects and develops on flood risk.[33]
5. With respect to FEMA's maps, which affect property development rights, insurance obligations, and premium rates, Congress required FEMA to employ formal procedures for amendment and revision, which are subject to administrative and judicial review.[34]

3. Sources of Existing Elevation Data

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[27] 42 U.S.C. § 4020.

[28] *See* 42 U.S.C. § 4015(b)(1).

[29] *See* FEMA, FLOOD INSURANCE MANUAL, Full Edition, pp. Rate 4-Rate 10 (showing the premium computation table for "elevation-rated" rates in a number of different flood zones).

[30] *See* Notes 3-11 and related text, *infra.*

[31] *See* Notes 18-21, *infra.*

[32] *See* Note 3, *infra.*

[33] *See* Notes 3 and 20, *infra.*

[34] Section 1363, 42 U.S.C. § 4104.

A major challenge in creating an elevation registry is to populate the registry with reliable data as quickly as possible. A principal source of data for this purpose is the substantial amount of elevation information already in existence and held by FEMA, its contractors, communities, insurance agents and WYO companies, and perhaps by others. In this section of this Report, we describe briefly the nature and sources of this existing data.

FEMA and its Contractors. FEMA already maintains structure specific elevation data in conjunction with several of its programs. This data derives from a variety of sources. First, FEMA's regulations provide a procedure for individual property owners to submit technical information to FEMA to show that the owner's property should not have been designated in a flood zone. Under these regulations, the owner submits — among other things — a "certification by a Registered Professional Engineer or Licensed Land Surveyor that the lowest grade adjacent to the structure is above the base flood elevation."[35] Under these regulations, FEMA processes thousands of requests for Letters of Map Amendment (LOMA) each year; whether or not a Letter of Map Amendment is ultimately issued, a record exists of the elevation data submitted with each request.

Second, FEMA's regulations provide a procedure for revision of flood maps at the request of communities or at the request of individuals "through the community," where a project would revise the topography of the land through addition of fill or other construction activities.[36] In many cases, the information submitted in these Requests for Map Revision, and Conditional Requests for Map Revision, include certified elevation data for individual properties and structures. Again, thousands of Letters of Map Revision are processed under these regulations each year, creating a sizable pool of elevation data available for inclusion in the registry.

Third, a small proportion of federal flood insurance policies are directly issued by FEMA rather than by a private insurance company operating under the WYO program. As to these policies, FEMA (through its contractor) obtains a property owner's application for insurance and provides the coverage. Although elevation certificates are not required to rate all policies (such as pre-FIRM structures in a Special Flood Hazard Area (SFHA)), elevation certificates are required in order to rate policies on a number of structures, particularly post-FIRM construction in an SFHA.[37]

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[35] 44 C.F.R. § 70.3(b)(4).

[36] *See* 44 C.F.R. §65.5; §65.6 and §65.8.

[37] *See* FEMA, FLOOD INSURANCE MANUAL, Full Edition, pp. Rate 4-Rate 10 (showing the premium computation table for "elevation-rated" rates in a number of different flood zones).

Fourth, after a flood, FEMA sometimes commissions licensed engineers and surveyors to create detailed maps of the flooding event. These maps are used to assist in recovery from the disaster and in the review of mitigation proposals under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended ("Stafford Act").[38] We understand that at least some of these projects may generate elevation data applicable to individual structures.

Elevation data obtained for Letters of Map Amendment and Revision, or from flood studies funded under the Stafford Act, might be held by FEMA, or, in some cases, might be held in the files of the FEMA contractors who originally generated the data or processed data provided by third parties.

Communities. As noted above, a community participating in the NFIP must adopt and enforce floodplain management ordinances.[39] These ordinances must generally prohibit construction in the floodway and require that a structure in the floodplain be built with various flood mitigation measures (such as elevation a minimum number of feet above the base flood elevation). Floodplain management ordinances generally enforce these requirements through the building permit process: an applicant for a building permit for a new or substantially modified structure in the SFHA must provide an elevation certificate from a registered engineer or licensed surveyor demonstrating compliance with the elevation requirements. Communities maintain these elevation certificates. In communities, which participate in the Community Rating System (CRS) program, Elevation Certificates must be submitted by the engineer or surveyor on an Elevation Certificate form prescribed by FEMA,[40] and these forms must be available for public inspection.[41] CRS communities obtain additional credit for placing Elevation Certificate information in a computerized database that is provided to FEMA each year.[42]

Insurance Agents and WYO Companies. Over 90% of the flood insurance policies issued under the NFIP are not issued by FEMA but by an insurance company operating under the WYO Arrangement.[43] For these policies, property owners submit applications to insurance agents; the agents review this information and require the owner to provide an Elevation Certificate where a Certificate is required in order to rate the policy. The agent then transmits the application to the WYO Company in the format and with the information that that Company requires in order to write the policy. The WYO Company, in turn,

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[38] 42 U.S.C. § 5121 *et seq.*.

[39] *See* 44 C.F.R. § 60.2.

[40] *See* FEMA Form 81-31, *supra note 22*.

[41] FEMA, COMMUNITY RATING SYSTEM MANUAL, SECTION 310, Page 310-2 (1999).

[42] *Id.*, SECTION 311, Page 310-6 (1999).

[43] 42 U.S.C. § 4012(c); 44 C.F.R. § 59.22(a)(3).

provides to FEMA a computer tape each month containing information about new policies or activities under existing policies as required by FEMA.

Although Elevation Certificates may be required to rate a policy, and Elevation Certificates are used by agents in providing companies the information required to write a policy, FEMA does not at present require that WYO companies submit the Elevation Certificates themselves, nor are WYO Companies required to transmit to FEMA all of the information contained in an Elevation Certificate. We understand that WYO companies vary in the amount of information they require agents to capture from an Elevation Certificate and transmit to the WYO Company. Record keeping practices of agents across the country may also vary.

CROSS-CUTTING LEGAL ISSUES

1. Applicability of the Privacy Act of 1974

Overview. The Privacy Act of 1974 (the Privacy Act)[44] regulates the collection, maintenance, use, and disclosure by federal executive branch agencies of certain information about individuals, which is personally identifiable. It can generally be characterized as an information resources management statute which incorporates "fair information practices"[45] to guide federal agencies in dealing with personally identifiable information. It guarantees access by individuals to information about themselves but prohibits disclosure to others without the written authorization of the subject individual (with some exceptions in both directions, of course). It also imposes requirements on agencies in managing Privacy Act data from collection to disposition.

> The lynchpin of the Privacy Act is the "system of records," a term with a particular meaning defined in the Privacy Act. If information is contained, or is proposed to be contained, in a "system of records," it is subject to the provisions of the Privacy Act, and an agency must collect, maintain, use and disclose that information only in accordance with the Privacy Act. Since the Privacy Act regulates initial collection of information, an agency cannot wait until it has acquired data to consider whether the Privacy Act applies. The agency must consider the entire life cycle of the data it intends to collect before beginning collection so that at the time of collection, the agency does not inadvertently violate the Privacy Act (for example, by failing to provide the proper notice in advance).
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> A "system of records" is defined by the Privacy Act as
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> A group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol or other identifying particular assigned to the individual.[46]

The term "record" is also defined by the Privacy Act:

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[44] The Privacy Act of 1974, P.L. 93-579 (codified at 5 U.S.C. § 552a).

[45] The concept of fair information practices was first elucidated in a 1973 advisory committee report to the Secretary of Health, Education and Welfare. *See* UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS: REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS 41 (July 1973).

[46] 5 U.S.C. § 552a(a)(5).

> Any item, collection, or grouping of *information about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, *or other identifying particular assigned to the individual*, such as a finger or voice print or a photograph.[47]

In order for the Privacy Act to apply to the elevation registry, the registry must first include records, each of which is "information about an individual" connected to an individual identifier of some sort. Those records, in order to qualify as a "system of records," must be retrieved by that individual identifier. We turn now to an analysis of whether the proposed elevation registry includes "records."

A "record" includes two elements: 1) information "about" an individual which is connected to 2) an identifier "assigned to the individual." The nub of the legal question is encapsulated by two questions, relying on the assumptions stated above about the contents of the database. First, do the proposed data elements constitute "information about an individual"? Second, if the data is, as proposed, to be retrieved by street address, is the street address an individual identifier as contemplated by the Privacy Act?

Retrieval by "Individual Identifiers." As a practical matter, almost all of the Privacy Act cases dealing with the definition of "record," are concerned with whether some particular piece of information in a clearly established system of records is "about" the subject individual and do not address the question of identifiers. There are barely a handful of cases, which directly address the question of whether the information includes an individual identifier. It may therefore seem in reviewing the cases that the courts confound these two concepts. This is due to the fact that in the most common factual situation presented to the courts, a grouping of information includes an individual's name or social security number, or some other obvious identifier, and usually the agency has recognized that the Privacy Act applies by complying with the requirement to publish a notice describing the system of records in the *Federal Register*.[48]

In understanding the difference, it is useful to remember that the Privacy Act was passed when the model for a system of records was a filing cabinet, rather than a database. The Congress was interested in covering the type of filing cabinet in which one could use the indexing system to immediately pluck out a file about an individual, such as a collection of folders alphabetized by last name, or in numerical order by social security number. The identifier was the indexing element, the sort of information one might find on the label of a file folder, and the "information about" the individual was the contents of the file folder. By contrast, they excluded from the definition of "system of records" a filing cabinet organized

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[47] 5 U.S.C. § 552a(a)(4)(emphasis added).

[48] *See* 5 U.S.C. 552a(e)(4).

chronologically, where one might have to search the entire filing cabinet to be sure to find the file on a particular individual—such a filing system would not be a "system of records" under the Privacy Act.

To qualify as a Privacy Act "record," the information must identify an individual.[49] Our question is whether a street address does so. The definition of individual is limited to living, natural persons who are U.S. citizens and permanent resident aliens.[50] An identifier need not be unique, but it must identify an individual. The Act itself lists both unique and non-unique identifiers, using the following examples: name, number, fingerprint, voice print, and photograph.[51] While an assigned number or fingerprint would be unique, it is common in American society to find more than one individual with the same name, such as John Smith, Sr., and John Smith, Jr. The list of individual identifiers in the Privacy Act includes examples, and is not an exhaustive list.[52]

The Supreme Court has addressed home addresses in the context of the Privacy Act in *DOD v. FLRA*. In that case, federal employee unions sought access to the home addresses of employees in a bargaining unit to support their representation responsibilities under the Federal Service Labor-Management Relations statute. The Supreme Court rejected the unions' argument that the Labor Statute afforded the unions special access to the records, and treated the unions as if they were any other third-party requester under the Freedom of Information Act. As a precedent, the Supreme Court stated without discussion or citation that "the employee addresses sought by the unions are 'records' covered by the broad terms of the Privacy Act."[53] Using a FOIA analysis, the Court concluded that the disclosure of employees' home addresses would constitute a "clearly unwarranted invasion of personal privacy."[54] However, the case is inapposite,

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[49] *Compare Reuber v. United States*, 829 F.2d 133, 142 (D.C. Cir. 1987) (letter reprimanding individual sent to and disclosed by agency was "record" because it clearly identified individual by name and address), *with Robinson v. United States Dep't of Educ*., No. 87-2554, 1988 WL 22292, at *3 (E.D. Pa.) Mar. 8, 1988 (letter describing individual's administrative complaint was not "record" because it "did not identify plaintiff in any way."); *see also Albright v. United States*, 631 F.2d 915, 920 (D.C. Cir. 1980) (case challenging agency's maintenance of records concerning how plaintiff exercised First Amendment rights holding that a videotape of a meeting constituted a "record" and stating that "[a]s long as the tape contains a means of identifying an individual by picture or voice, it falls within the definition of a 'record' under the Privacy Act").

[50] *See* 5 U.S.C. § 552a(a)(2). If the database were determined to be covered by the Privacy Act, and included records about any U.S. citizens, FEMA would be required to abide by the Act's limits, at least with respect to those individuals. While any subjects who were not living permanent residents would not be entitled by law to Privacy Act rights, as a matter of public policy and administrative convenience, FEMA might choose to treat all of its records the same, rather than try to delineate covered individuals and covered records from those not covered.

[51] *See* 5 U.S.C. § 552a(a)(4).

[52] *See id.*

[53] *DOD v. FLRA*, 510 U.S. 487, 494.

[54] *Id.* at 502.

because the Court did not have to consider whether a home address was an individual identifier. The personnel systems in question were indexed not by address, but by name and social security number. The home addresses, in this case, were the “information about” the employees, not the indexing individual identifiers. If it were already clear that FEMA’s elevation registry were a “system of records,” the home addresses in it would be protected from disclosure. But this does not answer the threshold question of whether there is a system of records in the first place.

It is possible that a court might consider a street address to be an identifier of an individual, but only where only one person owns or resides at the property. If more than one person lives at a particular address, the address alone cannot be associated with just one person in the household, but could identify, in addition, a spouse or domestic partner, child, other family member living in the household, a roommate, a live-in employee, or other arrangement. In that case, the address would be associated with two or more individuals, and could not be an individual identifier. Although an individual identifier does not have to be unique, it must identify a unique individual.

The closest case to FEMA’s street address problem may be the recent case of *Fleming v. United States Railroad Retirement Board*[55] in which summary information about an RRB investigation of the plaintiff was disclosed in a report to Congress. The District Court for the Northern District of Illinois decided that since the report did not identify the plaintiff but only described the case, it did not constitute a “record.” The court said that RRB’s report “would have identified plaintiff only to an individual who had other information that would have caused that individual to infer from the report that plaintiff was the subject of the investigation.”[56]

Even in the case of sole ownership or residence, a street address, as in *Fleming*, would only identify the owner or resident to a person who had other information that would allow the person to infer that the property was associated with a particular individual. More important, the definition of record in the statute uses the phrase “identifying particular *assigned to the individual*.”[57] In the case of a street address, even where only one person owns or resides at an address, when ownership or residence changes, the address comes to identify a completely different individual, or, in some cases, even an organization. There is a strong argument that a street address is assigned to the real property, and not to the individual, and therefore would not qualify as the identifier element necessary to defining a “record.”

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[55] No. 01 C 6289, 2002 WL 252459, at *2 (N.D. Ill. Feb. 21, 2002)

[56] *Id.* at *2

[57] 5 U.S.C. § 552a(a)(4).

"Information About An Individual" To meet the Privacy Act definition of "information" in a record, data does not have to be particularly personal or broad in its descriptive qualities. The Office of Management and Budget's Guidelines state that the term "record" means "any item of information about an individual that includes an individual identifier"[58] and "can include as little as one descriptive item about an individual."[59] The federal courts differ as to how broad or narrow the definition of "record" is.

Consistent with the OMB Guidelines, the Courts of Appeals for the Second and Third Circuits have broadly interpreted the term "record."[60] The Third Circuit held that the term "encompass[es] any information about an individual that is linked to that individual through an identifying particular" and is not "limited to information which taken alone directly reflects a characteristic or quality."[61]

The Second Circuit, after analyzing the tests established by the other courts of appeals, adopted a test "much like the Third Circuit's test."[62] The Second Circuit found the Third Circuit's test to be closest to the statutory language;"[63] it found the Third Circuit's test to be the only one consistent with the Supreme Court's decision in *DOD v. FLRA*, and, finally, it found the Third Circuit's test to be supported by the legislative history and OMB's guidelines.[64] Emphasizing that "the legislative history makes plain that Congress intended 'personal information' . . . to have a broad meaning," the Second Circuit held that the term "record" "has 'a broad meaning encompassing,' at the very least, any personal information 'about an individual that is linked to that individual through an identifying particular.'"[65] Other courts have also applied a broad interpretation of the term "record."[66]

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[58] United States Office of Management and Budget, Privacy Act Guidelines, 40 Fed. Reg. 28948, 28951 (1975). OMB has statutory authority to issue guidance and oversee implementation of the Privacy Act. *See* 5 U.S.C. § 552a(v).

[59] 40 Fed. Reg. at 28952.

[60] *See Bechhoefer v. United States Dep't of Justice Drug Enforcement Admin.,* 209 F.3d 57 (2d Cir. 2000); *Quinn v. Stone,* 978 F.2d 126 (3d Cir. 1992).

[61] *Quinn v. Stone,* 978 F.2d at 133 (holding out-of-date home address on roster and time card information were records covered by Privacy Act).

[62] *Bechhoefer*, 209 F.3d at 60.

[63] *Id.*

[64] *Id.* at 61-62

[65] *Id.* at 62 (quoting *Quinn* and holding that a letter containing Bechhoefer's name and "several pieces of 'personal information' about him, including his address, his voice/fax telephone number, his employment, and his membership in [an association]" was a record covered by the Privacy Act).

[66] *See, e.g., Williams v. VA*, 104 F.3d 670, 673-74 (4th Cir. 1997) (citing *Quinn*, *inter alia*, and stating that "[w]hether the *Tobey* court's distinction [(discussed below)] be accepted, the legislative history of the Act makes it clear that a 'record' was meant to 'include as little as one descriptive item about an individual,'" and finding that "draft" materials qualified as "records" because they "substantially pertain to Appellant," "contain 'information about' [him], as well as his

The Courts of Appeals for the Ninth and Eleventh Circuits have limited Privacy Act coverage by adopting a narrow construction of the term "record" — requiring that in order to qualify, the information "must reflect some quality or characteristic of the individual involved."[67]

The Court of Appeals for the District of Columbia Circuit, the Circuit of universal jurisdiction for the Privacy Act,[68] also has adopted a narrow construction of the term by holding that in order to qualify as a "record" an item must contain "information that actually describes the individual in some way."[69] Examining the Third Circuit's statement in *Quinn* that information could qualify as a record "'if that piece of information were linked with an identifying particular (or was itself an identifying particular),'" the D.C. Circuit rejected the Third Circuit's interpretation "[t]o the extent that . . . [it] fails to require that information both be 'about' an individual and be linked to that individual by an identifying particular."[70] In order to qualify as a "record," the D.C. Circuit ruled that the information "must both be 'about' an individual and include his name or other identifying particular."[71] On the other hand, the D.C. Circuit rejected as "too narrow" the Ninth and Eleventh Circuits' definitions in *Unt* and *Boyd*, and stated that: "So long as the information is 'about' an individual, nothing in the Act requires that it additionally be about a 'quality or characteristic' of the individual."[72] Ultimately, the D.C. Circuit, "[w]ithout attempting to define 'record' more specifically than [necessary] to

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'name' or 'identifying number,' " and "do more than merely apply to him" (quoting legislative history, Source Book at 866)); *Unt v. Aerospace Corp.*, 765 F.2d 1440, 1449-50 (9th Cir. 1985) (Ferguson, J., dissenting) (opining that majority's narrow interpretation of term "record" is "illogical, contrary to the legislative intent, and defies the case laws' consistent concern with the actual effect of a record on a person's employment when assessing that record's nature or subject"); *cf. Doe v. Herman*, No. 297CV00043, 1999 WL 1000212, at *9 (W.D. Va. Oct. 29, 1999) (unpublished magistrate's recommendation) (stating that in that litigation "no dispute exists as to whether the social security numbers at issue constitute records as defined by the Privacy Act"), *adopted in part & rev'd in part on other grounds* (W.D. Va. 2000), *aff'd in part & rev'd in part on other grounds, sub nom. Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002).

[67] *Boyd v. Sec'y of the Navy*, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam) (although stating narrow test, finding that memorandum reflecting "Boyd's failure to follow the chain of command and his relationship with management" qualified as Privacy Act record); *accord Unt v. Aerospace Corp.*, 765 F.2d 1440, 1448-49 (9th Cir. 1985) (letter written by employee — containing allegations of mismanagement against corporation that led to his dismissal — held not his "record" because it was "about" the corporation and reflected "only indirectly on any quality or characteristic" of employee).

[68] *See* 5 U.S.C. § 552a(g)(5) ("An action to enforce any liability created under this section may be brought in the District court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia").

[69] *Tobey v. NLRB*, 40 F.3d 469, 471-73 (D.C. Cir. 1994).

[70] *Id.*

[71] *Id.* at 471.

[72] *Tobey*, 40 F.3d at 472.

resolve the case at bar," held that an NLRB computer system for tracking and monitoring cases did not constitute a "system of records," because its files contained no information "about" individuals, despite the fact that the case information contained the initials or identifying number of the field examiner assigned to the case.[73] Although the D.C. Circuit recognized that the case information could be, and apparently was, used in connection with other information to draw inferences about a field examiner's job performance, it stated that that "does not transform the [computer system] files into records *about* field examiners."[74]

Several other courts have also limited Privacy Act coverage by applying narrower constructions of the term "record."[75]

On the rare occasions when the federal courts have heard Privacy Act cases involving information about property belonging to an individual, they have found that it does not constitute information about an individual covered by the Act. For example, in *Shewchun v. United States Customs Service*, the District Court for D.C. reviewed a request for a letter concerning the Customs Service's disposition of the plaintiff's seized merchandise and held that the letter lacked "sufficient informational nexus with [the plaintiff] to bring it within the definition of 'record'."[76] In Arizona, the District Court reviewed a request for a Postal Service claim form

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[73] *Id.* at 471-73.

[74] *Id.* at 472-73.

[75] *See Tripp v. DOD,* 193 F. Supp. 2d 229, 236 (D.D.C. 2002) (citing *Tobey* and stating that salary information for position for which plaintiff had applied "is not 'about' plaintiff—the fact that she could receive that salary had she been chosen for the position does not convert this into information 'about' plaintiff"); *Wolde-Giorgis v. United States*, No. 94-254, slip op. at 5-6 (D. Ariz. Dec. 9, 1994) (citing *Unt* with approval and holding that Postal Service claim form and information concerning estimated value of item sent through mail was "not a 'record' within the meaning of the [Privacy Act]" because it "disclosed no information about the plaintiff" and did not reflect any "'quality or characteristic' concerning the plaintiff"), *aff'd*, 65 F.3d 177 (9th Cir. 1995) (unpublished table decision); *Shewchun v. United States Customs Serv.*, No. 87-2967, 1989 WL 7351, at *1 (D.D.C. Jan. 11, 1989) (letter concerning agency's disposition of plaintiff's merchandise "lacks a sufficient informational nexus with [plaintiff] (himself, as opposed to his property) to bring it within the definition of 'record'"); *Blair v. United States Forest Serv.*, No. A85-039, slip op. at 4-5 (D. Alaska Sept. 24, 1985) ("Plan of Operation" form completed by plaintiff held not his "record" as it "reveals nothing about his personal affairs"), *appeal dismissed*, No. 85-4220 (9th Cir. Apr. 1, 1986); *Windsor v. A Fed. Executive Agency*, 614 F. Supp. 1255, 1260-61 (M.D. Tenn. 1983) (record includes only sensitive information about individual's private affairs), *aff'd*, 767 F.2d 923 (6th Cir. 1985) (unpublished table decision); *Cohen v. United States Dep't of Labor*, 3 Gov't Disclosure Serv. (P-H) ¶ 83,157, at 83,791 (D. Mass. Mar. 21, 1983) (record includes only "personal" information); *AFGE v. NASA*, 482 F. Supp. 281, 282-83 (S.D. Tex. 1980) (determining that sign-in/sign-out sheet was not "record" because, standing alone, it did not reveal any "substantive information about the employees"); *Houston v. United States Dep't of the Treasury*, 494 F. Supp. 24, 28 (D.D.C. 1979) (same as *Cohen*); *But cf. Williams v. VA*, 104 F.3d 670, 673-74 (4th Cir. 1997) (quoting legislative history and finding that materials qualified as "records" because they "substantially pertain to Appellant," "contain 'information about' [him], as well as his 'name' or 'identifying number,'" and "do more than merely apply to him").

[76] *Shewchun v. United States Customs Service*, No. 87-2967, slip op. at 3 (D.D.C. Jan 11, 1989).

and information concerning estimated value of an item sent through the mail, and ruled that it was “not a ‘record’ within the meaning of the [Privacy Act]” because it “disclosed no information about the plaintiff” and did not reflect any “ ‘quality or characteristic’ concerning the plaintiff.”

The type of information contemplated by FEMA for the flood database is closer to information about the property at a particular address than personal information about the owner of that property. The elevation of a particular structure’s floors, its lowest or highest adjacent grade, or whether or not it has a basement, are characteristics of the structure and not a “quality or characteristic” of the individual who owns the structure. Should ownership change, the previous individual owner might acquire a new structure with completely different characteristics, and the new owner would come to be associated with the characteristics of the property at the address alienated by the previous owner. The characteristics of a structure at a particular address would not change just because ownership had transferred. Therefore, we believe that the information contemplated for the elevation registry is about the property, not “information about an individual” as defined by the Privacy Act, and would not constitute a record under the Act.

Of course, a court will react to the particular facts before it in a particular case, and there is always a risk that, if challenged under the Privacy Act, a court would find the proposed elevation registry to be a “system of records”. A court might adopt a very broad definition of “record” and conclude that characteristics of real estate reflect on one personally. A court might further decide that a street address identifies any sole owner of a property, or even that just as a single name (John Smith) may identify more than one individual, a street address may identify all individuals whose names appear on the deed or the mortgage.

However, even under the Second and Third Circuits broad test for determining whether information is a “record” under the Privacy Act, the information must still be “about an individual” and linked to the individual by an identifier, although it need not, taken alone, directly reflect a “characteristic or quality” of the individual.[77] Since FEMA anticipates retrieving the data in the database by street address, and since the information associated with the addresses is likely to be found to describe information about the property at that address, and not the individual owner or resident, we firmly believe that the proposed data does not constitute “records” under the Act, that the registry would not fall within the definition of a “system of records” under the Privacy Act, and that, therefore, the Privacy Act would not apply.

Implications of Added Data Elements. As noted above, our conclusion depends upon the contents for the database as described by FEMA. If FEMA were to add to this registry data elements that are individual identifiers, such as

[77] *Quinn v. Stone*, 978 F.2d at 133.

names or policy numbers, the Privacy Act is much more likely to apply. If the Privacy Act applies, FEMA would be required to publish a notice identifying the registry as a "system of records," and describing the registry in the *Federal Register*, give direct notice to individuals at the time information was collected for the registry, and most important, FEMA would not be able to disclose information in the registry to the general public without the written consent of the individuals who are the subjects of the record. Disclosures for program purposes would occur under a disclosure exception, most likely a routine use.[78] Disclosure pursuant to a routine use would be limited to particular program purposes, such as to insurance companies, or local governments that have particular needs for the data in carrying out the flood program. The addition of a routine use to a system of records requires 30-day advance notice in the Federal Register providing the opportunity for public comment,[79] and approval by the Office of Management and Budget.[80] In addition, an agency is required to maintain for at least five years an accounting of all disclosures made via the routine use provision,[81] to make the accounting available upon request to the individual who is the subject of the record,[82] and use the accounting to inform anyone to whom the record has been disclosed of any subsequent correction or notation of dispute about the record.[83] It would be difficult, although not impossible, for FEMA to justify affirmative disclosure of data designated as a "system of records" to the public at large.[84] Because we understand this is not the planned use of the registry, we have not analyzed this possibility in detail.

Relationship to Existing FIMA Systems of Records. In addition, while we understand that FEMA does not contemplate storing personally identifiable data in the elevation registry, we are aware that FEMA nevertheless already maintains databases of information related to the National Flood Insurance Program that do identify individuals and have been designated by FEMA as Privacy Act systems of records.

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[78] A "routine use" under 5 U.S.C. § 552a(b)(3) is a disclosure of a record outside of an agency for a "purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7).

[79] *See* 5 U.S.C. § 552a(e)(11).

[80] *See* United States Office of Management and Budget, Circular No. A-130, "Management of Federal Information Resources, Appendix I, 4.c.(1)(f), 65 Fed. Reg. 77677 (Dec. 12, 2000).

[81] *See* 5 U.S.C. § 552a(c)(1)-(2).

[82] *See id.* § 55a(c)(3).

[83] *See id.* § 552a(c)(4).

[84] Usually, agencies that have been able to justify such broad disclosure rely on specific statutory authority that requires it. For example, executive branch financial disclosure reports are a designated system of records and are required to be made available to any requester under section 205 of the Ethics in Government Act of 1978 (section 105 of the Ethics Act, as amended), which is administered by the Office of Government Ethics. However, if there is a program purpose that is "compatible with the purpose for which the information was collected," it may be possible to justify broad public disclosure.

The Federal Insurance and Mitigation Administration (FIMA) last published notices for their systems of records on January 23, 2002. Below is a summary of these six systems of records taken from the information in that notice. We have not made any evaluation about the currency of the notice or the quality of these notices with respect to their compliance with the Privacy Act of 1974.

FIMA-2, "National Flood Insurance Direct Servicing Agent Application and Related Documents Files," covers applicants for flood insurance and individuals insured directly by FEMA for flood insurance. In addition to identifying information such as name, address, and taxpayer identification number, it contains records about the subject's policy, mortgage lender, loans, and claims including Group Flood Insurance Program certificates. The records are used to carry out the NFIP and verify no duplication of benefits.

FIMA-3, "National Flood Insurance Bureau and Statistical Agent Data (BSA) and Related Files," covers information about insured individuals that is required to be reported by private insurance agencies in the Transaction Record Reporting and Processing Plan.

FIMA-4, "National Flood Insurance Program Marketing Records and Related Files," includes marketing information about consumers, flood insurance policyholders, insurance agents, Write-Your-Own company employees and lenders, such as identifying information and data about awareness, attitudes, and satisfaction related to the flood program. The records are used in the campaign to increase awareness of flood risks and the availability of flood insurance.

FIMA-5, "National Flood Insurance Program Telephone Response Center (TRC) Consumer and Policyholder Records and Related Documents Files," covers consumers and policyholder identifying information, consumer research, and records of inquiries for NFIP marketing material.

FIMA-6, "National Flood Insurance Special Direct Facility (SDF) Repetitive Loss Target Group Records and Related Files," includes underwriting and claims data about individuals who have been designated as RLTG policyholders. The data includes identifying information, including taxpayer identification number, and may include application forms, claims and loss information, and information about the lender, loans and dates of mortgages, *Most relevant to our current inquiry, this system of records includes Elevation Certificates.*

FIMA-7, "National Flood Insurance Community Rating System and Related Documents Files," includes information on individuals in communities applying to the Community Rating System, Repetitive Loss property owners, and other applicants for insurance or policyholders.

FEMA may collect information already in FEMA's possession for the registry from these systems of records. Under an exception to the "no disclosure without

consent rule,"[85] FEMA is permitted to disclose information from a system of records to "officers and employees of the agency …who have a need for the record in the performance of their duties." As long as the record stays within the agency for a mission purpose, disclosure is permitted.

However, the fact that a record initially was part of a system of records does not mean it is always protected by the Privacy Act. The exact same record in a grouping of records, which is not retrieved by an individual identifier, is NOT protected by the Privacy Act because it does not meet the definition of a "system of records."[86] Therefore, even if elevation data or elevation certificates were transferred from FIMA-6, "National Flood Insurance Special Direct Facility (SDF) Repetitive Loss Target Group Records and Related Files," to the registry, as long as the registry records were not retrieved by an individual identifier, none of the information in the registry would be protected, or regulated, by the Privacy Act.

However, if FIMA-6 records are to be used on a routine basis as a source of data for the registry, FEMA would be wise to review the sources from which information for FIMA-6 records are collected. If any of that information is collected directly from the subject individual (for example, on an application form), FEMA could update the notice given to the subject individual, and the associated system of records notice published in the *Federal Register*, to properly reflect the expanded ultimate use of the information.

Linking Databases or Computer Matching Programs. If FEMA intends that the new registry not be covered by the Privacy Act, FEMA must maintain such systems of records separately from the registry. FEMA may match the data from the registry together with these systems of records, as long as the databases are not combined, and there is no permanent link between a designated Privacy Act system of records and the registry.[87] We understand that since the registry is contemplated for disclosure, which would be more administratively burdensome if it were covered by the Privacy Act, FEMA has a strong incentive to keep the databases separate.

Furthermore, an agency is permitted to use its own databases for program purposes, including for computer matching. The Computer Matching and Privacy Protection Act (CMPPA)[88] which regulates the comparison of systems of records, does not prohibit comparisons, it merely requires certain procedural safeguards for interagency matches which affect individuals' federal benefits or loans, or

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[85] *See* 5 U.S.C. § 552a(b).

[86] *See* 5 U.S.C. § 552a(a)(5).

[87] *See Tobey v. NLRB (a*gency "could use data from [database] in combination with other information to draw inferences about [plaintiff's] job performance. . . does not transform the [database] files into records.)

[88] *See* Pub. L. No. 100-503 (codified in scattered sections of 5 U.S.C. § 552a).

matches involving federal personnel records.[89] Intra-agency matches for program purposes are not regulated. So, if FEMA compared its existing Privacy Act systems of records with the new elevation registry, such a match would not be covered by the CMPPA.

Finally, we note that there is some possibility that documents could be attached to the registry that contain personally identifying information. For example, one way to alert users of the source of data placed in the registry would be to attach to the registry an electronic copy (say, a .pdf file) of the source document, such as an elevation certificate from community files or a LOMA application. This attached document might include the name of the property owner. However, we do not believe that the presence of this information on an attached file would convert the registry into a Privacy Act system of records, at least if it were not technically possible for a person using the registry to conduct a computer search using the 'individual identifier' of the individual's name. In order to be a "system of records" triggering coverage under the Privacy Act, information in a filing system must actually be retrievable by individual identifiers.

2. Freedom of Information Act Issues[90]

Overview. With the passage of the Freedom of Information Act (FOIA) in 1966,[91] Congress firmly established a right of access to federal records, and the right to enforce that access in federal court. FOIA incorporates a presumption of openness, based on the principle that in a democratic society, citizens must be informed in order to check corruption and ensure the government is accountable for the performance of its statutory duties. Since enactment of FOIA, other open records laws have been passed to strengthen these goals, such as the Sunshine Act,[92] which governs federal open meetings, and the Federal Advisory Committee Act,[93] governing meetings of councils of outside advisors to the executive branch, and numerous other statutes governing access to specific types of information.

FOIA is a disclosure statute. FOIA *requires* disclosure, on request, of any information in government files unless the information falls within one of FOIA's exemptions. FOIA *permits*, but does not require, agencies to withhold exempt

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[89] *See* 5 U.S.C. § 552a(a)(8).

[90] The discussion in this section responds to the following issue in our Task Order: Evaluate the legal impediments to making information in a National Elevation Registry available outside FEMA, either to the public at large, or, in the alternative, to selected NFIP stakeholders such as mortgage and insurance companies with a legitimate need to know."

[91] 5 U.S.C. § 552.

[92] 5 U.S.C. § 552b.

[93] 5 U.C.C. App.

information.[94] Thus, although FOIA does exempt some types of records from the requirement to disclose,[95] FOIA itself never prohibits any type of disclosure. The Justice Department's Freedom of Information Act Guide states, "[i]nasmuch as the FOIA's exemptions are discretionary, not mandatory, agencies may make discretionary disclosures of exempt information, as a matter of their administrative discretion, where they are not otherwise prohibited from doing so."[96] In other words, while the FOIA accommodates certain prohibitions embodied in *other* statutory authorities, it does not, itself, require an exemption to be exercised.[97] Barring another statute that would prohibit disclosure, agencies are legally permitted to disclose information to the public that is exempt under FOIA.[98]

As demonstrated above, the dissemination of information in FEMA's possession about flood risk is one of the key elements of the National Flood Insurance Program.[99] These elements of the NFIP are wholly consistent with FOIA and longstanding federal policy favoring affirmative disclosure of information in support of an agency's mission.[100] In the case of the Elevation Database, FEMA's specific intent is to disclose elevation data to the WYO companies and their agents, and to change FEMA's regulations to allow those companies and agents to rely upon the Elevation Database in writing policies.

Under FOIA, data in the Database will be "records" under the control of an "agency."[101] Accordingly, FEMA very well may receive a FOIA request for the data in the elevation registry from others — homeowners or prospective homebuyers, communities, mortgage lenders, or flood zone determination companies. When FEMA receives a request, it should make no inquiry into the requester's motives for seeking documents, as a requester's basic rights to

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[94] *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information.").

[95] The core of the FOIA is the requirement that "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, [an agency] shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A).

[96] United States Department of Justice, *Freedom of Information Act Guide*, May 2002.

[97] *See Campaign for Family Farms v. Glickman*, 200 F.3d 1180, 1185 (D. Minn. 2000) ("agency has discretion to disclose information within a FOIA exemption, unless something independent of FOIA prohibits disclosure.")

[98] *See Chrysler Corp. v. Brown* and *Bartholdi Cable Co. v. FCC, supra note 94*.

[99] *See* 42 U.S.C. § 4101.

[100] *See* FOIA, 5 U.S.C. § 552(a)(1) and (2), and U.S. Office of Management and Budget, Circular No. A-130, Transmittal No. 3, "Management of Federal Information Resources," at 8(a)(5), 61 Fed. Reg. 6427, 6432 (Feb. 20, 1996), *available at* <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html> (visited Jan. 7, 2003).

[101] *See* 5 U.S.C. 552(f).

access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public.[102]

We have not been advised of any desire by FEMA to withhold information so requested, assuming FEMA is not legally barred or subjected to undue legal risk in doing so. Nonetheless, we note that the policy of the Justice Department, as most recently enunciated by Attorney General Ashcroft, is that agencies considering discretionary disclosure of exempt materials do so "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."[103] Accordingly, we turn to a review of the possible legal risks that FEMA would incur in disclosing this elevation data in response to a FOIA request — bearing in mind that the most significant legal risk an agency may incur under FOIA would arise were the agency to fail to disclose non-exempt information.

'FOIA' Analysis of Risk of Disclosure.[104] Although FOIA is a disclosure statute, third parties whose information is held by the federal government have frequently filed suit to prevent disclosure of "their" information by the federal government. These "reverse-FOIA" suits must argue both that the information is exempt from disclosure, and that disclosure would substantially invade a protectible interest of the plaintiff.[105] The exemption at issue in most reverse-FOIA cases is Exemption 4, covering "trade secrets or other commercial and confidential information, and Exemption 6 covering "personnel and medical files or similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[106]

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[102] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10; *see Parsons v. Freedom of Info. Act Officer*, No. 96-4128, 1997 WL 461320, at *1 (6th Cir. Aug. 12, 1997)(holding that plaintiff's argument of "legitimate need for the documents superior to that of the general public or the press" fails because identity of requester is irrelevant to determination of whether exemption applies).

[103] John Ashcroft, Attorney General, MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES, "The Freedom of Information Act," Oct. 12, 2001.

[104] We concluded *supra*, at 20-30. that the Elevation Registry as contemplated by FEMA would not likely be held a "system of records" under the federal Privacy Act of 1974 and hence that disclosure of information in the Registry would not violate the Privacy Act.

[105] *See Glickman*, 200 F.3d at 1188 (without deciding whether there is a constitutional right to secret ballot, finding a "strong and clearly established privacy interest in a secret ballot," and finding that the privacy interest in a secret ballot was "severely threatened," and that disclosure of names and addresses of persons who signed a petition would "substantially invade that privacy interest").

[106] Several such suits have recently been decided. *See, e.g., Recticel Foam Corp. v. United States Dep't of Justice*, No. 98-2523, slip op. at 9-10 (D.D.C. Jan. 31, 2002) (enjoining disclosure of FBI's criminal investigative files pertaining to plaintiffs), appeal dismissed, No. 02-5118 (D.C. Cir. Apr. 25, 2002); *Tripp v. DOD*, 193 F. Supp. 2d 229, 238-40 (D.D.C. 2002) (rejecting plaintiff's challenge to disclosure of federal job-related information concerning herself after disclosure had already been made to the media); *Glickman*, 200 F.3d at 1182 (agreeing with submitter that Exemption 6 should have been invoked and ordering permanent injunction requiring agency to withhold requested information).

In a reverse FOIA suit “the party seeking to prevent a disclosure the government itself is otherwise willing to make” assumes the “burden of justifying nondisclosure.”[107] A reverse-FOIA challenge to an agency's disclosure decision is reviewed in light of the “basic policy” of the FOIA to “open agency action to the light of public scrutiny” and in accordance with the “narrow construction” afforded to the FOIA's exemptions.[108]

The landmark case in the reverse-FOIA area is *Chrysler Corp. v. Brown*, in which the Supreme Court held that jurisdiction for a reverse-FOIA action cannot be based on the FOIA itself “because Congress did not design the FOIA exemptions to be mandatory bars to disclosure” and, as a result, the FOIA “does not afford” a submitter “any right to enjoin agency disclosure.”[109] In *Chrysler Corp.* the Court found that review of an agency's decision to disclose requested records can be brought under the Administrative Procedure Act (APA).[110] Accordingly, reverse-FOIA plaintiffs ordinarily argue that an agency's contemplated release would violate the Trade Secrets Act (or, sometimes, the Privacy Act or another statute) causing the plaintiff harm, and thus would “not be in accordance with law” or would be “arbitrary and capricious” within the meaning of the APA.[111] However,

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[107] *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997); *accord Frazee v. United States Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996) (“party seeking to withhold information under Exemption 4 has the burden of proving that the information is protected from disclosure”); *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 342 (D.C. Cir. 1989) (explaining that “statutory policy favoring disclosure requires that the opponent of disclosure” bear burden of persuasion); *TRIFID Corp. v. Nat'l Imagery & Mapping Agency*, 10 F. Supp. 2d 1087, 1097 (E.D. Mo. 1998) (same).

[108] *Martin Marietta*, 974 F. Supp. at 40 (quoting United States Dep't of the Air Force v. Rose, 425 U.S. 352, 372 (1976)); *see, e.g., TRIFID*, 10 F. Supp. 2d at 1097 (reviewing submitter's claims in light of FOIA principle that "[i]nformation in the government's possession is presumptively disclosable unless it is clearly exempt"); *Daisy Mfg. Co. v. Consumer Prod. Safety Comm'n*, No. 96-5152, 1997 WL 578960, at *1 (W.D. Ark. Feb. 5, 1997) (examining submitter's claims in light of "the policy of the United States government to release records to the public except in the narrowest of exceptions" and observing that "[o]penness is a cherished aspect of our system of government"), *aff'd,* 133 F.3d 1081 (8th Cir. 1998).

[109] 441 U.S. 281, 293-94 (1979).

[110] *See id*; *See also* 5 U.S.C. §§ 701-06 (2000); *see, e.g., CC Distribs. v. Kinzinger*, No. 94-1330, 1995 WL 405445, at *2 (D.D.C. June 28, 1995) (“neither FOIA nor the Trade Secrets Act provides a cause of action to a party who challenges an agency decision to release information . . . [but] a party may challenge the agency's decision” under APA); *Comdisco, Inc. v. General Svcs. Admin.*, 864 F. Supp. 510, 513 (E.D. Va. 1994) (“sole recourse” of ’party seeking to prevent an agency's disclosure of records under FOIA’ is review under APA); *Atlantis Submarines Haw., Inc. v. United States Coast Guard*, No. 93-00986, slip op. at 5 (D. Haw. Jan. 28, 1994) (in reverse FOIA suit, “an agency's decision to disclose documents over the objection of the submitter is reviewable only under” APA), *dismissed per stipulation* (D. Haw. Apr. 11, 1994); *Envtl. Tech., Inc. v. EPA*, 822 F. Supp. 1226, 1228 (E.D. Va. 1993) (same).

[111] *See, e.g., McDonnell Douglas Corp. v. Widnall*, 57 F.3d 1162, 1164 (D.C. Cir. 1995) (holding that the Trade Secrets Act "can be relied upon in challenging agency action that violates its terms as 'contrary to law' within the meaning of" APA); *Acumenics Research & Tech. v. Dep't of Justice*, 843 F.2d 800, 804 (4th Cir. 1988) (same); *Gen. Elec. Co. v. NRC*, 750 F.2d 1394, 1398 (7th Cir. 1984); *Gen. Dynamics Corp. v. United States Dep't of the Air Force*, 822 F. Supp. 804, 806

any reverse-FOIA action challenging disclosure of elevation registry data would face severe hurdles.

Public Domain Waiver. First, the Court of Appeals for the District of Columbia Circuit has held that even if government information would otherwise fall within one of FOIA's exemptions, the government must disclose that information on request if the information is in the "public domain."[112] In the court's view, once information becomes public, withholding data pursuant to an exemption would serve no purpose, and the government is deemed to have waived its right to invoke the exemption.[113] This "public domain" doctrine may be very critical should FEMA seek to withhold data in the registry, as much of the data in the elevation registry will be derived from sources in the public domain.[114]

In the context of individual privacy, the "public domain" doctrine does not wholly eliminate the ability of an agency to withhold information that some time ago appeared publicly. In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*,[115] the U.S. Supreme Court made clear that it is possible to have a strong interest in the privacy of information "even where the information may have been at one time public."[116] In that case, the plaintiffs requested from the FBI its "rap sheets" on individuals; these rap sheets collected into one file the individual's arrest and conviction records obtained by the FBI over time from multiple local and state authorities. The Court reasoned that if the information in question was at some time or place available to the public, but is now "hard-to-obtain information," the individual to whom it pertains may have a privacy interest in maintaining its "practical obscurity."[117]

(D.D.C. 1992), *vacated as moot*, No. 92-5186 (D.C. Cir. Sept. 23, 1993); *Raytheon Co. v. Dep't of the Navy*, No. 89-2481, 1989 WL 550581, at *1 (D.D.C. Dec. 22, 1989).

[112] *See Students Against Genocide v. Dep't of State*, 257 F.3d 828, 836 (D.C. Cir. 2001); *Cottone v. Reno*, 193 F.3d 550, 555-56 (D.C. Cir. 1999) (finding waiver of government's right to invoke exemption where plaintiff identified specific audio tapes played at trial, determining them to be in public domain).

[113] *Id.*

[114] Recall that in the CRS communities, the community must obtain and make publicly available the FEMA form of Elevation Certificate before issuing building permits in the floodplain. Further, And by federal regulation, all communities participating in the NFIP must obtain elevation data (not necessarily on the FEMA form) in connection with its permitting decisions. See page 15 *supra*.

[115] 489 U.S. 749 (1989).

[116] *Id.* at 767.

[117] *Reporters Comm.*, 489 U.S. at 780; *see also Wash. Post*, 456 U.S. at 603 n.5; *Abraham & Rose, P.L.C., v. United States*, 138 F.3d 1075, 1083 (6th Cir. 1998) (noting that there may be privacy interest in personal information even if "available on publicly recorded filings"); *Linn v. United States Dep't of Justice*, No. 92-1406, 1995 WL 417810, at *31 (D.D.C. June 6, 1995) (declaring that even if "some of the names at issue were at one time released to the general public, individuals are entitled to maintaining the 'practical obscurity' of personal information that is developed through the passage of time").

The elevation registry, however, does not collect into a single file scattered information from disparate sources, as with a rap sheet, nor is it likely to become less available to the public from its original public source, unlike information once published in a newspaper. Rather, the database, as proposed, will be indexed by an address, not a person. It will not gather together or link information on an individual (such as multiple properties owned by an individual). Many of the records in the registry would derive solely from information in publicly available records of state or local government.[118] The entire database would not be easily reproduced, but all of the information about a particular address could very easily be retrieved from the one place in which the information originally resided. Thus, the concept of "practical obscurity" as envisioned by the *Reports Committee* court does not apply to the elevation registry.

Accordingly, we believe that the D.C. Circuit's "public record doctrine" cases cited above would control the FOIA status of any records in the elevation registry that have been in the public domain.

Exemption 4. Exemption 4 covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[119] The Trade Secrets Act[120] prohibits the unauthorized disclosure of information falling within the exemption for confidential commercial information constraining an agency's ability to make a discretionary disclosure absent an agency regulation, authorized by statute, that expressly authorizes disclosure.[121]

A number of the stakeholders in the NFIP could not readily assert reverse-FOIA action based on disclosure of data in the registry. Elevation data collected from existing sources at FEMA or from other governmental entities is not "obtained by a person" under Exemption 4.[122] Information obtained via contractors hired by FEMA to collect elevation data is governed by contracts that, presumably, would require the information to be made available to the public[123]. We do not understand FEMA to be contemplating obtaining elevation data directly from engineers or surveyors other than those contracted by FEMA, because it would be too inefficient and administratively burdensome to establish relationships with the myriad engineers and surveyors in each community.

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[118] See discussion of public record laws in Sources of Existing Elevation Data, at pp. 17-19 *supra, cf.* discussion, *infra* at pp. 89-92, of Strategy E, "Sharing of Community Tax Parcel Data and or other Community Data Bases."

[119] *See* 5 U.S.C. § 552(b)(4).

[120] 18 U.S.C. § 1905.

[121] *See Chrysler v. Brown*, 441 U.S. 281, 295-96 (1979).

[122] *See Allnet Communication Servs. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992).

[123] It is conceivable that some of the remote sensing techniques or equipment used to obtain elevation data might be exempt as a "trade secret." However, we do not believe that any such techniques would appear in the Elevation Registry.

The strongest potential source of Exemption 4 reverse-FOIA actions are WYO companies and perhaps their agents. WYO companies participate in the flood insurance program by agreeing to an arrangement promulgated, after notice and comment rulemaking, by FEMA under the National Flood Insurance Act.[124] That agreement requires the WYO companies to submit policy and transaction data to FEMA. We understand that WYO companies compete with each other for business, and jealously guard from one another information that might allow one company to target marketing activity to another company's existing policy holders. To the extent the elevation registry would allow such targeted marketing, it is at least arguable that information provided by the WYO companies for the registry could be claimed proprietary and that WYO companies could object to disclosure.

We have substantial doubt, however, that Exemption 4 "trade secret or commercial information" status could be bestowed on an elevation registry which included all addresses for which FEMA had elevation data. The data in the registry would come not just from insurance companies, but also from FEMA contractors and from local governments participating in the CRS or submitting data derived from their own elevation surveys. Thus, the registry would not disclose any company's customer list or disclose whether a listed property is insured by FEMA directly, insured by a competitor, or, indeed, whether the property is insured at all. The most that can be said is that, taken together, the addresses might reveal the location of the flood plain, or flood prone areas, information that is available directly from FEMA or from public libraries, and cannot be said to be proprietary to any company.

The purpose of the registry is to reduce the costs of writing flood insurance by providing access to elevation data that is more quickly and easily accessible, nearly as accurate as current sources of elevation data, and free of charge to agents, WYO companies, and their customers. In order to implement the registry, FEMA must by rule modify the arrangement (and related Transaction Record Reporting and Processing Plan) to advise companies that Elevation Certificate information should be provided to it and that it can rate policies based on information in the registry rather than by review of an Elevation Certificate. As part of this rulemaking, FEMA should make clear that it will place in the registry the address and elevation certificate data (but not any personal identifiers) it obtains from a number of sources, including the WYO companies themselves. In this rulemaking, FEMA would have an opportunity to balance any assertions of proprietary disclosure — should any be asserted — against the benefit — in terms of reducing the cost to insureds and all WYO companies — to the entire NFIP. Thus, even if some low level of proprietary interest would derive, for example, from the possibility of using the address data as a mailing list for marketing service to new customers, FEMA would have the opportunity to determine whether this imposition on the proprietary interests of the WYO

[124] *See* 42 U.S.C. § 4001, *et seq.*

companies is greatly outweighed by the benefits of establishing the elevation registry. As there is no requirement that WYO companies participate in the flood program, any who do not wish to report information about their customers as required by FEMA may choose to discontinue participation.

Exemption 6. FOIA Exemption 6 permits withholding of all information about individuals in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[125] In evaluating whether this exemption applies, we must first consider whether the data in the registry meet the threshold requirement of being "personnel and medical files and similar files." They clearly are not personnel or medical files — but are they "similar files" — the sort intended to be covered by Exemption 6?

"Similar Files." In *United States Department of State v. Washington Post Co.*, the Supreme Court held, based upon a review of the legislative history of the FOIA, that Congress intended the term "similar files" to be interpreted broadly; "similar files" under this exemption covers all information that "applies to a particular individual."[126] More recently, in *Na Iwi O Na Kupuna v. Dalton*, the District Court in Hawaii was explicit that "to trigger Exemption Six protection, the actual production of the documents must constitute a clearly unwarranted invasion of 'personal' privacy."[127] That court went on to observe, "[o]bviously, that can only occur when the documents disclose information directly attributable to an individual." The court also cited the legislative history, which states, "[E]xemption [6] is. . . intended to cover detailed Government records on an individual which can be identified as applying to that individual."[128] As we have previously discussed in the context of the Privacy Act, property addresses do not correspond to particular individuals. Only where a property is a single family residence rather than a multi-unit dwelling or other commercial establishment, where the owner is a single individual, and where the owner and the resident are one and the same would an address even correspond to a unique individual.

Moreover, the elevation registry will not include any kind of individual identifier with which to connect a property address to the individual, so even though such a connection is theoretically possible, the connection will not exist in the registry.

"Invasion of Personal Privacy." If FEMA finds, *arguendo*, that property addresses could meet the threshold test of being "similar files" qualified for exemption, FEMA must then analyze whether disclosure "would constitute a clearly unwarranted invasion of personal privacy." In this analysis, an agency employs the test elucidated in *Reporters Committee*, which requires a balancing

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[125] 5 U.S.C. § 552(b)(6).

[126] 456 U.S. 595, 599-603 (*quoting Washington Post Co.*, 456 U.S. at 601); *accord Sherman v. United States Dep't of the Army*, 244 F.3d 357, 361 (5th Cir. 2001).

[127] 894 F. Supp. 1397, 1413 (D. Haw. 1995)

[128] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

of the public interest in disclosure of the information[129] with the harm to personal privacy that would result from the disclosure.[130]

First the agency must ascertain whether a protected privacy interest exists that would be threatened by disclosure. If no privacy interest is found, further analysis is unnecessary and the records must be disclosed.[131] This step eliminates from Exemption 6 all records placed in the registry regarding properties of corporations and business associations: corporations and business associations do not possess protectible privacy interests.[132] This rule probably applies to decedents' estates, as well.[133]

Next we review potential privacy interests for other (non-commercial) addresses in the elevation registry. For Exemption 6 to apply, the threat to privacy must be real rather than speculative.[134] In the context of the Privacy Act, this report has discussed at length the very scant privacy interest in the elevation data and concluded that it most likely would be considered information about the property and not about the individual. In *National Association of Retired Federal Employees v. Horner*, the Court of Appeals for the District of Columbia Circuit explained that Exemption 6 applies where a "substantial likelihood that any concrete facts *about a particular individual* could be inferred."[135] As noted *infra* in our discussion of Privacy Rights and Remote Surveillance, even in communities that are not participating in the CRS, this same information is generally required by state law to be publicly available, reducing the potential privacy interest that might attach to the data.[136]

In the *DOD v. FLRA* case discussed *supra*, the Supreme Court found a privacy interest in federal employees' names and home addresses even though they

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[129] *See* 489 U.S. at 772-75

[130] *See id.* at 767.

[131] *See Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984); *Holland v. CIA*, No. 91-1233, 1992 WL 233820, at *16 (D.D.C. Aug. 31, 1992) (stating that information must be disclosed when there is no significant privacy interest, even if public interest is also de minimis).

[132] *See, e.g., Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980); *Nat'l Parks & Conservation Ass'n v. K leppe*, 547 F.2d 673, 685 n.44 (D.C. Cir. 1976); *Ivanhoe Citrus Ass'n v. Handley*, 612 F. Supp. 1560, 1567 (D.D.C. 1985).

[133] The right to privacy of deceased persons is not entirely settled, but the majority rule is that death extinguishes privacy rights. *See, e.g., Na Iwi O Na Kupuna v. Dalton*, 894 F. Supp. 1397, 1413 (D. Haw. 1995). The Department of Justice usually follows this rule as a matter of policy. *See* Department of Justice, *FOIA Update*, Vol. III, No. 4, at 5.

[134] *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 380 n.19 (1976); *Carter v. United States Dep't of Commerce*, 830 F.2d 388, 391 (D.C. Cir. 1987); *Arieff v. United States Dep't of the Navy*, 712 F.2d 1462, 1467-68 (D.C. Cir. 1983).

[135] 879 F.2d 873, 878 (D.C. Cir. 1989) (emphasis added).

[136] See discussion of public record laws in Sources of Existing Elevation Data, at pp. 17-19 *supra, cf.* discussion *infra* at pp. 89-92, of Strategy E, "Sharing of Community Tax Parcel Data and or other Community Data Bases,"

"often are publicly available through sources such as telephone directories and voter registration lists."[137] Many courts have protected from disclosure compilations of addresses *linked to names*,[138] but these cases all differ from FEMA's disclosure of elevation data, because the contemplated registry does not link names with addresses, but only identifies properties, not indicating which are residences, which are multi-unit dwellings, or which are commercial, and not identifying individual persons. It is difficult to imagine how records indicating the location and elevation of properties could be viewed as generating any viable privacy interest when land sale and elevation records are public in most states, and as noted in our discussion of the Privacy Act, no record in the registry will be linked to an identifier of a specific individual. Indeed, we are not aware of any case deciding that government records of addresses, without names, are exempt from disclosure under Exemption 6.

Names and Addresses. Even though the registry will not include names, perhaps a court might stretch and require FEMA to analyze the contemplated disclosure of an address as a disclosure of "a name and address." But even this possibility does not, in our view, generate a real likelihood that a successful reverse-FOIA action based on Exemption 6 could be maintained. In *NARFE,* the D.C. Circuit explained that for Exemption 6 to apply, there must be a "substantial probability that disclosure will cause an interference with personal privacy."[139] Lists of names and addresses alone, without more, do not do so. As explained by the *NARFE* court:

> Every list of names and addresses sought under FOIA is delimited by one or more defining characteristics, as reflected in the FOIA request itself; no one would request simply all "names and addresses" in an agency's files, because without more, those data would not be informative. The extent of any invasion of privacy that release of the list might occasion thus depends upon the nature of the defining characteristics, *i.e.,* whether it is significant that an individual possesses them. A non-embarrassing characteristic may or may not be otherwise significant, in a manner relevant to the individual's privacy interests, depending upon whether many parties in addition to the party making the initial FOIA request would be interested in obtaining a list of and contacting those who have that characteristic.[140]

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[137] *See* 510 U.S. 487, 500 (1994).

[138] *See, e.g., Professional Programs Group v. Dep't of Commerce*, 29 F.3d 1349, 1353-55 (9th Cir. 1994) (withholding names and addresses of persons registered to take patent bar examination); *Bibles v. Or. Natural Desert Ass'n*, 519 U.S. at 355-56 (mailing list of recipients of Bureau of Land Management publication).

[139] *See National Association of Retired Persons v. Horner,* 879 F.2d at 878 (hereinafter "NARFE").

[140] *Id.* at 876.

In *DOD v. FLRA*, names and addresses were all linked to a particular fact about the names and addresses in question: union membership, or membership in a bargaining unit — a fact that would differentiate a household on the list from those not requested. Similarly, in the cases in which exemption of the addresses of FOIA requesters have been upheld,[141] disclosure would have included not just the names and addresses of individuals, but the fact that each household included a person who had made a FOIA request in the past. In the case of *Professional Programs Group*, the names and addresses were connected to registration for the patent bar examination.[142] In *Bibles v. Or. Natural Desert Ass'n*, addresses were connected to those receiving, and presumably interested in, the Bureau of Land Management's publications.[143]
By contrast, in the case of the elevation registry, the names and addresses are connected only to elevation data, a characteristic of the property, not of an individual resident or owner of the property. The existence of elevation measurements, by itself, does not differentiate the group of addresses in the database from addresses not in the database, since every address has elevation. The particular elevation measurement serves to differentiate one address from another, but not one individual from another. The individuals associated with a particular address may change as ownership or residence changes, but the elevation of the address remains associated with the address.

Even if FEMA were unpersuaded by these arguments and concluded that there is a privacy interest in the subset of addresses in the database which are associated with personal residences of individuals, it must then go on to balance the privacy interests of the resident-owner of the property with the public interest in disclosure of the addresses and elevation data.

In considering the privacy interest in addresses, the *NARFE* court considered whether disclosure of names and addresses would "interfere with the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes."[144] That court observed,

> the disclosure of names and addresses is not inherently and always a significant threat to the privacy of those listed; whether it is a significant or a *de minimis* threat depends upon the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue.[145]

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[141] *See Holland v. CIA*, No. 91-1233, 1992 WL 233829, at **15-16 (D.D.C. Aug. 31, 1992) (holding that researcher who sought assistance of presidential advisor in obtaining CIA files he had requested is comparable to FOIA requester whose identity is not protected by Exemption 6); *Martinez v. FBI*, No. 82-1547, slip op. at 7 (D.D.C. Dec. 19, 1985) (denying protection for identities of news reporters seeking information concerning criminal investigation) (Exemption 7(C)).

[142] *See* 29 F.3d 1349 (9th Cir. 1994).

[143] *See* 519 U.S. 355 (1997).

[144] *NARFE*, 879 F.2d at 876.

[145] *NARFE*, 879 F.2d at 877.

The list at issue in that case revealed not only the names and addresses of a large group of individuals, but indicated that "each is retired or disabled (or the survivor of such a person) and receives a monthly annuity check from the federal Government."[146] The court pointed out that, "any business or fund-raising organization for which such individuals might be an attractive market could get from the Government, at nominal cost, a list of prime sales prospects to solicit. Armed with this information, interested businesses, charities, and individuals could, and undoubtedly would, subject the listed annuitants to an unwanted barrage of mailings and personal solicitations."[147]

It is possible that WYO companies might want to solicit the business of persons who own properties listed in the registry by sending "Dear Occupant," letters, and that some individuals might be annoyed by receiving such solicitations. Nevertheless, the disclosure of the information in the registry would not reveal personal, medical, financial, or other embarrassing information about any individual, and the list is unlikely to be of interest to entities other than WYO companies, so a "barrage of mailings," is not likely. Given the nature of the registry, the public nature of much of the data in the registry, the purpose of the registry in communicating flood risk to those responsible for insuring against flood risk, and even (since it is not a stated purpose of the registry) the importance of communicating about flood risk to persons that may have an interest in whether a property could flood, we believe that FEMA could easily conclude that the balance of interests rests in favor of disclosure.

Finally, we note a practical consideration which would make the invocation of Exemption 6 extremely difficult. if resident-owners were found to have a protectible privacy interest, and FEMA chose to withhold records based on that conclusion under Exemption 6, upon every FOIA request for records in the database, FEMA would be required to investigate the current ownership of each property before disclosure. Since withholding of records about commercial entities or decedents' estates based on Exemption 6 would be a violation of FOIA's requirement to disclose non-exempt records, FEMA would risk violation of the statute and resulting litigation if it chose to invoke Exemption 6 without a thorough check of the ownership of each address in the database. The transfer of property ownership from an individual to a commercial entity is rather common, as is the transfer of property from a decedent to his or her estate upon death, and, since ownership and residence are not included in the database, FEMA would have no way of knowing whether the records were currently eligible for exemption without investigating the current ownership in each case. We imagine this would be prohibitively burdensome to implement.

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[146] *Id.* at 876.

[147] *Id.* (citations omitted).

Other Exemptions. We are not aware of any other specific authority that would prohibit the records from disclosure. Addresses of buildings are not classified national security information[148] even if there may be elements of the nation's critical infrastructure whose exact location may have national security implications. As for other FOIA exemptions, addresses of buildings, even if 'georeferenced,' are not "geological or geophysical information and data, including maps, regarding wells."[149]

Electronic FOIA. Under the "Electronic Freedom of Information Act," information must be provided in electronic format if the request seeks data in that format and the information is readily reproducible by the agency in that format.[150] Thus, if the federal government creates an elevation registry in a computerized format and makes that database accessible — in words taken from our Task Order — "to select NFIP stakeholders such as mortgage companies and insurance companies with a legitimate need to know," then this information would appear to be "readily reproducible" in that computerized format. Accordingly, this information must be available (upon request) in that same computerized format to any requester — whether or not the requester is perceived as having a "legitimate" need to know.

3. Liability Issues.

Disputes over flood risk maps, including FEMA's Flood Insurance Rate Map ("FIRM"), and over flood risk data for individual structures and land parcels, sometimes end up in court. The courts have reviewed various theories of liability involving a wide range of possible defendants: the seller of land, the seller's or buyer's real estate agent, the buyer's insurance agent, the buyer's lender, the community which issued a construction permit, the surveyor who provided a survey or elevation certificate at closing, the engineer who performed a flood study for FEMA, and FEMA itself.

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[148] Exemption 1, 42 U.S.C. § 552(b)(1). The Act creating the Department of Homeland Security added an exemption from disclosure for information about critical infrastructure that is voluntarily submitted to the government as part of the government's efforts to protect critical infrastructure from terrorist attack. Homeland Security Act of 2002, PL 107-296, Nov. 25, 2002, 116 Stat 2135, § 214. This exemption would not extend to information in on elevation certificate submitted in order to obtain flood insurance.

[149] Exemption 9, 42 U.S.C. § 552(b)(9).

[150] 5 U.S.C. §552(a)(3) provides:

> (B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.
> (C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

Of course, all case law with respect to liability for erroneous flood map or elevation information was developed prior to establishing an elevation registry. The question reviewed in this report is whether, or how, the creation of an elevation registry would affect the liabilities of the many participants in the elevation process. We note at the outset that FEMA is designing this registry for a particular purpose — the rating of flood insurance policies — and will develop the quality control procedures and acceptable error limits of elevation data in the registry specifically for that purpose. The analysis below assumes that persons or entities use the data for that purpose, also use the data for other purposes, and suffer harm as a result. To reduce the frequency of these situations FEMA should include a specific disclaimer as to the suitability of the registry for any purpose other than the rating and writing of flood insurance policies.

Liability of FEMA Generally. We believe that there is little likelihood that FEMA can be held liable for information in the registry.

It is well established that the United States and its agencies enjoy sovereign immunity, except to the extent that immunity is waived.[151] The National Flood Insurance Act waives immunity only in two very limited ways. First, Section 1341[152] waives sovereign immunity for challenges to the agency's disallowance of flood insurance claims. Second, Section 1364(g)[153] provides for administrative review of elevation determinations, and appeal to the U.S. District Courts. Publication of information about elevation of specific properties is not the disallowance of a flood insurance claim, so Section 1341 does not apply. Judicial review of a FEMA decision not to change elevation information in the elevation registry would, at most, require the agency to change elevation information in a manner specified by the plaintiff. It would not lead to monetary damages.

Three cases involving FEMA's mapping authority demonstrate the strength of FEMA's sovereign immunity defenses. In *Normandy Pointe Assocs. v. FEMA*,[154] Normandy Pointe, a developer, sued FEMA and FEMA's contractor, Dewberry and Davis, LLC, as well as its own engineering firm and the local government, seeking to have the court decide where the flood plain really was. (Normandy Pointe had constructed and sold several homes in an area mapped by FEMA as being in the flood plain, based on its own engineer's independent flood study showing that the flood plain did not extend beyond the river bank. After the homes flooded, the township commissioned a third flood study that showed the homes to be in the flood plain). The court had no difficulty dismissing FEMA and FEMA's consultant from the litigation on sovereign immunity grounds. In doing

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[151] *See* 77 Am. Jur. 2d § 61 and cases cited therein.

[152] 42 U.S.C. § 4072.

[153] 42 U.S.C. § 4104(g).

[154] *See* 105 F. Supp. 2d 822 (S.D. Ohio 2000).

so, the court found neither a waiver of sovereign immunity in the NFIA, nor a waiver of immunity in general statutes providing courts with jurisdiction to resolve "federal questions,"[155] nor in the Declaratory Judgment Act.[156]

The court used a different analysis to throw out a challenge to NFIP maps in *Britt v. U.S*.[157] In *Britt*, homeowners alleged that they had relied on erroneous and negligently prepared NFIP flood maps in building their homes; these homes were then severely damaged by flooding. The court threw out a lawsuit against the United States seeking recovery of floodwater damages, holding that the immunity provisions of 33 U.S.C. § 702c precluded the action. Section 702c — enacted as part of the Flood Control Act of 1928 (after the disastrous Mississippi floods of 1927) — provides in pertinent part: "No liability of any kind shall attach to or rest upon the United States for any damage from or by flood waters at any place." This section had previously been construed to prevent actions against the United States for flood damage unless the damage arose out of negligence of the United States unconnected with any "Congressionally mandated flood control initiative." The court held that preparation and dissemination of maps under the NFIA were "flood control initiatives," and therefore that Section 702c precluded the action.

In *Segall v. Rapkin*,[158] defendant Goodkind & O'Dea had performed a "Flood Insurance Study" as contractor for FEMA, and in that study specified the base flood elevation (BFE). Plaintiffs alleged that due to Goodkind's survey errors, the BFE adopted by FEMA was inaccurate; relying on this inaccurate BFE, plaintiffs' homes were constructed three and one half feet below the actual base flood elevation. Plaintiffs sued FEMA's engineering contractor, Goodkind. The court granted Goodkind's motion to dismiss, holding that the NFIA provides no private right of action for erroneous map information. The court noted:

> It is not necessary for private parties to have a right of action under the Act to achieve or further its purposes. Indeed, to allow plaintiffs to hold Goodkind liable would discourage future surveyors from reporting their views concerning flood levels to FEMA.

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[155] Section 1331 of title 28 of the U.S. Code grants federal courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." This is not, however, "a general waiver of sovereign immunity, it merely establishes a subject matter that is within the competence of the federal courts to entertain." *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993).

[156] The Declaratory Judgment Act, 28 U.S.C. § 2201-02, "neither provides an independent basis for subject matter jurisdiction nor waives FEMA's sovereign immunity. The Act merely grants the Court the power to issue declaratory judgments when jurisdiction otherwise exists." *Normandy Pointe Associates v. FEMA*, 105 F. Supp. 2d 822, 827 (S.D. Ohio 2000)(citing *Skelly Oil v. Phillips Petroleum Co*., 339 U.S. 667, 671-72 (1950)).

[157] *See* 515 F. Supp. 1159 (M.D. Ala. 1981)

[158] *See* 875 F. Supp. 240 (S.D.N.Y. 1995).

> In addition, courts have consistently held that no private cause of action exists for breach of duty by a government contractor for violation of the underlying agencies' duties.[159]

While it would be dangerous to assert that no attack on FEMA's sovereign immunity would ever be successful,[160] we believe that this defense is quite strong and does not appear to be weakened by creation of a registry containing — and centralizing — information already required for administration of FEMA's current flood insurance and mitigation programs.

Liability of FEMA: Implications of "Horizontal" vs. "Vertical" Mapping Activity.

Our Task Order asked us to review whether the immunity for "vertical" mapping — meaning the mapping of elevations of land and structures — differs from the traditional two-dimensional "horizontal" maps shown on FIRMs. It does not. Sovereign immunity applies to FEMA's activities under the National Flood Insurance Act in acquiring and disseminating information about flood risk. It applies to the "horizontal issues involving Special Flood Hazard Areas." It applies to FEMA's actions in publicizing elevation data obtained by FEMA contractors,[161] and it applies to FEMA's actions in publicizing elevation data obtained from the files of participating NFIP communities and from WYO companies.

We recognize that there are more statutory provisions granting FEMA authority to create and disseminate map information on flood hazard zones or areas, than there are granting authority to collect and disseminate information on individual structures.[162] Further, FEMA's maps designating special flood hazard areas trigger mandatory flood insurance purchase requirements and can have a substantial impact on the ability of owners to develop land; these 'horizontal' maps are the cornerstone of the NFIP's floodplain management and insurance purchase regulations. Congress was very concerned about the technical accuracy of FEMA's flood maps and provided special procedures by which

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[159] 875 F. Supp. at 241 (citations omitted).

[160] In *Brown v. U.S.*, 599 F. Supp. 877 (D. Mass. 1984), the trial court was moved to find NOAA liable under the Federal Tort Claims Act (FTCA) for its failure to provide accurate information — a weather report — causing a fishing vessel to be at sea when a storm hit, sank the boat, and drowned three fishermen. In this case, however, the trial court's decision did not survive appeal: the First Circuit held that the FTCA waiver of sovereign immunity did not apply due to its discretionary function exemption. *Brown v. U.S.*, 790 F.2d 199 (1st Cir. 1986).

[161] *See, e.g., Normandy Pointe Assocs. v. FEMA*, 105 F. Supp. 2d 822 (S.D. Ohio 2000).

[162] The several subsections in 42 U.S.C. § 4101 contain some of FEMA's broadest authorities for collecting and disseminating flood risk information. These authorities appear primarily to contemplate 'horizontal' map information; they use terms such as "flood plain areas . . . which have special flood hazards;" "updating flood maps;" estimates of "probable flood loss for the various flood risk zones for each of these areas," all of which seem focused on horizontal maps.

communities and individuals could appeal mapping errors.[163] Indeed, we believe that FEMA would have an obligation to correct erroneous information in the registry that came to its attention, and that a person who could show that it had been aggrieved by erroneous information in the registry may well have a right to judicial review and potentially an order requiring FEMA to change the map should FEMA refuse to do so.[164]

Nonetheless, our conclusion is the same for all of FEMA's efforts to obtain and disseminate flood risk information: the United States and its component agencies, including FEMA, are immune from suit unless Congress has explicitly waived sovereign immunity. The National Flood Insurance Act does not waive sovereign immunity for obtaining and disseminating flood risk information, and certainly contains no distinction between horizontal or vertical maps or risk information. There is always a risk that a court will find liability in a particular case. Courts may occasionally stretch to reach what they believe to be a just result and may attempt to find a waiver of sovereign immunity in a general statute (such as the Federal Tort Claims Act[165]) even where a specific statute is silent. Nonetheless, this risk appears to be small, is not affected in a significant manner by the nature of the "flood risk information" that FEMA is authorized to collect and distribute, and would be reduced still further by including a disclaimer in the registry that the information is appropriate only for the rating and writing of flood insurance policies.

Liability of Other Parties. Elevation determinations, as well as determinations of the location of a property inside or outside a floodplain, have been a frequent subject of litigation. Most of the reported cases have arisen as an outgrowth of real estate transactions. The range of defendants exposed to liability in cases of this type is extensive:

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[163] *See* 42 U.S.C. § 4104.

[164] The Administrative Procedure Act provides that a person "adversely affected" or "aggrieved" by agency action can seek judicial review of agency action, unless the relevant statute precludes review or the matter is committed to agency discretion by law. *See* 5 U.S.C. §§ 702, 706.

[165] The Federal Tort Claims Act is codified at 28 U.S.C. §§ 2671-80. Section 2674 provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." Section 2680 states exceptions to the FTCA, including the "discretionary function" exception, § 2680(a), and an exception for certain torts arguably related to potential claims based on spreading false information about a property: libel, slander, misrepresentation, deceit, or interference with contract rights, *see* § 2680(h). Although we found no cases in which a plaintiff had successfully brought an FTCA action against FEMA for errors in maps or other floodplain information, a court could be tempted to do so in particular cases. *See Brown v. U.S, infra* at note 102 (liability for incorrect weather forecast dismissed only on appeal). *Cf.* Note*, A Technological Dream Turned Legal Nightmare: Potential Liability of the United States under the Federal Tort Claims Act for Operating the Global Positioning System*, 33 VAND. J. TRANSNAT'L L. 371 (2000).

- The seller of property, who knew the property was in a flood zone but failed to so advise the buyer;[166]
- The real estate agent who represented both buyer and seller in the transaction, who both provided to and interpreted for the buyer a prior flood elevation survey, and in doing so erroneously advised that the survey showed the property was not in a flood zone; [167]
- The insurance agent who advised that property was not in a flood zone and could not be insured;[168]
- The engineer or surveyor who erroneously determined that the property was above the base flood elevation;[169]
- The mortgage lender who did not advise the buyer, as required by the NFIP, that the property was located in a Special Flood Hazard Area;[170]
- The local government that issued a building permit to the buyer without advising the buyer that the property was in a flood hazard area or that development was restricted in that area;[171]
- The commercial general liability insurer of a land developer, who constructed homes in a flood area upon advice from his engineer (who did not look at FEMA's maps) that the homes were not in a flood area. The developer faced liability from the owners of the homes flooded in the development.[172]

A detailed legal analysis of all of the possible ways in which a particular engineer, surveyor, insurance agent, real estate agent, real estate seller, mortgage lender, flood zone determination company, or local government might incur liability is

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[166] *See, e.g.*, *Kirchner v. Stief*, 2001 WL 1555313 (Del. Com.Pl. 2001); *Robertson v. George*, 2001 WL 1173279, Tenn. Ct. App. 2001)(unpublished); *Revitz v. Terrell*, 572 So.2d 996 (Fla. App.s 3d.Dist. 1990); *Garrison v. Barryman*, 594 P.2d 159 (Kan. 1979); *Chapman v. Hosek*, 475 N.E.2d 593 (Ill. App. 1985).

[167] *Potter v. First Real Estate Co., Inc.*, 2002 WL 31002850 (Sept. 6, 2002);*see also, Chapman v. Hozek*, 475 N.E.2d 593 (Ill. App. 1985).

[168] *Nast v. State Farm Fire and Casualty Co.*, 82 S.W.3d 114 (Tex. Ct. App. 2002); *McKinnon v. Batte*, 485 So. 2d 295 (Miss.1986).

[169] *McClung Surveying, Inc. v. Worl*, 541 S.E.2d 703 (Ga. App. 2000)(dismissing buyer's action against surveyor because closing attorney had hired surveyor for benefit of lender, not for benefit of buyer); *Salmon v. Pearson & Associates, Inc*, 446 S.E.2d 762 (Ga. 1994)(reversing summary judgment for surveyor hired by closing attorney for benefit of lender); *Somers Mill Assoc. v. Fuss & O'Neill*, 2002 WL 467910 (Conn. Super. Mar. 5, 2002)(dismissing action against engineering firm after finding no evidence of scope of engineer's work).

[170] *See, e.g.*, *Dollar v. Nationsbank of Georgia*, 534 S.E.2d 851 (Ga. App. 2000)(bank not liable); *Small v. South Norwalk Savings Bank*, 535 A.2d 1292 (Conn. 1992)(finding bank liable).

[171] *See, e.g.*, *Gibson v. Evansville Vanderburgh Bldg. Comm'n,* 725 N.E.2d 949 (Ind. App. 2000); *Quality by Father & Son, Ltd. v. Bruscella*, 666 N.Y.S.2d 380 (N.Y. 1997); *City of Tarpon Springs v. Garrigan*, 510 So.2d 1198 (Fla. App. 2d Dist. 1987); *Hanks v. Calcasieu Parish Police Jury*, 479 So.2d 1010 (La. Ct. App. 3d Dist.1986).

[172] *See, e.g.*, *GRE Insurance Group v. Normandy Pointe Assoc.,* 2002 WL 360646 (Ohio App. 2d Dist. March 8, 2002).

neither possible nor within the scope of this project. Liability of parties due to the new elevation registry will depend substantially on the particular facts of particular transactions, the particular language in the agreements between the parties involved, and the existence and wording of a disclaimer advising users that the data is not appropriate for uses other than the determination of the proper premium in writing flood insurance policies. Our task in this report is not to analyze the circumstances in which potential defendants run the risk of liability for their direct or indirect involvement with flood elevation or flood zone data. Rather, our task is to analyze the likelihood that by establishing an elevation registry FEMA will *increase* the risk of liability faced by these parties.

Liability Implications of Correct Registry Information. In discussing the potential liability implications of establishing an elevation registry, we make several initial observations applicable to liability exposure arising from accurate and reliable information in the elevation registry; that is, where the registry correctly specifies the elevation of a structure, its adjacent grades, and the base flood elevation. Accurate communication about flood risk to people and organizations making development and insurance decisions is a critical objective of the NFIP, and the elevation registry would play a central role in advancing that objective. It would make elevation information more available to insurance agents and insurance companies and, to a lesser extent, to homeowners, homebuyers, mortgage lenders, and real estate agents. Much of the litigation documented in the notes to this report arose because flood elevation or risk information was not readily available, causing one party to a transaction to rely upon another party in making a real estate purchase, development, or insurance decision. To the extent that the elevation registry provides *accurate* elevation data upon which insurance agents and WYO companies rely (and upon which even buyers, developers, or insureds might rely, albeit contrary to a disclaimer about proper use of the registry), many transactions that might have led to litigation will simply not take place.

Second, third parties participating in some way in the creation of elevation information or in transactions using elevation information — surveyors and engineers, insurance and real estate agents, developers — should not suffer increased liability because *reliable* information is given greater distribution through placement in an elevation registry. A property may well lose value because it is located below base flood elevation and cannot be developed under floodplain management ordinances. Its owner may attempt litigation against the community, or other available defendants, asking the court to permit development or to shift to defendants the loss in value of land caused by its high flood risk. But the greater availability of accurate elevation data is unlikely to help in this owner's efforts to impose liability on others.

Third, although the error rates for data in the registry may be higher than is appropriate for floodplain management purposes, the availability of the registry to

property owners may encourage closer review of elevation information and possibly lead more property owners to obtain elevation certificates.

Fourth, disputes will arise because an insurance agent or company could have, but did not, review the information in the elevation registry before taking action. For example, an insurance agent might advise that a property is eligible for low premiums, or need not be insured, because the agent thinks that the property is elevated above base flood elevation, when, in fact, the elevation registry accurately shows that it is not above base flood elevation. While failure to check the elevation registry would not necessarily establish liability of insurance agents, the existence of (and publication of information about) this registry would weaken the agent's legal defenses and hence increase his or her potential liability. Similarly, the ready availability of flood elevation information in the registry may well weaken the defenses, and increase the liability, of other parties who are found to have had a duty to check, and who did not check, the registry. It is not clear, however, that FEMA should be concerned with increased liability created when FEMA makes it easier for those with a duty to check flood risk information to do so.

Liability Created by Inaccurate Data in the Registry. Concern about increased liability from an elevation registry is properly directed toward the probability that a database involving millions of structures will not be error free.

Inaccuracies in the registry — and potential liability — may result from a number of sources, such as the original surveyor, an intermediary who transferred the data to FEMA,[173] a FEMA engineering contractor,[174] a FEMA data entry contractor, or FEMA itself. There are two potential types of errors in the registry, leading to different liability results: the registry shows an elevation lower than the true elevation of a structure and a higher risk of flood than the true risk, or the registry shows an elevation higher than the true elevation and a lower risk of flood.

Registry Data Shows Flood Risk Higher Than Actual Flood Risk. Where the registry reports elevation too low, the structure will actually be higher, and hence

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[173] *See, e.g.*, *Somers Mill Assoc. v. Fuss & O'Neill*, 2002 WL 467910 (Conn. Super. March 5, 2002)(where data from a FEMA flood study had been incorrectly transferred to a FIRM, and defendant engineer, who did not participate in the flood study or the transfer, relied on the FIRM without independently checking the flood study, case against the engineer dismissed after finding no evidence that the engineer had been asked to perform a more detailed review); *Cf. Gibson v. Evansville Vanderburgh Bldg. Comm'n*, 725 N.E.2d 822 (Ind. App. Mar. 29, 2000)(dismissing on immunity grounds action against community that misread a FIRM).

[174] *See, e.g.*, *Quality by Father & Son v. Bruscella*, 666 N.Y.S.2d 380 (N.Y. 1997)(survey showing elevation of 15.7 feet later discovered during construction to actually have elevation of 7.61 feet);*see also Segall v. Rapkin*, 875 F. Supp. 240 (S.D.N.Y. 1995)(finding no private right of action against a FEMA contractor and dismissing action on jurisdictional grounds, where engineering firm's flood study, conducted for FEMA, erroneously placed the BFE 3.5 feet too low).

less susceptible to flooding, than is implied by the registry. The registry's low reported elevation for the structure could trigger insurance premiums for property owners and development restrictions under local ordinances that are higher and more stringent than warranted by the structure's true elevation. In order to reduce the likelihood of litigation arising from this source of error, FEMA must ensure that there are procedures in place to allow correction of inaccurate data in the registry. Thus, an owner adversely affected by erroneous information about his or her property must be able to provide information — such as an elevation certificate performed by a licensed engineer —that would cause FEMA to correct the information in the database. If such a procedure were available, the economic consequence to owners affected by the erroneous information in the registry — and hence the damages that could be sought in potential litigation — would be limited: with the corrected data, premiums could be reduced and construction of additions to existing structures could go forward without being subject to any, or at least as extensive flood control measures.[175]

We note that one of the "losses" that might be claimed is that excess premiums were paid over an extended period of time until the error is corrected. We anticipate that FEMA could be asked to review its policy limiting refund of excess premiums earned by the NFIP where erroneous information in the registry caused the excess premiums.

Registry Data Shows Flood Risk Lower Than Actual Flood Risk. In the more troublesome case — and the one that is more likely to give rise to litigation — the registry reports elevation too high, indicating a property is less susceptible to flooding than it really is. Litigation in these situations normally arises either because an owner experiences uninsured flood losses, or because an owner must either satisfy an unanticipated requirement for flood insurance or pay much higher premiums than the owner had anticipated when the property was acquired.

We provide the following observations on the potential for increased exposure to liability for six different types of parties caused by the creation of an elevation registry.

FEMA Engineering or Surveying Contractors: To the extent the database is populated with data provided by engineering or survey companies under contract with FEMA, there should be no change in the potential liability of these

[175] *Cf.*, *Morton Buildings, Inc. v. Redeeming Word of Life Church*, 744 So.2d 5 (La. App. 1998), *annulled by Morton Buildings, Inc. v. Redeeming Word of Life Church,* 835 So.2d 685 (La. App. 2002). In this case, a new church gymnasium and education addition to a church was constructed with its first floor at the same elevation as the existing church — which was two feet below the elevation required by the building code adopted to comply with floodplain management requirements. Litigation ensued when the contractor failed to get waiver of the elevation requirement but constructed the addition at the lower elevation anyway. We note, however, that FEMA does not intend that communities use the Registry for floodplain management.

companies as a result of the publication of the data in an elevation registry. The standard of care of these contractors, and liability of these contractors, should be determined by their contracts with FEMA. Absent contrary provisions in the contracts, these contractors are not liable to third parties who may rely on the information published by FEMA. "Courts have consistently held that no private cause of action exists for breach of duty by a government contractor for violation of the underlying agency's statutory duties."[176] We note — since FEMA does not always use its NFIP authority in contracting for elevation data — that this result should apply even where the contractors are providing flood elevation data to FEMA under contracts funded by the Disaster Relief Fund and authorized under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C §§ 5121 *et seq*.

Insurance Agents. Simplifying the process of writing flood insurance for insurance agents is the primary purpose behind creation of the registry. Insurance agents have been held liable in some cases for providing their clients with misinformation about the risk of flooding and the availability of flood insurance,[177] and establishment of the registry may reduce the overall number of situations in which misinformation is provided by simplifying acquisition of flood risk data. Where the registry is inaccurate, agents will be disseminating the inaccurate information taken from the registry (we presume unknowingly), rating insurance policies based on the inaccurate information, and perhaps even discouraging applicants from insuring property. These actions might lead to liability to which the agent would not have been exposed had the registry not existed. In the absence of a registry, perhaps the agent would have required the owner to provide a new elevation certificate from a licensed engineer.

The basis of an action against an agent in this context would be that the agent owed a duty of professional care to the insured, and that the agent did not act with the required level of care by relying on the registry. While this possibility cannot be completely discarded — particularly if there were evidence that the agent *knew* that the registry information for the property at issue was incorrect — we believe that the possible increased risk to the agent is relatively small compared to the significant benefits of the program. The primary purpose of FEMA in establishing the registry is to provide agents with available information about the elevation of structures, which will reduce the complexity and expense of the NFIP application process and the proper determination of premium. We therefore anticipate that FEMA would encourage and even require agents to use

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[176] *Segall v. Rapkin*, 875 F.Supp. 240 at 241 (S.D.N.Y. 1995), citing *Arvai v. First Federal*, 698 F.2d 683 (4th Cir. 1983); *Till v. Unifirst Fed. Sav. & Loan*, 653 F.2d 152, 155-56, 158-61 (5th Cir. 1981); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360-62 (5th Cir. 1977).

[177] *See, e.g.*, *Nast v. State Farm Fire & Casualty*, 825 S.W.3d 114 (Tex. Ct. App. 2002)(reversing summary judgment for insurance agent and holding that representations by insurance agent that NFIP coverage was not available, and that neighbor's insurance policy had been sold by a shyster, were affirmative misrepresentations supporting a claim under the Texas Deceptive Trade Practices Act.)

this database in order to write policies. Since FEMA is the federal agency charged with creating and administering the entire flood insurance program, its judgments and policies asserting the level of care that it demands for agents writing NFIP policies would likely be given deference.[178]

Engineer/Surveyors: Engineers or surveyors not working as FEMA contractors supply elevation data under contract to various clients, including home owners and developers, and also to local governments. Engineers or surveyors clearly have potential liability to their clients — unaffected by the existence of a registry — for errors in the elevation surveys they provide, with the extent of liability dependent on the scope of their work and whether it was performed in accordance with professional standards of care. The law is mixed on the degree to which engineers or surveyors might also be liable to persons who were not parties to the professional services contract but who nonetheless rely upon the erroneous data to their detriment. For example, two years ago one Georgia court dismissed a homebuyer's lawsuit against a surveyor because the survey had been requested by the closing attorney at the request of a lender; the court held that the homebuyer (who had paid for the survey as part of "closing costs") was not a party to the contract.[179] Another Georgia court held six years earlier that a homeowner *could* sue an engineer in very similar circumstances.[180]

In any event, for a third party to incur liability, that party must rely upon the erroneous data about flooding and suffer damages as a result. This limits the class of potential plaintiffs to those who are parties to a contract to acquire or sell property that the engineer surveyed.[181] Thus, even if an elevation registry made available to everyone in the country, via the Internet, an engineer's faulty elevation work, the liability of the engineer would be limited to those for whom there was potential exposure prior to the creation of the registry: those who might base decisions to buy, sell, or develop particular property on the engineer's work. In consequence, establishing the registry should not significantly increase engineers' and surveyors' liability for erroneous work.

Local Governments/Communities. At present, local governments participating in the NFIP obtain and use elevation data in a number of ways. Elevation certificates may be obtained from property owners seeking development or construction permits. Communities may contract for elevation data, either to

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[178] *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)(holding that a federal agency charged by statute with administering a program should be given great deference with respect to decisions interpreting the statute and carrying out the program).

[179] *See Dollar v. Nationsbank of Georgia*, 534 S.E. 2d 851 (Ga. App. 2000).

[180] *See Salmon v. Pearson & Associates*, 446 S.E. 2d 762 (Ga. App. 1994)(absence of privity with surveyor does not bar a negligence action).

[181] We have not researched whether an engineer or surveyor could have exposure to persons whose businesses were damaged by the collapse of a purchase transaction caused by erroneous survey data (such as a construction contractor). We believe such liability, if any, would be very limited.

provide data in support of FEMA flood map changes, to aid in recovery from a flood disaster, or as part of community land use planning efforts. Although for some purposes no particular format for elevation information is required, for the roughly 1000 communities in the CRS (in which a majority of NFIP flood policies are located) communities must maintain the elevation certificates in a particular FEMA approved form, and they are required to make these forms available to the public.

In administering their responsibilities under the NFIP to adopt and enforce flood plain management regulations, local governments have been subject to litigation arising out of errors in flood zone and elevation determinations on individual structures. In the reported cases reviewed for this study, the local government escaped liability, either on sovereign immunity grounds (based on an exemption from the state tort claims act for unintentional misrepresentation[182]) or based on a finding of no negligence.[183] Nonetheless, in some states local governments do not have sovereign immunity, and it is certainly possible that a court could find a community liable for a community's negligence in providing data to a property owner who suffers losses as a result.

The question we address here is whether the likelihood of a finding of liability against a community would be increased if an elevation registry were established. Potential liability attributable to the registry would depend on whether the community is the source of inaccurate information in the registry, or whether the community had or should have had information suggesting that the registry information was inaccurate, but relied on the registry anyway. In the former case, increased liability from providing inaccurate information to the registry is likely to be small: the community's exposure is created primarily from the unreliability of information in its own files, upon which buyers or owners would presumably have relied on in any event, rather than its transfer of the information to FEMA where others might have access to the inaccurate information, but are less likely to be parties in interest. This is particularly true in CRS communities, which are already under an obligation to make elevation data publicly available.

As to the latter case, we note that FEMA does not intend to revise its flood plain management regulations requiring communities to obtain actual elevation certificates in issuing construction permits. FEMA recognizes that some of the data that will be placed in the registry will be obtained from sources, which have greater margins of error than those present in elevation certificates. A community might nonetheless issue construction permits based on data in the registry (even though issuance is contrary to its ordinances adopted to comply with FEMA's floodplain management regulations). Should it do so, in violation of federal floodplain management guidelines and its own ordinances, and should

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[182] *See, e.g.*, *Gibson v. Evansville Vanderburgh Building Commission*, 725 N.E.2d 949 (Ind. App. 2000); *City of Tarpon Springs v. Garrigan*, 510 So. 2d 1198 (Fla. Ct. App. 2d Dist. 1987).

[183] *See, e.g.*, *Hanks v. Calcasieu Parish Police Jury*, 479 So. 2d 1010 (La. Ct. App. 1986).

the property owner subsequently encounter significant losses due to flooding, a court could conceivably find the community liable due to its failure to follow its ordinances and to review an accurate Elevation Certificate before allowing construction.

Lenders. Federally sponsored lenders have an important role in the Flood Insurance program: they are required to determine whether a property is or is not in an area mapped by FEMA as a special flood hazard area.[184] If the area is in an SFHA, the lender is required to ensure that the property has flood insurance. Lenders are required to document their flood hazard determination on a Flood Hazard Determination Form, which includes information on the flood zone a property is in, but does not include information about the elevation of particular structures. Where a property is found in a SFHA, the lender must require that there be flood insurance, and elevation information may well be available to the lender as part of the process of ensuring that the owner obtains a flood insurance policy. However, there is no decision for which the lender is responsible that requires elevation information and lenders would not normally have information in their files that would be provided to the registry. Accordingly, the registry would not obtain information from lenders and hence would not create possible liability for lenders by publicizing incorrect information in their files.

Lenders could conceivably suffer liability by using information from (rather than supplying information to) the registry for their required flood determinations. However, this liability would appear to be self-inflicted. First, FEMA intends to advise users of the registry that it is designed for and should be used for determination of flood insurance premiums and not for other purposes. Second, to use the registry in this manner, it appears that lenders would have to ignore an existing statutory requirement that a lender

> may provide for the acquisition or determination of such information [regarding location of a property in an SFHA] by a person other than the lender (or other person) only to the extent that such person guarantees the accuracy of the information.[185]

The registry with its notice that it should be used only for purposes of determining premium would not carry with it the guarantee required by the statute.

Home Sellers and Real Estate Agents. Home sellers and real estate agents have been held liable to buyers when they provide false or misleading information about the flood risk of a property. Occasionally, liability attaches where the seller or agent knew that the property was in a flood zone or had recently flooded, and failed to so advise the buyer. Liability in these cases is almost exclusively determined by state law. Some states maintain a 'buyer

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[184] Lenders are usually not liable if the notice they provide home borrowers is incorrect. *See, Lukosus v. First Tennessee Bank Nat'l Assoc.*, 2003 WestLaw 21658263 (W.D.Vir. July 9, 2003)

[185] 42 U.S.C. § 4104b (d).

beware' policy backed up by provisions in standard real estate purchase contracts;[186] other states require sellers to disclose flood risk information to the buyer.[187]

If the registry shows flood risk to be low, and buyers rely on the data in the registry in purchasing property, it might be possible, in some states, for a buyer to hold a seller liable if the buyer could show that the seller knew, and failed to advise the buyer, of significant flood risk. Other scenarios of liability, involving a seller breaching a duty to provide flood risk information to the buyer are possible. The importance of any increase in liability generated by scenarios of this type should of course be weighed against the potential reduction of litigation that would ensue if real estate agents (working with insurance agents) and buyers were aware of and reviewed information in the registry before making purchase decisions.

Liability Summary: As these brief observations on liability show, we do not believe that the creation of an elevation registry would generate a major increase in liability for any of the groups who create elevation data or use elevation data for insurance, floodplain management, property acquisition, or development purposes. Our belief that the registry would not cause significant new liability exposure recognizes that litigation is unpredictable: there may be a factual pattern in which reliance on erroneous information in the registry gives rise to real economic loss and to major monetary damages due to flood, causing a court in egregious situations to hold liable an entity that it finds to be responsible for the losses.

Our analysis of liability issues highlights the importance — if an elevation registry is created — of populating the registry with accurate data. At present, the principal data published by the NFIP are in the form of maps. While these maps are not always accurate, they are adopted by FEMA after review of all available data and after providing opportunities for comment and appeal. From a regulatory point of view, what is critical is that these maps are the maps adopted by the agency charged by statute with administering the flood program. The existence of an insurance requirement for a property does not, under the law, depend on what its actual risk of flooding is, but on whether the property is located in an area that is mapped by FEMA as a Special Flood Hazard Area.

An elevation registry provides a source of information about the flood risk of particular properties in addition to that provided by FEMA's maps. It is quite possible, with two different sources of elevation and map data (the FIRM and the registry) and the lapse of time between generation of the two types of data, that

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[186] For example, in Kentucky, the doctrine of caveat emptor "(the buyer beware)" applies to purchase of house subject to exceptions for fraud and, in the case of new home from builder, implied warranty of merchantability. *Craig v. Keene*, 32 S.W. 3d 90 (Ky. App. 2000).

[187] For example, sellers in California must fill out a Seller Real Estate Disclosure form, which includes specific reference to conditions of flooding. *See* Cal. Civ. Code § 1102 (2001).

information about a property in the registry will not be consistent with information on the official FEMA flood map for the area in which the property is located. Inconsistency in "official" elevation information will give rise to claims that an agent, lender, owner, or community relied on the wrong information, or, at a minimum, that a party should have investigated the discrepancy. Inconsistency will breed disputes and litigation.

This concern is best addressed by (1) including a disclaimer as to the use to which registry information is to be put; (2) carefully designing the procedures to be used in collecting registry information and the standard for determining reliability of data that will populate the registry; and (3) establishing a workable procedure to allowing for corrections to registry data at the request of property owners, insurance agents, and communities.

4. Legal Effect of Electronic Signatures and Verification[188]

Under current FEMA insurance manuals, when insurance agents submit NFIP insurance policy applications for certain properties, they are required by FEMA to obtain an Elevation Certificate and to attach it to the application.[189] The Elevation Certificate, in turn, must bear the normal signature and seal of a licensed Professional Engineer or other qualified certifier. The registry will capture only data fields (such as address, map panels, and elevation data itself). It almost certainly will not capture the signature and seal of the many engineers and surveyors who determined the elevations of the millions of structures that will be included in the registry. Accordingly, the Task Order requested that the EOP Foundation review how elevation data in an elevation registry should, "be certified for accuracy when [FEMA does not] have the normal signature and seal of a Professional Surveyor or other qualified certifier", and further requested EOP Foundation to "evaluate the need for and legality of 'electronic' signatures."

We first review the federal legislation applicable to electronic signatures.

E-SIGN. In an effort to encourage uniform standards affecting electronic transactions, the U.S. Congress enacted the Electronic Signatures In Global and National Commerce Act (E-SIGN).[190] E-SIGN governs transactions that involve international or interstate commerce.[191] E-SIGN preempts state law, but permits itself to be partially overridden by comparable state legislation. By enacting E-

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[188] This section on the legal effect of Electronic Signatures and Verification was prepared by Mr. Terry Banks of the EOP Foundation.

[189] *See* FEDERAL EMERGENCY MANAGEMENT AGENCY, FLOOD INSURANCE MANUAL, at Applications 6 (2000, rev. Oct. 1, 2002). This requirement applies to properties that are Post-FIRM construction, as well as pre-FIRM construction using optional post-FIRM rating, and are located in Zones A1-A30, AE, AH, A, V1-V30, VE, and V. *Id.*

[190] Pub. Law 106-229, *codified at* 15 U.S.C. §§ 7001-31.

[191] 15 U.S.C. § 7001.

SIGN, Congress intended to promote the acceptance and use of electronic signatures.[192]

The central provision of E-SIGN validates the legitimacy of electronic signatures in interstate commerce.

> Notwithstanding any statute, regulation, or other rule of law . . . with respect to any transaction in or affecting interstate or foreign commerce—
>
> (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
>
> (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.[193]

An "electronic record" under the statute, is a contract or other record created, sent, communicated , received, or stored by electronic means.[194] An "electronic signature" is "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[195] In other words, an electronic signature can

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[192] Congress' intent is embodied in sections on "Required Actions," and "Principles."

> Required actions. The Secretary of Commerce shall promote the acceptance and use, on an international basis, of electronic signatures in accordance with the principles specified in paragraph (2) and in a manner consistent with section 101 of this Act [15 U.S.C.S. § 7001]. The Secretary of Commerce shall take all actions necessary in a manner consistent with such principles to eliminate or reduce, to the maximum extent possible, the impediments to commerce in electronic signatures, for the purpose of facilitating the development of interstate and foreign commerce.
>
> Principles. The principles specified in this paragraph are the following:
> (A) Remove paper-based obstacles to electronic transactions by adopting relevant principles from the Model Law on Electronic Commerce adopted in 1996 by the United Nations Commission on International Trade Law.
> (B) Permit parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions, with assurance that those technologies and implementation models will be recognized and enforced.
> (C) Permit parties to a transaction to have the opportunity to prove in court or other proceedings that their authentication approaches and their transactions are valid.
> (D) Take a nondiscriminatory approach to electronic signatures and authentication methods from other jurisdictions.

156 U.S.C. § 7031(a).

[193] 15 U.S.C. §7001(a).

[194] 15 U.S.C. § 7006(4).

[195] 15 U.S.C. § 7006(5).

be as simple as an e-mail message or fax from one person to another agreeing to a contract, or as complex as a technologically sophisticated digital signature.[196]

E-SIGN also specifically authorizes the electronic notarization, acknowledgment, or verification of documents.[197] Congress specifically identified insurance as a business to which E-SIGN was intended to apply.[198] Thus, electronic signatures and verification apply to the creation of contracts of insurance between private parties under the National Flood Insurance Program. The federal government is not required to accept electronic signatures for contracts to which it is a party.[199]

State E-Commerce Laws. E-SIGN applies to transactions involving interstate and international commerce. However, states may modify, limit, or supersede the provisions of E-SIGN by enacting the Uniform Electronic Transactions Act (UETA),[200] which was issued by the National Conference of Commissioners of Uniform State Laws (NCCUSL) in 1999.[201] Either a state version of UETA that deviates from the model law, or passage of an electronic signature law not based on UETA, such that the state law is inconsistent with E-SIGN, could be preempted by E-SIGN.[202] California, Florida, Louisiana, and North Carolina have all adopted versions of UETA, but with varying levels of uniformity.[203]

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[196] Note that "electronic signature" is a general term referring to a manifestation of intent to create an agreement, while "digital signature" refers to a specific technology based on encryption which may be used to sign a document electronically and which can be authenticated.

[197] *See* 15 U.S.C. § 7001(g), which states in pertinent part:

> If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

[198] 15 U.S.C. § 7001(i)("It is the specific intent of the Congress that this title . . . apply to the business of insurance").

[199] *See* E-SIGN, § 104, *codified at* 15 U.S.C. § 7004.

[200] *See* Uniform Electronic Transactions Act, 7A U.L.A. 17 (Supp. 2000), *available at* Uniform Electronic Transactions Act (visited Mar. 17, 2003) <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/ueta99.htm> (hereinafter UETA).

[201] *See* 15 U.S.C. § 7002(a)(1)(permitting preemption of E-SIGN if a state passes UETA).

[202] *Id.*

[203] *See* Uniform Electronic Transactions Act, 1999 Cal. Stat. 428, Cal. Civ. Code §§ 1633.1-17; Uniform Electronic Transactions Act, 2000 Fla. Laws ch. 668.50; La. Rev. Stat. Ann. §§ 9:2601-20; N.C. Gen. Stat. §§ 66-308 to 308.17.

The model UETA is comparable to E-SIGN in that it specifically legitimizes electronic records, contracts, and signatures.[204] UETA also provides for electronic verification:

> If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.[205]

UETA also permits state agencies to decide whether or not to accept and use electronic signatures.[206]

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[204] Section 7 of the model UETA provides, "Legal Recognition of Electronic Records, Electronic Signatures, and Electronic Contracts":

> (a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
> (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.
> (d) If a law requires a signature, an electronic signature satisfies the law.

[205] *See* UETA, § 11.

[206] Section 18 of UETA sets out rules for "Acceptance and Distribution of Electronic Records by Governmental Agencies":

> (a) Except as otherwise provided [separately for each governmental agency] [the designated state officer] of this State shall determine whether, and the extent to which, [the state agencies] will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.
> (b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a), the [governmental agency] [designated state officer], giving due consideration to security, may specify:
> (1) the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes;
> (2) if electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process;
> (3) control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and
> (4) any other required attributes for electronic records which are specified for corresponding non-electronic records or reasonably necessary under the circumstances.
> (c) Except as otherwise provided in Section 12(f), this [Act] does not require a governmental agency of this State to use or permit the use of electronic records or electronic signatures.

California. California passed a non-uniform version of UETA that included significant consumer protection provisions making it likely that the California UETA will be susceptible to federal preemption. In addition to their UETA law, California has also grappled with digital signatures.[207] The California digital signature law provides that the use of a digital signature shall have the same force and effect as the use of a manual signature if and only if it embodies all of the following attributes:

> (1) It is unique to the person using it.
> (2) It is capable of verification.
> (3) It is under the sole control of the person using it.
> (4) It is linked to data in such a manner that if the data are changed, the digital signature is invalidated.
> (5) It conforms to regulations adopted by the Secretary of State.[208]

The California statute does not mandate the use of or digital signatures by state agencies:

> The use or acceptance of a digital signature shall be at the option of the parties. Nothing in this section shall require a public entity to use or permit the use of a digital signature.[209]

California, of course, cannot mandate the acceptance of electronic signatures or digital signatures by the federal government.[210]

Florida. Florida enacted UETA on May 26, 2000. The Florida law contains all of the provisions in the uniform UETA, including provisions relating to notaries, the time and place of sending and receiving electronic records, and the acceptance and distribution of electronic records by governmental agencies.[211]

Louisiana. Louisiana's version of UETA was enacted on June 1, 2001. The Louisiana statute includes the uniform provisions discussed above.[212]

North Carolina. North Carolina enacted its version of UETA on August 2, 2000, and amended its law on April 5, 2001. The North Carolina statute includes the uniform provisions discussed above except for the provision allowing state agencies to decide whether or not to use and recognize electronic signatures.[213] The state's Electronic Commerce Act, enacted in 1998, allows for the use of

[207] See *supra* note 196.

[208] Cal. Gov't Code § 16.5(a).

[209] Cal. Gov't Code § 16.5(b).

[210] *See* 15 U.S.C § 7001(a)(1).

[211] *See* Fla. Stat. § 668.50.

[212] *See* La. Rev. Stat. Ann. § 9:2601 *et seq.*

[213] *See* N.C. Gen. Stat. § 66-311 *et seq.*

electronic signatures by public agencies. The Act provides for the legal validity and enforceability of electronic signatures, as well as their admissibility into evidence.[214]

In sum, under E-SIGN and state UETA laws, records and signatures may not be denied legal effect solely because they are in electronic format. If a law requires a record to be in writing, an electronic record satisfies the law, and an electronic signature satisfies a legal requirement for a signature. Electronic signatures may be used when a law requires a signature or record to be notarized, acknowledged, verified, or made under oath.[215] FEMA may choose to require that there be a written or electronic certification of the data for each property in the elevation registry. The method of certification could vary depending upon the method of determining the elevation: a written or paper seal for a traditional elevation certificate prepared on-site by a surveyor or inspector, or an electronic signature if obtained by airborne remote sensing, by mobile photogrammetric vans, or other methods. Whatever methods of collection FEMA chooses to authorize, it could require certification of the accuracy of the data by the individual data collector by either written or electronic means.

Modification of Manual Required. Agencies are thus encouraged by law to allow use of electronic signatures in those situations where appropriate controls against counterfeit signatures are in place. However, even if this were not the case, FEMA would not be precluded from establishing the registry and requesting that insurance agents use the registry in submitting NFIP insurance applications. As noted above, FEMA requires that agents "attach" Elevation Certificates to those applications where elevation affects premium. FEMA mandates use of a FEMA approved form Elevation Certificate, which must be signed by a registered and state-licensed engineer or surveyor. In order for the registry to be established, FEMA must modify its Flood Insurance Manual to allow agents to rely on data from the registry in lieu of a signed Elevation Certificate. Once this change is made, it is of no particular legal consequence whether the data provided to FEMA and placed in the registry was (1) provided in an original Elevation Certificate with original signature and seal; (2) provided in a photocopy of an original Elevation Certificate; (3) transmitted to FEMA in electronic form with an electronic signature; or (4) developed using remote sensing techniques. We expect FEMA would establish quality control procedures to assure the validity of the data placed in the registry, as well as documentation and audit procedures to assure that agents in fact obtain and properly interpret elevation data from the registry when rating policies.

LEGAL ISSUES RELATED TO STRATEGIES FOR ACQUISITION OF DATA

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[214] *See* N.C. Gen. Stat. §§ 66-58.1 to 58.11.

[215] *See* UETA, § 11.

As this project advances, Dewberry & Davis will be evaluating five different strategies for obtaining data to populate the registry. Each of these strategies raises somewhat different legal issues. The remainder of this report reviews the principal legal issues raised by the five strategies; some of the analysis is clearly applicable to more than one strategy.

Strategy A: Maximize use of existing Elevation Certificates to populate the elevation registry.

1. FEMA authority to request, but not require, holders to provide elevation data

Congress has authorized FEMA to request elevation data from private entities and from state and local governments.[216]

Insurance Companies and Agents. With respect to insurance companies and agents, FEMA has express authority to

> [e]nter into any contracts, agreements, or other appropriate arrangements which may, from time to time, be necessary for the purpose of utilizing, on such terms and conditions as may be agreed upon, the facilities and services of any insurance companies or other insurers, insurance agents and brokers, or insurance adjustment organizations[217]

Under the WYO arrangement, the insurance companies write the policies and collect a percentage of the premiums, while FEMA underwrites the risk. With respect to insurance companies operating under the WYO arrangement, FEMA already requires that companies comply with the WYO Transaction Record Reporting and Processing Plan, under which the WYO provides to FEMA monthly data tapes of transactions (such as new policies written, existing policies renewed, and claims activity).[218] The WYO Arrangement — which is promulgated as a federal regulation and agreed to by companies participating in the WYO Program — itself provides that

> [t]he Company shall furnish to FEMA such information and analyses of information including claim file information, and *property address, location, and/or site information* in its records as may be necessary to carry out the purposes of the National Flood Insurance Act of 1968, as amended, in such form as the FIA [Federal Insurance Administration], in cooperation with the Company, shall prescribe.[219]

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[216] See discussion in “Background,” *supra* p.10ff., for an extensive review of FEMA’s authority to collect, use, and publish elevation data.

[217] 42 U.S.C. § 4081(a).

[218] *See* 44 C.F.R. § 62.23(h)(4) & (j)(3); *see also* 44 C.F.R. § 62.23 (j)(6). In preparing this Report, we have not reviewed the Transaction Record Reporting and Processing Plan.

[219] 44 C.F.R. Part 62, App. A, Article VI (emphasis added).

Elevation information held by insurance agents and companies was originally obtained, and is maintained, because it is necessary to determine proper premiums. Elevation information is clearly "necessary to carry out the purposes of the National Flood Insurance Act." Accordingly, FEMA is authorized to revise its Transaction Record Reporting and Processing Plan and the WYO arrangement (in consultation with the WYO Companies) in order to request this data from the WYO companies and agents. However, actual collection of the data may be expensive, since the data might not have previously been requested or required by FEMA, and, therefore, might not be held in centralized locations, or in compatible formats, or captured electronically in the first place. The increased cost to WYO companies could trigger requests for adjustment of the expenses allowed to be retained by the WYO Companies under the WYO Arrangement.

State and Local Governments*.* FEMA also has broad authority to request specific elevation data from state and local governments. The NFIA expressly provides that FEMA Director can

- consult with, receive information from, and enter any agreements with …the head of any State or local agency …in order that he may … identify and publish information with respect to all floodplain areas …which have special flood hazards …and …establish or update flood-risk zone data in all such areas, and make estimates with respect to the rates of probable flood caused loss"[220]
- undertake and carry out studies and investigations, and receive or exchange such information as may be necessary to estimate, and shall from time to time estimate, on an area, subdivision, or other appropriate basis (1) the risk premium rates for flood insurance.[221]

If FEMA can request data from state and local governments, are there significant *legal* (non-budgetary) restrictions on these governments' ability to provide this information to FEMA? We believe that there are not. To illustrate, we focus this review primarily on a brief review of applicable laws in Florida, North Carolina, Louisiana, and California.

First, records held by local governments in each of these states — and we believe in virtually all of the other states — are subject to laws governing the inspection of public records.

Each of the four states we have been asked to review has a public records act, which requires that governmental agencies make available for inspection or

[220] 42 U.S.C. § 4101(a).

[221] 42 U.S.C. § 4014(a).

copying records about the conduct of public business.[222] Information about structural elevation is not among those items exempted from disclosure requirements. We have not found any state statute that otherwise prevents the disclosure of elevation data. Therefore, although we have not scoured every State code, our belief is that there is no impediment in principle to obtaining elevation information. We do not expect, however, that FEMA would rely on state freedom of information laws to request elevation data.

In practice, FEMA would most likely conclude agreements with the States about the type of information FEMA wishes to collect, the formats compatible with state data systems, and the appropriate schedule on which the information would be collected. FEMA should be aware that any collection of information, whether mandatory or voluntary, that involves ten or more persons (including individuals, companies, or State or local governments), is subject to the administrative requirements of the Paperwork Reduction Act,[223] which has a six month minimum lead time for new or expanded collections of information.[224]

The operation of FEMA's Community Rating System confirms our view that there are not significant *legal* obstacles to communities making available elevation data they have obtained in carrying out their floodplain management responsibilities. Every local community participating in the Community Rating System[225] must maintain in its files flood elevation certificates for new structures or construction in the SFHA built from the time the community first submits its application for the CRS program.[226] Further, the elevation certificates must use the prescribed FEMA form, and the community must make the certificates available to any requester.[227] About 1000 communities participate in the CRS, and these communities encompass a significant percentage of all of the properties insured under the NFIP.[228] Since the certificates must be available to *every* requester, there would be no *legal* impediment to FEMA requesting and reviewing the data in the communities' files. (However, FEMA may find review of data in each community's files impracticable.) In addition, under the CRS, "extra credit" is available if the community's "elevation and flood-proofing certificate data are kept

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[222] *See* Cal. Civ. Code § 6250 et seq.; Fla. Stat. Ann. § 199.01 et seq.; La. Rev. Stat. Ann. § 44:1 et seq.; N.C. Gen. Stat. § 132-6.

[223] *See* 44 U.S.C. § 1320.l, et seq.

[224] *See* 5 C.F.R. § 1320, "Controlling Paperwork Burdens on the Public," 60 Fed. Reg. 44978-96 (Aug. 29, 1996).

[225] CRS is a voluntary program expressly authorized by 42 U.S.C. § 4022(b).

[226] See discussion of the CRS program, *supra* p. 17.

[227] FEDERAL EMERGENCY MANAGEMENT AGENCY, COMMUNITY RATING SYSTEM MANUAL, Series 300, § 311(a).

[228] For example, as of June 2002, there were 210 CRS communities in Florida, 57 in California, 80 in North Carolina, and 38 in Louisiana. *See* "Community Rating System, Eligible Communities," *available at* <http://www.fema.gov/nfip/pdf /manual10_02/19cr1002.pdf>, (visited Mar. 19, 2003).

in computer format and provided to FEMA each year."[229] So, FEMA may already be collecting a significant portion of available elevation data originating in CRS communities.

The decision of many communities participating in the NFIP to join CRS indicates, consistent with our review of state public records laws, that those communities have not found it legally impermissible to make elevation data publicly available. We recognize that it is theoretically possible that some communities have hesitated to join the CRS because they face, or believe that they face, a legal obstacle under local law to disclosing elevation data that participating CRS communities in their state do not face. However, since public records laws and exemptions to public records laws are generally adopted by states, and generally apply to all governmental jurisdictions within the state, we believe that this theoretical possibility is unlikely to reflect a real legal concern.

2. FEMA Authority to Require Submission of Elevation Data

Our analysis to this point focused on legal restrictions on FEMA's ability to request, but not require, elevation data held principally by FEMA contractors, insurance agents, WYO companies, and communities. We have also reviewed whether there may be legal obstacles preventing these entities from providing elevation data to FEMA *voluntarily* at FEMA's request. We now examine FEMA's potential ability to *mandate* that these entities provide existing data. The short answer is "FEMA cannot," at least unless FEMA arranges to compensate sources for the cost of providing the data. We review briefly the analysis for the different entities that may hold elevation certificate data.

FEMA Contractors. Except in rare instances not applicable here, FEMA does not have authority to mandate private entities to enter into contracts.[230] The contractor's obligations to provide data developed under the contract will be determined by the contract itself. We have not reviewed the scope of work of the FEMA contractors who might hold elevation certificates, but it is common practice for government contracts to include a requirement that the contractor provide the government, on request, with whatever information and documents were generated or obtained in performance under the contract. Accordingly, it is quite probable that FEMA can "require" that its contractors holding elevation certificates or elevation data provide the certificates or data to FEMA. However, this request would likely be considered a new task order or change in scope of work, and FEMA would likely be obligated, pursuant to the contract, to pay the cost incurred by contractors in complying with the requirement.

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[229] Federal Emergency Management Agency, Community Rating System Manual, § 311, p. 310-6 (1999).

[230] *Compare* 42 U.S.C. § 4082 ("may enter into contracts") *and* 42 U.S.C. § 4101(a) ("is authorized to . . . enter into agreements with"), *with* 42 U.S.C. § 5196(i) ("may procure by condemnation or otherwise").

WYO Companies. FEMA also cannot require insurance companies to act as WYO Companies; insurance companies become WYO Companies voluntarily, by agreeing to the terms and conditions of the WYO Arrangement. FEMA is authorized to enter into this arrangement only with "terms and conditions as may be agreed upon."[231] FEMA is authorized to amend the Arrangement, prospectively, by rule, to "require" that WYO Companies provide FEMA with elevation certificates or elevation certificate data. However, if these costs are significant, and WYO Companies do not believe that they would be compensated for incurring them, WYO Companies may simply drop out of the WYO program.

Insurance Agents. FEMA has even less authority over agents than over WYO Companies to mandate submission of data, since most agents have a relationship to the NFIP only through the WYO Companies. To the extent WYO Companies are required under the Arrangement to provide elevation certificates or data, and this information is initially collected by agents, then WYO Companies can "require" agents to submit the information with any policy application or renewal.

State and Local Governments*.* The NFIP is a voluntary program, so while there are strong incentives for communities to participate and make federal flood insurance available to their residents, no community is required to do so. In order to join the NFIP, a community must adopt "land use and control measures" consistent with "comprehensive criteria" developed by FEMA to:

> (1) Constrict the development of land which is exposed to flood damage where appropriate;
> (2) Guide the development of proposed construction away from locations which are threatened by flood hazards,
> (3) Assist in reducing damage caused by floods, and
> (4) Otherwise improve the long range land management and use of flood-prone areas.[232]

This section might be broad enough to allow FEMA, through informal rulemaking, to amend its current "comprehensive criteria" to include a requirement that communities submit to FEMA their elevation certificates or data. Absent indication that FEMA would attempt to do so, we have not analyzed this question in any depth. As with any rulemaking, the proposed and final rules would be subject to the requirements of the Administrative Procedure Act, including compliance with the Paperwork Reduction Act, review by the Office of Management and Budget under Executive Order 12866, and other regulatory analyses and certifications necessary to that process. Such a regulatory change,

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[231] 42 U.S.C. § 4081(a).

[232] 42 U.S.C. §§ 4102 and 4015(c)(2).

if imposed on State and local governments without concomitant funding, might be criticized as an "unfunded mandate."[233]

3. Relevance of Ownership of Elevation Certificates.

FEMA has requested that we analyze the issue of "who owns the elevation data" — the owner who paid for an elevation certificate, the insurance agent or WYO company that required a certificate to rate a policy, the community that required a certificate before issuing a construction permit for a structure, or other entities. In addition, we were tasked to evaluate the degree to which persons that have elevation data derived from elevation certificates, but are not the "owners" of the certificates, may provide this data to FEMA. Newly created data will be governed by the contract under which it is collected, and FEMA can include in each data collection contract appropriate provisions regarding ownership and use of data. Further, even if "ownership" concerns exist with respect to the transfer of existing elevation data into a FEMA database, FEMA may be able to address those concerns prospectively by making appropriate changes to the language of the agreements under which it obtains elevation data from third parties. However, our review of the restrictions applicable to insurance agents, WYO companies, and state and local governments has cast substantial doubt in our minds that ascertaining the "owner" of the certificate is of any real relevance to FEMA's ability to obtain elevation data and to place that data into the registry.

With respect to retrospective elevation data, we can assume that "original" Elevation Certificates, with original signatures and bearing the seals of licensed surveyors or engineers, exist in a number of places. They are likely to have been provided originally by the engineer to the requester: a property owner, a potential buyer and developer of the property, a community that funded detailed elevation surveys in flood prone areas, or perhaps even an escrow agent or mortgage banker who arranged insurance as part of the closing of a real estate loan.[234] This original certificate, or copy of this certificate with or without a formal certification of the copy, may then have been provided to an insurance agent (for purposes of obtaining insurance), to a community (to obtain an as built elevation certification), to FEMA or its contractors (for purposes of obtaining a Letter of Map Amendment or Revision), or to some other person.

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[233] To be subject to the requirements of the Unfunded Mandates Reform Act, a rule must impose, in aggregate, a cost of $100 million per year on State, local, or tribal governments. *See* 2 U.S.C. § 1501 et seq. We do not know whether such a change is likely to reach that threshold.

[234] The variety of potential fact patterns — and the difficulty of ascertaining rights of "ownership" in these fact patterns — is illustrated by *McClung Surveying v. Worl*, 541 S.E. 2d 703 (Ga. App. 2000). In *Worl*, an escrow agent ordered a flood zone determination (not an elevation certificate) from an engineer at the request of the lender, so that the lender would know if the property was subject to a mandatory flood insurance requirement. The borrower/property owner paid for the determination as part of closing costs. Nonetheless, the property owner/borrower was held not to be in privity with the engineer and could not sue the engineer for damages caused by an erroneous certification that the property was not in the flood plain.

Having received a certificate from the original "holder," the recipient insurance agent, WYO company, or government clearly has at least a right to physical possession of that certificate whether or not it "owns" that certificate. Moreover, even if the first "holder" of the certificate had a right, as "owner", to request return of the "original" certificate from the recipient, we are confident that the recipient would have the right, if not the obligation, as a matter of audit and federal and state recordkeeping requirements, to make and keep a copy of that certificate. Further, we have already reviewed whether FEMA can request data from certificates in the files of agents, WYO companies, and participating NFIP communities, and concluded that ownership does not appear to be relevant to FEMA's ability to acquire this data. Public record keeping laws, for example, require governments to make available for public inspection information lawfully in their files regardless of where "ownership" may reside.

The issue of ownership may well be important if FEMA seeks not just the elevation data contained on elevation certificates, but physical possession of the elevation certificates themselves. We question — but have not analyzed — whether FEMA would be able to obtain physical possession of "original" elevation certificates, for example, those filed with a community's building permit records. In any event, FEMA has advised that it has no intent to do so as part of the elevation registry project, and so we have not pursued this issue further.

We have considered what other types of ownership issues might be raised where FEMA seeks data from airborne sensing, photogrammetric vans, or conventional surveys. We are aware that the owners of the technology used for remote sensing may, in an effort to preserve competitive advantage with respect to their technology, have retained some rights with respect to disclosure of their work product. However, FEMA would have the opportunity to review, evaluate, and negotiate removal of any such restrictions when entering into the contracts under which it would acquire the data.

We have also considered other legal issues that might be relevant, but are more tangential to FEMA's current objectives. For example, does a property owner have a right to control information about his or her land in the same way celebrities have a "right of publicity" in their voices, images, and "likenesses." Does state trade secret law in some situations restrict a person from using overflight photographs, noted as a possibility in the *Dow Chemical* case discussed *infra*,[235].

In the last few years, a particularly controversial topic of legislation involves determining the appropriate intellectual property status of complex collections of public information, which companies invest significant resources to collect and organize, and which may have significant value in the market. A database of

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[235] *See* 476 U.S. 227, 232 (1986).

public information is not eligible for copyright protection, but without some sort of protection for their investments, companies will be unwilling to make this type of product available. This is similar to the problem of obtaining elevation certificates, since elevation is essentially a characteristic of the earth — public information — but which is obtained only by an expert surveyor, or expensive remote sensing equipment. There is even a recent case in which the plaintiff attempted creatively to sue in "trover," an ancient common law tort, to challenge another who appropriated, for profit, a laboriously constructed World Wide Web page. Indeed, in constructing a registry, FEMA may face variations on this private concern from flood zone determination companies who have expended considerable effort in their business of advising and certifying to mortgage lenders whether a property is or is not in an SFHA.[236]

However, the range of potential issues raised by these questions is quite broad, detailed legal research of these issues would be expensive, and the issues appear tangential to the registry. Accordingly, we have not pursued them.

Strategies B & C: Maximize use of remote sensing: LIDAR, IFSAR and airborne photogrammetry; mobile photogrammetric vans.

1. Privacy Rights and Collection of Data by Remote Surveillance

The remote sensing technologies that FEMA might utilize to collect elevation data include the use of aerial or "drive by" photogrammetry that uses stereo photography to measure the elevation of land or structures; Light Detection and Ranging (LIDAR), a remote sensing technology that employs eye-safe airborne laser technology to measure the elevation of land or structures; or Interferometric Synthetic Aperture Radar (IFSAR), a remote sensing technology that employs airborne radar technology to measure the elevation of land or structures. In our analysis, we have primarily reviewed the case law examining whether remote sensing by criminal or regulatory investigators violates the Fourth Amendment's protection against warrantless searches by the government.

Initially, the test for whether a search violated the Fourth Amendment asked whether physical intrusion was involved,[237] but as technology advanced, the Supreme Court found this inquiry insufficient to deal with new kinds of privacy invasions and modified its thinking. At present, the test used by the Supreme

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[236] A mortgage lender is permitted to obtain elevation determinations from a third party only if the third party "guarantees the accuracy of the information." 42 U.S.C. § 4104b(d). Flood zone determination companies make and guarantee the accuracy of flood zone determinations for a fee.

[237] *See Olmstead v. United States*, 277 U.S. 438, 457, 466 (1928) (holding that wiretaps inserted into telephone wires from the street without any physical trespass on the defendant's property, physical entry into his house, or seizure of any tangible item, did not constitute an unlawful search under the Fourth Amendment).

Court is that elucidated in *Katz v. United States*,[238] which considers 1) whether the person had an expectation of privacy and (2) whether society recognizes that expectation as "reasonable."[239]

The data collection FEMA intends to conduct requires observation directly outside of and near private homes. In determining a person's expectation of privacy in the area outside a person's home, the Supreme Court distinguishes between the home and that area immediately adjacent to it, known as the "curtilage,"[240] from "open fields," which the Court has described as "any unoccupied or undeveloped area outside of the curtilage."[241] Within the curtilage an owner has the greatest expectation of privacy;[242] but in an "open field" an owner has no expectation of privacy.[243] That distinction was made clear in *Oliver v. United States*, in which the Court reviewed a search conducted by police officers who walked onto defendant's property, passing "no trespassing" signs along the way, and found marijuana growing in two fenced patches in the woods behind the house. The Court explained that "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes."[244] But the Court found that the secluded woods, away from the curtilage, was an "open field," and did not garner the same level of privacy as the curtilage. Consequently, the court found that the search by the officers was not unconstitutional.[245]

The Supreme Court has considered a number of times the application of the *Katz* test to remote surveillance. In the case of *California v. Ciraolo*, the Court held that observation by police inside the curtilage of a home was not a violation of the homeowner's Fourth Amendment rights where the property in question was surrounded by a fence and observed with the naked eye from a fixed-wing airplane flying within FAA sanctioned airspace at 1000 feet.[246] In the companion case of *Dow Chemical Co. v. United States*, decided on the same day as *Ciraolo*, the Court addressed a warrantless search of Dow's Midland, Michigan, plant by

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[238] *See* 389 U.S. 347 (1967).

[239] *See* 389 U.S. at 361 (1967) (Harlan, J., concurring). *Katz* involved the wiretapping by police of a conversation in a public telephone booth without any physical intrusion by a device inside the telephone booth. The Court saw that the advances in technology made its previous physical intrusion test insufficient to deal with new kinds of privacy invasions and abandoned that rule in favor of the two-part test.

[240] *See Oliver v. United States*, 466 U.S. 170, 180 (1984).

[241] *Id.* at 180 n.11 (explaining that an "open field" need not be actually "open" or a "field" in the common use of those terms).

[242] *Id.* at 180.

[243] *Id.* at 181.

[244] *Id.* at 180 (internal quotations deleted).

[245] *Id.* at 183.

[246] 476 U.S. 207 (1986).

the Environmental Protection Agency which "employed a commercial aerial photographer, using a standard floor-mounted, precision aerial mapping camera, to take photographs of the facility from altitudes of 12,000, 3,000, and 1,200 feet."[247] The camera was mounted in an airplane flying in lawful navigable airspace.[248] The data and images collected apparently permitted, using simple magnification, identification of objects such as wires as small as 1/2-inch in diameter.[249]

The *Dow* Court distinguished the private activities of home from activities conducted on property used for commercial or industrial purposes, which are afforded a lesser expectation of privacy.[250] In holding the search constitutional, the Court pointed out that warrantless government observations of workplaces are less likely to violate the Fourth Amendment. Significantly, the *Dow* Court relied on the fact that even though equipment was used to enhance human vision, the images "remain limited to an outline of the facility's buildings and equipment."[251] The Court also took into account the fact that the EPA was conducting a legitimate compliance investigation under the Clean Air Act.[252]

Just three years after those cases, the Court ruled in *Florida v. Riley*, another aerial observation case, that activities conducted in plain view, even within the curtilage of one's home, will generally not be protected.[253]

In the course of deciding remote surveillance cases, the courts have distinguished among places, equipment, behaviors, and circumstances for which there is a reasonable expectation of privacy and for which an expectation of privacy is less reasonable. Eight different elements of the courts' reasoning are apparent. An expectation of privacy is less likely to be present in an "open field"

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[247] 476 U.S. 227, 229. The majority described the camera as a "conventional, albeit precise, commercial camera commonly used in mapmaking." *Id*. at 238. The dissenters quoted the District Court's findings with respect to the camera:

> The camera used "cost in excess of $22,000.00 and is described by the company as the 'finest precision aerial camera available.' . . . The camera was mounted to the floor inside the aircraft and was capable of taking several photographs in precise and rapid succession." This technique facilitates stereoscopic examination, a type of examination that permits depth perception.

Id. at 242 n.4 (Powell, J., dissenting)(citations omitted).

[248] *Id.*

[249] *Id.* at 238.

[250] *Id.* at 237-38.

[251] *Id.* at 238.

[252] *Dow*, at 233-34.

[253] *See* 488 U.S. 445, 449 (1989) (finding aerial observation by police officer with his naked eye in helicopter 400 feet above defendant's partially covered greenhouse in the backyard of his home was not a violation of Fourth Amendment).

than within the "curtilage" of a property;"[254] in a commercial establishment than in a private home;[255] when observation is conducted remotely as opposed to where there is a physical intrusion;[256] when carried out from a location where the government agents have a legal right to be (e.g. navigable air space),[257] rather than when they are trespassing;[258] where the observation collects information exclusively about activities outside the buildings[259] rather than where it also collects information about the activities inside;[260] where the government is carrying out a regulatory activity authorized by statute[261] rather than conducting a "fishing expedition" to develop leads for possible investigation; where human observation or readily available equipment is employed[262] rather than advanced sensory enhancing technologies not generally available to the public;[263] where the observed have not taken measures to avoid the loss of privacy, rather than where they have taken such measures.[264]

Of these eight different elements, which assist a court in deciding whether surveillance is lawful under the Fourth Amendment, FEMA's proposed data collection for the elevation registry would lean toward a greater expectation of privacy in only two of the elements. FEMA's collection of structural elevation data would certainly be an observation inside the "curtilage" of some private homes. While some of the structures mapped may be commercial, the mapping will surely include homes, which are afforded the highest expectation of privacy under the Constitution. The area that is required to be surveyed is that area

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[254] *See Oliver*, 466 U.S. at 180.

[255] *See Dow*, 476 U.S. at 237-38.

[256] *See Ciraolo*, 476 U.S. at 213-14.

[257] *Id.* at 213.

[258] In this section, we are not making any observation about the law of trespass. As the Court said in *Oliver*,

> The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

466 U.S. at 183-84.

[259] *See Dow*, 476 U.S. at 236.

[260] *See Dow*, 476 U.S. at 238 ("EPA was not employing some unique sensory device that, for example, could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories, but rather a conventional, albeit precise, commercial camera commonly used in mapmaking").

[261] *See id.* at 233 ("Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.").

[262] *See Ciraolo*, 476 U.S. at 213-14.

[263] *See Dow*, 476 U.S. at 238-39.

[264] *See Ciraolo*, 476 U.S. at 212.

immediately adjacent to a structure — the lowest adjacent grade and the highest adjacent grade. For this part of the analysis, we assume that there would be no physical intrusions onto the land of any homeowner.[265] Instead, FEMA will collect data exclusively outside of the structures and with readily available commercial photogrammetric equipment. The collection of new elevation data would be carried out by FEMA under its authority to run the National Flood Insurance Program, and as such, FEMA would be conducting a statutorily authorized function from legal, navigable airspace or from a public street.

As for the last element — whether property owners will try to prevent FEMA from mapping the correct elevation of their land — it is certainly possible, but very unlikely. It is possible that property owners will have erected fences or coverings over their yards, or that there are other impediments to observation. However, as we discussed in the previous section on the Privacy At of 1974, the type of data being collected is not the sort of information the Court seems concerned with protecting—the private activities and behaviors of people.[266] Elevation data is for the most part about the characteristics of property, and probably not the sort of thing that could or should be protected from observation even if a homeowner wanted to protect that information for some reason.

So far, the Supreme Court has not yet decided a case with facts that exactly match the activities FEMA proposes to engage in to collect data for the elevation registry. In *Dow*, the Court approved surveillance of a commercial property using sophisticated, although commercially available, vision-enhancing equipment. In *Ciraolo* and *Riley*, the Court approved surveillance with the naked eye inside the curtilage of private homes from within navigable airspace, even as close as 400 feet. The states, too, have subtle differences in how they interpret their own constitutions with respect to government searches.[267] It is true that in *Dow*, the

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[265] See discussion of trespassing under Strategy D.

[266] *See Oliver*, 466 U.S. at 179 (referring to " those intimate activities that the Amendment is intended to shelter from government interference or surveillance").

[267] California, for example, has chosen not to follow the Supreme Court's rulings but to afford greater protection to its residents under the California Constitution:

> We were not persuaded [in *People v. Cook*, 710 P.2d 299 (Cal. 1985)] that police officers who examine a residence from the air are simply observing what is in "plain view" from a lawful public vantage point. Such reasoning, we explained, ignores the essential difference between ground and aerial surveillance. One can take reasonable steps to ensure his yard's privacy from the street, sidewalk, or neighborhood, and police on the ground may not broach such barriers to gain a view of the enclosed area. But there is no practical defense against aerial spying, and precious constitutional privacy rights would mean little if the government could defeat them so easily.
>
> Even if members of the public may casually see into his yard when a routine flight happens over the property, we concluded, a householder does not thereby consent to focused examination of the curtilage by airborne police officers looking for evidence of crime. No law enforcement interest justifies such intensive

Court suggested that were the government to use equipment generally not available to the public in surveillance of a private home, they might decide differently.[268] But the Court did not consider the camera at issue in the case to fall into that category, inasmuch as the Court referred to it as "a conventional, albeit precise, commercial camera commonly used in mapmaking."[269] Therefore, we think it unlikely that, even should the Court grant *certiorari* in a case involving photogrammetric surveillance of private homes by the police, it would find that activity unconstitutional. We believe that collecting the proposed registry data using photogrammetry from the air or street would be permissible.

Even though FEMA would not be making observations solely with the use of the naked eye, the Supreme Court sanctioned the use of a $22,000 aerial camera in the *Dow* case as being, a "common" and "standard" tool for mapmaking.[270] Like EPA's reliance in *Dow* on its statutory authority to conduct Clean Air Act investigations, FEMA would be conducting the collection of structural elevation data under its authority to make maps to support the National Flood Insurance Program.

Strategy D: Utilize conventional/GPS surveys only when necessary, because these cost the most and would be unaffordable for FEMA to pay for nation-wide coverage with Elevation Certificates.[271]

We have been advised that the remote sensing techniques of Strategies B and C are likely to be adequate for much of the information required for insurance purposes, and may even be quite accurate for some properties. However, some information — such as whether a property has a walkout basement — is difficult to see remotely. Strategy D will evaluate a 'compromise' technique under which remote sensing would be used rapidly to gather most of the required information, but with a very brief "walk on" to the property by the engineer or surveyor to confirm structural data not visible from the street. These physical intrusions onto

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> warrantless government intrusion into a zone of heightened constitutional privacy.

People v. Mahoff, 729 P.2d 166 (Cal. 1986). Conversely, in Texas, police surveillance with a helicopter hovering just 100 feet above a residential garden is not considered a search subject to the Fourth Amendment. *See Moss v. State*, 878 S.W.2d 632 (Tex. App. 1994). *See, e.g., Board of Cty. Commrs. v. Sundheim*, 926 P.2d 545 (Co. 1996).

[268] *See Dow*, 476 U.S. at 238 ("It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant")

[269] *Id.*

[270] *Dow*, 476 U.S. at 229, 231.

[271] Terry Banks of the EOP Foundation provided significant research and analysis to this "Strategy D" section of the report. However, the ultimate conclusions are those of FEMA Law Associates, PLLC.

private property by agents of the federal government raise substantial legal issues: physically entering onto private property for this purpose without consent may be considered a possible criminal or civil trespass or tortious invasion of privacy.

As more fully set forth in the discussion below, there are a number of limitations and defenses to the criminal and civil actions in trespass or for invasion of privacy. As a result there may be relatively low risk that agents of the federal government would be prosecuted or would suffer liability for damages from entering onto private property very briefly to render more accurate elevation surveys. Nonetheless, a federal agency may and should have some hesitation in directing its agents to enter on the private property of hundreds of thousands of homeowners without the consent of those owners and without a clear statutory authorization to do so. Even if legal defenses were available to actions in trespass or for invasions of privacy, as a matter of policy the agency would want to obtain an owner's consent where possible, to provide landowners with advance notice of when inspections will occur, and to obtain concurrence and perhaps even participation in the inspection program from participating NFIP communities.

1. Basic Elements of Trespass.

We first review applicability of trespass law in California, Florida, Louisiana, and North Carolina. In each of the four states, the unauthorized entry upon a landowner's property can be a tort giving rise to a potential action for damages or a misdemeanor under the state's criminal law, or perhaps both.

California: Criminal Law. California' criminal trespass law[272] contains 21 separate offenses; the ones most relevant to this inquiry are (a) entering on real property marked by no trespassing signs; (b) entering on real property and refusing to leave at the request of the owner, and (c) entering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession. These offenses are misdemeanors.

California: Civil Liability. The Supreme Court of California has held that, unless a defendant causes actual damage to the land, he cannot be held liable for trespass.[273] However, California law proscribes as a "nuisance" the obstruction or free use of property, so as to interfere with the comfortable

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[272] Cal. Pen. Code § 602 (2001).

[273] *San Diego Gas & Elec. Co. v. Superior Court of Orange Cty,* 920 P.2d 669, 695 (Cal. 1996) (finding no trespass cause of action existed for property damage caused by electric and magnetic fields arising from power lines operated by defendant public utility, where intrusions from power lines were wholly intangible, and plaintiffs did not allege any *physical* damage to their property); *Wilson v. Interlake Steel Co.*, 649 P.2d. 922, 924 (Cal. 1982) (holding noise alone, without damage to the property, will not support a tort action for trespass).

enjoyment of life or property.[274] The California courts have interpreted the law of nuisance much more broadly, allowing recovery for discomfort or annoyance. In *Judson v. Los Angeles Suburban Gas Co.*,[275] the landowner complained that the fumes, smoke, noxious odors, and noise emanating from a gasworks owned by the gas company interfered with the use and enjoyment of his property. The court held that causing a landowner mere annoyance was sufficient to justify liability for nuisance.

> The fact that respondent proved no damage to the dwelling-house or herbage on his land or to the rental, or vendible value of the property, does not prevent the court from awarding damages. In the very nature of things the amount of detriment sustained is not susceptible of exact pecuniary computation. It is for the court to say what sum of money the plaintiff should receive in view of the discomfort or annoyance to which he has been subjected.[276]

Florida: Criminal Law. *Under Florida law, "[a] person who, without being authorized, licensed, or invited, wilfully enters upon or remains in any property other than a structure or conveyance: As to which notice against entering or remaining is given . . . commits the offense of trespass . . . ", which offense is a misdemeanor.*[277]

Florida: Civil Liability. The plaintiff in *Coddington v. Staab*[278] alleged that the defendant entered plaintiff's apartment without plaintiff's consent and destroyed property in the apartment. The Court held that "[t]respass to real property has been defined as 'an unauthorized entry onto another's property,'" and that the measure of damages is the loss of use and enjoyment of the land.[279] The *Coddington* case involved a tenant. The Court held the measure of damages for the landowner in *Stockman v. Duke*[280] to be the difference in value of the land before and after the trespass.[281]

Louisiana: Criminal Law. Under Louisiana law, "[n]o person shall intentionally enter immovable property owned by another: (1) when he knows his entry is unauthorized, or (2) under circumstances where he reasonably should know his entry is unauthorized."[282] Violation of the trespassing provision is a

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[274] Cal Civ. Code § 3479 (2001).

[275] 106 P. 581 (1910).

[276] *Id*. at 583 (citations omitted).

[277] Fla. Stat. § 810.09(a) and (b)(2002).

[278] 716 So. 2d 850 (Fla. App. 1998).

[279] *Id.* at 851, c*iting Pearson v. Ford Motor Co.,* 694 So.2d. 61, 69 (Fla. App. 1997).

[280] 578 So. 2d 831 (Fla.App. 1991).

[281] *Id.* at 832.

[282] La. Rev. Stat. § 14:63(B) (2002).

misdemeanor.[283] However, registered land surveyors are exempt from this law.[284]

Louisiana: Civil Liability. The Louisiana Civil Code provides that, "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[285] The tort of trespass is defined as the unlawful physical invasion of the property of another.[286] A trespasser is one who goes on another's property without the other's consent.[287] Louisiana courts permit the recovery for the tort of trespass as a means to correct the damage caused when an owner is unjustly deprived of the use and enjoyment of his or her land.[288] However, damages which cause mere discomfort, disturbance, inconvenience, and even sometimes financial loss as an ordinary and general consequence of public improvements are not compensable, and are considered *damnum absque injuria,* loss without a legal remedy.[289]

North Carolina: Criminal Law. Under North Carolina law, "[a] person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another: (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person."[290] Violation of the trespassing provision is a misdemeanor.[291]

North Carolina: Civil Liability. The elements of a trespass claim in North Carolina are that a defendant made an unauthorized entry on land of which

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[283] La. Rev. Stat. § 14:63(H) (2002).

[284] Louisiana law provides in pertinent part:

> Affirmative defenses to a prosecution pursuant to Subsection B of this Section shall be: (1) That the entry was by a registered land surveyor, and his personnel, engaged in the 'Practice of Land Surveying,' as defined in R.S. 37:682, or a person employed by a public utility acting in the course and scope of his employment relating to operation, repair, or maintenance of a public utility facility.

La. Rev. Stat. § 14:63(G)(1) (2002).

[285] La. Civ. Code Ann. art. 2315.

[286] *Dickie's Sportsman's Centers, Inc. v. Department of Transp. and Dev.,*477 So. 2d 744, 750 (La. App)*, writ denied*, 478 So. 2d 530 (La. 1985).

[287] *Williams v. J.B. Levert Land Co.*, 162 So. 2d 53, 58 (La. App.), *writ refused*, 245 La. 1031, 162 So. 2d 574 (La.1964).

[288] *Williams v. City of Baton Rouge*, 715 So. 2d 15, 24 (La. App. 1998), *aff'd in part, rev'd in part*, 631 So. 2d 240 (La. 1999); *Britt Builders, Inc. v. Brister*, 618 So. 2d 899 (La. App. 1993).

[289] *Williams v. City of Baton Rouge*, 631 So.2d 240 246-47(La. 1999); *Reymond v. State*, 231 So. 2d 375, 383 (La. 1970).

[290] N.C. Gen. Stat. § 14-159.13(a)(1)(2002).

[291] N.C. Gen. Stat. § 14-159.13(b)(2002).

plaintiff was in possession at the time of the alleged trespass, and that plaintiff was damaged by the alleged invasion of his rights of possession.[292]

To succeed in a nuisance claim, plaintiffs must show an unreasonable interference with the use and enjoyment of their property.[293] An intentional invasion or interference occurs when a person acts with the purpose to invade another's interest in the use and enjoyment of their land, or knows that it will result, or will substantially result.[294] An intentional invasion or interference, however, is not always unreasonable. The factors bearing on whether an invasion is unreasonable include: (1) the surroundings and conditions under which defendant's conduct is maintained, (2) the character of the neighborhood, (3) the nature, utility and social value of defendant's operation, (4)the nature, utility and social value of plaintiffs' use and enjoyment which have been invaded, (5) the suitability of the locality for defendant's operation, (6) the suitability of the locality for the use plaintiffs make of their property, (7) the extent, nature and frequency of the harm to plaintiffs' interest, (8) the priority of occupation as between the parties, (9) and other considerations arising upon the evidence. No single factor is decisive; all the circumstances in the particular case must be considered.[295]

To be actionable, "the interference must be substantial and unreasonable. *Substantial* simply means a significant harm to the plaintiff and *unreasonable* means that it would not be reasonable to permit the defendant to cause such an amount of harm intentionally without compensating for it."[296] Once plaintiff establishes that the invasion or intrusion is unreasonable, the plaintiff must prove the invasion caused substantial injury to his or her property interest.[297]

2. No Trespass if Landowner Consents to Entry; Ability to Condition Policy Issuance and Renewal on Consent to Entry.

Our brief summary of trespass law demonstrates that a fundamental element of criminal and civil trespass is the absence of authorization, either by the owner of land, or by law. If the owner gives consent, entry is no longer “unauthorized” and

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[292] *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 553 S.E.2d 431, 438 (N.C. App. 2001); *Jordan v. Foust Oil Co., Inc.,* 447 S.E.2d 491, 498 (N.C. App. 1994)(*citing Matthews v. Forrest*, 69 S.E.2d 553, 555 (1952)).

[293] *See Whiteside Estates,* 553 S.E.2d at 436; *Jordan v. Foust,* 447 S.E. 2d at 498.

[294] *See Whiteside Estates,* 553 S.E.2d at 436; *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689 (N.C. 1953).

[295] *See Whiteside Estates,* 553 S.E.2d at 436; *Watts v. Pama Mfg. Co.*, 124 S.E.2d 809, 814 (N.C. 1962).

[296] *See Whiteside Estates,* 553 S.E.2d at 437(*citing* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 88 (5th ed. 1984) (emphasis supplied).

[297] *See Whiteside Estates,* 553 S.E.2d at 437; *Watts,* 124 S.E.2d at 814 (N.C. 1962); *Rudd v. Electrolux Corp.*, 982 F. Supp. 355 (M.D.N.C. 1997).

no trespass action can lie. Accordingly, FEMA's ability to obtain consent from the owners of significant numbers of properties in the flood plain, in an administratively feasible manner, eliminates any potential trespass claims from those owners.

FEMA has clear authority to determine the conditions under which it will extend flood insurance coverage.[298] At present, FEMA already requires, as a condition of extending coverage, that Elevation Certificates be obtained by any applicant for insurance in post FIRM properties in the SFHA; to obtain the Certificate, the owner must allow a registered surveyor to enter onto the property to be insured. (One of the principal purposes of the elevation registry proposal is to reduce the burden of this "condition" by allowing policies to be issued by merely checking elevation data in the data base rather than by requiring the owner, at an expense of several hundred dollars, to contract with a registered surveyor to create a new certificate.) FEMA could, when implementing the registry, add, by regulation, a new condition to the Standard Flood Insurance Policy specifying that the policy holder consents to inspection of conditions, such as structure elevation, relevant to rating of the policy.

FEMA already has exercised its "conditioning" authority under the NFIP to "require" a policy holder to provide other information needed for issuance and administration of flood insurance policies — including information derived from "inspections". The policy specifies that after a loss, the owner must "cooperate with the adjuster or representative in the investigation of the claim," and, if requested, "[s]how [the insurer] or our representative the damaged property."[299] The policy also specifies that "[i]n connection with the renewal of this policy, we may ask you during the policy term to certify, on a Recertification Questionnaire we will provide to you, the rating information used to rate your most recent application for or renewal for insurance."[300]

FEMA's pilot inspection procedure applicable in Monroe County and in the city of Islamorada, Florida, further demonstrates FEMA's ability to require new or renewing insurance applicants to consent to inspections as a condition of flood insurance. The Standard Flood Insurance Policy issued in Monroe County and the City of Islamorada now includes language advising policy holders that

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[298] *See,* 42 U.S.C. 4013(a): "The Director shall from time to time [after various required consultations] provide by regulation for general terms and conditions of insurability which shall be applicable to properties eligible for flood insurance coverage … including (1) the types, classes, and locations of any such properties which shall be eligible for flood insurance; …(3) the classification, limitation, and rejection of any risks which may be advisable; … and (6) any other terms and conditions relating to insurance coverage or exclusion which may be necessary to carry out the purposes of this chapter."

[299] *See, e.g.*, 44 C.F.R. Part 61, App A(1)(Standard Flood Insurance Policy, Dwelling Form), ¶¶ J.6. and K.1(a).

[300] *See, e.g.*, 44 C.F.R. Part 60 App A(1)(Standard Flood Insurance Policy, Dwelling Form), ¶ H. 4.

> during the several years that this inspection program will be in place, you may be required to obtain and submit an inspection report from your community certifying whether or not your insured property is in compliance with the community's floodplain management ordinance before you can renew your policy.[301]

This requirement was formally proposed in 1999 and promulgated one year later.[302]

We have already noted that FEMA must revise its rules in order to implement the elevation registry; FEMA currently requires that agents obtain Elevation Certificates to rate certain policies, and the registry cannot fulfill its purpose unless insurance agents are allowed to rely on the registry instead. In the rulemaking proceeding making this change, FEMA could and we believe should include language in which the insured consents to inspections of structural information relevant to flood risk during the term of the policy.[303]

3. Trespass Issues where Consent Not Obtained

Placing language authorizing elevation inspections of insured property in the SFIP will not generate any consent from uninsured property. We next review potential sources of authorization — other than the owner's consent — to enter land.,

No Clear Entry Authority: Federal. First, we note that the flood insurance program's extensive information gathering authorities nowhere state that FEMA can command, or mandate, a person to provide information or to allow entry onto property against his or her will. Rather, these provisions only give FEMA the ability to conduct "studies and investigations" and "receive or exchange data" relevant to flood insurance premiums, and to "make arrangements" with federal agencies, state and local agencies, or persons or private firms in order to obtain information about flood risk.

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[301] 44 C.F.R. Part 60 App. A(4)-A(6). *See also* 44 C.F.R. 59.30.

[302] *See* 64 Fed. Reg. 24256 (May 5, 1999)(NPRM); 65 Fed. Reg. 39726 (June 27, 2000)(Final Rule).

[303] There may be some uninsured properties for which owners have provided consent for government agents to enter onto the property to evaluate flood risk. For example, we understand that applications for property acquisition or elevation under the Hazard Mitigation Grant Program of the Robert T. Stafford Disaster Assistance and Emergency Relief Act, 42 U.S.C. § 5170c contain consent language.

Varied Entry Authority for Surveys: State. If state or local government entities have broad authority to enter upon private property for purposes of surveying flood risk, FEMA could "make arrangements" with these state or local governments under which they could obtain elevation data exercising their own authority and provide it to FEMA. However, a cursory review[304] of inspection or survey authorities in four states suggests that most jurisdictions do not have inspection or survey authorities broad enough affirmatively to authorize entry onto private property for elevation determinations. We have selected from some of the state inspection and survey authorities to illustrate their scope and limitations.

Florida. In the state of Florida, local governments have a number of inspection authorities applying principally to enforcement of varying types of public health and safety codes — but it appears that this inspection right is limited. For example, government bodies have clear authority to inspect assisted living facilities,[305] but cannot inspect the residential unit of occupants of the nursing home without the resident's (or their representative's) consent. Indeed, FEMA's Pilot Inspection procedure in Monroe County was promulgated in response to the position taken by Monroe County and the City of Islamorada that under Florida law they do not have authority to inspect owner-occupied primary residences. Florida's statutes provide:

> An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is to be made. In addition, the affidavit shall contain a statement that consent to inspected has been sought and refused or a statement setting forth facts or circumstances reasonably justifying the failure to seek such consent. *Owner-occupied family residences are exempt from the provisions of this act*.[306]

Given the exemption for owner-occupied residences from this general inspection statute and the position taken by local governments in Florida in the Monroe County rulemaking proceeding, it appears unlikely that FEMA will be able to use local government rights of entry to authorize the "walk on" inspections contemplated by Strategy D.

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[304] We have not performed a detailed analysis of all possible inspection/property appraisal authorities in each state; this analysis is intended to illustrate the types of authorities encountered in the various states.

[305] *See* Fla. Stat. Ann. § 400.434.

[306] Fla. Stat. Ann. § 933.21 (Emphasis added). See 64 Fed. Reg. 24256 at 24258 (May 5, 1999). (FEMA statement that in Florida, inspection pursuant to a search warrant (upon showing of probable cause) is available but "extremely difficult to obtain" for floodplain compliance inspections.)

California. California appears to have a somewhat broader inspection warrant procedure. California's Civil Procedure Code provides generally for "inspection warrants" relating to a wide variety of local laws and regulations:

> An inspection pursuant to this warrant may not be made between 6:00 p.m. of any day and 8:00 a.m. of the succeeding day, nor in the absence of an owner or occupant of the particular place, dwelling, structure, premises, or vehicle unless specifically authorized by the judge upon a showing that such authority is reasonably necessary to effectuate the purpose of the regulation being enforced. An inspection pursuant to a warrant shall not be made by means of forcible entry, except that the judge may expressly authorize a forcible entry where facts are shown sufficient to create a reasonable suspicion of a violation of a state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning, which, if such violation existed, would be an immediate threat to health or safety, or where facts are shown establishing that reasonable attempts to serve a previous warrant have been unsuccessful. Where prior consent has been sought and refused, notice that a warrant has been issued must be given at least 24 hours before the warrant is executed, unless the judge finds that immediate execution is reasonably necessary in the circumstances shown.[307]

Again, this procedure — which relates inspections to determine compliance with a "regulation being enforced" — would not necessarily be available for purposes of assisting insurers to rate insurance policies. The process of obtaining inspection warrants through a judge may prove administratively burdensome.

Louisiana. The existence of and potential limitations on authority to enter onto land for an elevation inspection is illustrated by Louisiana's Code. Louisiana bestows on levee boards a number of significant powers, including the right to construct and maintain levees, the right to take property by eminent domain for this purpose, and the right

> to enter upon any lands, waters, and premises in the state for the purpose of making such surveys, soundings, drillings, and examinations as they may deem necessary or convenient for carrying out the purposes of this [levee district] Chapter, which entry shall not be deemed a civil or criminal trespass nor a temporary construction servitude, nor shall it be deemed an entry under any eminent domain proceedings which may be then pending, provided that prior written notice of five days to resident owners and fifteen days to nonresident owners be given to the last record property owner as reflected in the parish assessment rolls. Written notice shall consist in mailing the notice by certified mail to the last known address of the owner as shown in the current assessment records. The levee boards and/or levee and drainage board shall indemnify the property owner for any loss or injury resultant from entry upon the

[307] Cal. Civ. Pro. § 1822.56.

> property and shall make reimbursement for any actual damages resulting to lands, waters, and premises as a result of these activities.[308]

Thus, a levee board has power to enter onto land for purposes of making preliminary surveys, as long as 5 or 15 days notice is provided to resident and non-resident landowners, respectively. Entry under this section is for surveys as necessary "to carry out the purposes of this chapter." Determination of the elevation of a structure for inclusion in an elevation registry (to allow the National Flood Insurance Program to correctly determine flood insurance premiums but not to allow local governments to use this information in processing permits for building modifications) is arguably, but not clearly, within the purposes of this statute: the statute provides that levee districts may undertake any activities "related directly to … Flood Protection [or] "Cooperative activities with other public bodies for public purposes."[309]

North Carolina. North Carolina statues have provisions allowing government employees to enter onto property in a number of contexts: for purposes of health inspections,[310] hospital inspections, [311] nursing home inspections,[312] and general administrative warrants.[313] These inspection rights are generally restricted to specific purposes and times, and include specific provisions for advance notice (except in emergencies).

Maryland. The Real Property law in Maryland, while it is not one of the states that we have been asked to review for this report, provides a broader authority to surveyors than appears in the other states, and serves as a useful contrast. The Maryland law authorizes surveyors to enter onto private property "to obtain information …for any governmental report [or] undertaking:"

> (a) Civil engineers, land surveyors, real estate appraisers, and their assistants acting on behalf of the State or of any of its instrumentalities or any body politic or corporate having the power of eminent domain after every real and bona fide effort to notify the owner or occupant in writing with respect to the proposed entry may:
>
> (1) Enter on any private land to make surveys, run lines or levels, or obtain information relating to the acquisition or future public use of the property or for any governmental report, undertaking, or improvement;
>
> (2) Set stakes, markers, monuments, or other suitable landmarks or

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[308] La Rev. Stat. § 38:301 (D).

[309] La. Rev. Stat. § 38:325. If measuring elevation and observing the type of basement in a structure were a permissible purpose, we note that the Governor appears to have express power to enter into agreements with FEMA on behalf of any political subdivision in the state to "carry out, effect, secure the benefits and obligations of any state or federal law. La. Rev. Stat. 38: 81.

[310] *See* N.C. Stat. § 130A-17.

[311] *See* N.C. Stat. § 131E-80.

[312] *See* N.C. Stat. § 131E-105.

[313] *See* N.C. Stat. § 15-27.2.

reference points where necessary; and
(3) Enter on any private land and perform any function necessary to appraise the property[314]

Summary: Inspection Authorities. State and local governments have varying arrays of inspection or survey authorities, with separate authorities enacted to facilitate enforcement of individual administrative codes and standards (such as regulation of nursing homes), or to facilitate exercise of the right of eminent domain. In some cases, these authorities may be broad enough to encompass inspection for purposes of floodplain management or surveys related thereto. Except in situations of imminent threat to the health or safety of citizens, these inspection and survey authorities are generally qualified by requirements that landowners be given prior notice of the time of the inspection, and that the time of the inspection be at times likely to be convenient to the property owner. Finally, in most cases statutes provide inspection authority in connection with exercise of specific regulatory responsibilities exercised by the local government. An inspection for the sole purpose of allowing the accurate determination of insurance premium may not be a purpose for which local governments are authorized to inspect private land. (As discussed above, FEMA does not plan to relax its requirement that local governments obtain Elevation Certificates from registered surveyors for floodplain management purposes.)

The Government's Right to Conduct Preliminary Surveys. Federal law and the law in many states recognizes the right of entities that enjoy the right of eminent domain to enter onto private property to take preliminary surveys. It is assumed that before an entity can determine whether or not to exercise its right of eminent domain, it must conduct preliminary physical inspections of the affected properties. So long as the land is not damaged by these analyses, the inspection does not subject the entity conducting the analysis to liability for trespass or nuisance. As noted by the California Supreme Court in *Fox v. The Western Pacific Railroad Company,*[315]

> The right to take for public use implies the right to enter for the purpose of ascertaining whether the public need will be subserved by the taking. If a railroad is to be constructed, a survey must be made before the corporation can determine the precise land which will be required; and the corporation may lawfully enter for that purpose and may lawfully do what would otherwise be a trespass. Under no circumstances, then, can the entry be regarded as the taking. Nor, indeed, can it be said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains uncharged by the servitude,

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[314] Md. Real Prop. § 12-111(a).

[315] 31 Cal. 538, 555 (1867).

> there can have been no taking under conditions, which, as already stated, preclude the commission of a trespass.[316]

The pre-condemnation right of entry is frequently provided by statute specifying terms and conditions for the exercise of this right. For example, the North Carolina statute provides:

> Any condemnor without having filed a petition or complaint, depositing any sum or taking any other action provided for in this Chapter, is authorized to enter upon any lands, but not structures, to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Chapter. The condemnor shall give 30 days' notice in writing to the owner at his last known address and the party in possession of the land of the intended entry authorized by this section.
> Entry under this section shall not be deemed a trespass or taking within the meaning of this Chapter, however, the condemnor shall make reimbursement for any damage resulting from such activities. [317]

And as noted above, Maryland has a statute allowing surveyors generally to enter upon land — not just for purposes of eminent domain, but for "any governmental report or undertaking"[318] — and Louisiana levee boards have a statutory right to survey property for purposes related flood protection.[319] Indeed, the federal government has a statutory right of right of eminent domain for the purpose of flood control,[320] and after a particular property is identified for potential acquisition and after written notice is provided to the landowner, the

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[316] *Id*. at 555.

[317] N.C. Rev. Stat. § 40A-11.

[318] Md. Real Prop. § 12-111(a).

[319] *See* La Rev. Stat. § 38:301 (D).

[320] Section 701c-1 of Title 33 of the U.S. Code provides as follows:

> In case of any dam and reservoir project, or channel improvement or channel rectification project for flood control . . . title to all lands, easements, and rights-of-way for such project shall be acquired by the United States or by States, political subdivisions thereof or other responsible local agencies and conveyed to the United States . . . [T}he Secretary of War [Secretary of the Army] is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War [Secretary of the Army] and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized.

Corps of Engineers will, with or without the accompaniment of the landowner, enter on the property to obtain the survey and appraisal information required for the condemnation proceeding.[321]

However, we strongly doubt that FEMA can make use of this theory to support its walk-on inspections, except possibly in those states, such as Maryland, whose law allows surveyors working for governments to enter onto land to survey for the purpose of "any governmental report [or] undertaking." The basic problem is that even though FEMA's mapping activities have been held to be "flood control initiatives" which trigger sovereign immunity under a federal flood control statute,[322] FEMA's mapping activities do not include any authority to condemn land. Moreover, even though the Corps of Engineers has a (narrow) pre-condemnation right of entry, (and FEMA has authority to make arrangements with the Corps to obtain information), the Corps' authority is exercisable only in connection with a specific project and the proposed condemnation of specific parcels of land.

In sum, we have not found a federal or (except in a few states) state authorization for entry on land that would eliminate legal risk of trespass actions. This does not, of course, mean that the brief "trespasses" contemplated by Strategy D would generate criminal prosecutions or the risk of significant civil liability.

Defenses to Trespass Actions. In the four states whose laws have been reviewed in this report, criminal trespass appears to be of relatively minor concern; this offense requires elements in addition to that of entry onto property. In Louisiana, surveyors are exempt from the criminal trespass statute. In Florida, criminal trespass is committed only where a person defies warnings or requests not to enter, or (if in the curtilage of a home) commits an additional offense other than trespass.[323] In California, criminal trespass is found only in the presence of aggravating factors (such as willfully damaging property or refusing to leave premises when requested). And in North Carolina, criminal trespass requires disregard of warning signs or requests to leave the property. Given the limited duration and activity involved in Strategy D's "walk on" surveys, we believe that it is unlikely that Strategy D would involve criminal trespass as long as surveyors are instructed to and do obey all "no trespassing signs" and leave any property when requested to do so.

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[321] Telephone conversation with Real Estate Attorney in the Directorate for Real Estate of the Army Corps of Engineers, May 22, 2003.

[322] *Britt v. U.S.*, 515 F. Supp. 1159 (D. Ala. 1981).

[323] *See* Fla. Stat. § 810.09.

Defenses to civil trespass actions also exist that would minimize any potential liability.[324] The most important is the absence of measurable damages. In each of the four states reviewed, a landowner can only recover from a trespasser the actual damages or reduction in value of the property as a result of the trespass. It is unlikely that the brief "walk on" inspections contemplated by Strategy D would impair the value of property in a way that might generate civil liability. (Of course, if FEMA's agent caused damage to the property (e.g. breaking a window) this would generate liability under the Federal Tort Claims Act.)

FEMA may not and should not wish to depend on the absence of damage as a policy justification for planning to trespass on private property in a massive and systematic way. A brief review of the common law right of privacy — while again finding that risk of legal liability from walk on inspections may be limited — nonetheless does not eliminate concern that a federal agency should be wary of directing its agents to enter onto private property without clear statutory authorization and without consent.

4. Common Law Right of Privacy

One who invades the privacy of another can be subject to tort liability for the resulting harm to the interests of the other.[325] If the landowner has advance knowledge that the data will be collected, he or she may seek to have the government enjoined from entering onto his or her property. The traditional standard for granting a preliminary injunction requires a plaintiff to show that, in the absence of its issuance, he will suffer irreparable injury and also that he is likely to prevail on the merits. It is unclear whether Plaintiffs could show that allowing a government agent to determine whether a dwelling has a walkout basement, for purposes of qualifying the property for flood insurance, will cause the property owner "irreparable harm." Nonetheless, it is not FEMA's intention to generate bad will or bad press by challenging efforts by private landowners with no connection to the flood insurance program to prevent entry onto their land, and we would not recommend that it do so.

In general, to constitute an invasion of a landowner's right of privacy, an act must be of such a nature that a reasonable person would conclude that the act would likely cause mental distress and injury to anyone possessed of ordinary feelings

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[324] The Federal Government has waived sovereign immunity for actions in tort based on trespass. *See generally Hatahley v. United States,* 351 U.S. 173, 181 (1956) (holding that the Federal Tort Claims Act allows the United States to be sued for trespass); *Black v. Sheraton Corp. of Am.,* 564 F.2d 531, 539-41 (D.C.Cir.1977) (holding that the FTCA allows the United States to be sued for trespass based on illegal eavesdropping). However, the government will prevail in an action of this type if its entry onto the property us authorized by law. *See, e.g., Lawmaster v. Ward*, 125 F.3d 1341, 1352 (10th Cir. 1997)(no trespass under Oklahoma law by officers entering property pursuant to warrant).

[325] Restatement 2d, Torts § 652A(1).

and intelligence.[326] The acts constituting the invasion of privacy must be highly offensive to a reasonable person for three out of the four forms of invasion of privacy:

(1) Intrusion upon the plaintiff's seclusion;
(2) Publicity given to the plaintiff's private life; and
(3) Placing plaintiff in a false light.[327]

In an action for invasion of privacy based on public disclosure of private facts regarding the plaintiff, the information disclosed must actually be of a private nature. The law does not recognize a right of privacy in connection with that which is already public.[328] The right of privacy is not infringed by the publication of matters of public record.[329] In *Wehling v. Columbia Broadcasting System*,[330] a claim of violation of the right of privacy was denied when a broadcaster televised the plaintiff's residence. The Court held that "the broadcast provided the public with nothing more than could have been seen from a public street. Consequently, no invasion of privacy occurred."[331]

While the *Wehling* case is not directly applicable to elevation information that cannot be determined from a public street, it highlights the requirement that the revealed information must be private in nature. The elevation or structural data that a surveyor seeks to confirm by a "walk on" survey is unlikely to trigger successful actions for violation of right to privacy; a reasonable person is not likely to find knowledge of such a basement to be "highly offensive." However, it is not difficult to construct scenarios in which privacy issues are raised by a survey. The owner may have constructed a high fence from the back of his house around a swimming pool and patio; many home owners might find it "highly offensive" if a government surveyor were to climb over this fence, without consent, to confirm the existence of a basement — and by happenstance also to observe activities in this "curtilage" of the home.

In sum, while there may be legal defenses to actions in trespass or for rights of privacy that would limit the agency's damage exposure, we cannot find that "walk on" inspections would not constitute at least technical violations of law — let alone a potential public relations problem. Accordingly, where FEMA is unable to obtain consent to walk on inspections, or cooperation from state and local

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[326] 62A Am. Jur. 2d *Privacy* § 40.

[327] The only form of invasion of privacy that does not require a showing of highly offensive conduct is the wrongful appropriation of one's name or likeness. Restatement 2d, Torts § 652(B), (C), (D) and (E).

[328] 62 Am. Jur. 2d *Privacy* § 100.

[329] 62 Am. Jur. 2d *Privacy* § 103.

[330] 721 F.2d 506 (5th Cir. 1983).

[331] *Id*. at 509.

governments who in fact do have authority for such entry, we would not recommend that FEMA direct its agents to enter onto land in absence of consent.

Strategy E: Leverage alternative data sources for an elevation registry.

A final strategy is to obtain elevation data from other possible sources with no previous relationship to the National Flood Insurance Program. We were specifically directed to review restrictions on obtaining data from the Census Bureau, and also to provide observations on the likely legal issues affecting cooperation with other data sources such as the U.S. Postal Service, community E-911 databases, etc.

1. Sharing data with the U.S. Census Bureau.

The Census Bureau collects and updates a national database of address information for use in the decennial and other censuses conducted by the Bureau. The address data is collected under the authority of Title 13 of the U.S. Code, which prohibits the use of the data for anything but the statistical purpose for which it was originally collected.[332] This very strict confidentiality law also precludes the sharing of any data outside of the Census Bureau that was collected under the authority of Title 13.[333]

Census does make available to the public its Topologically Integrated Geographic Encoding and Referencing (TIGER®) files, a digital database of geographic features, such as roads, railroads, rivers, lakes, legal boundaries, census statistical boundaries, etc. covering the entire United States. The data base contains information about these features such as their location in latitude and longitude, the name, the type of feature, address ranges for most streets, the geographic relationship to other features, and other related information. These data are publicly available for a nominal fee, but do not include individual addresses.[334]

For the most part, we understand that there is no good source of government address data which is referenced by longitude and latitude, or by some other method that would be able to link street addresses with FEMA's elevation data.[335] However, whether or not FEMA may obtain data from the Census

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[332] *See* 13 U.S.C. § 9.

[333] *See id; see also Baldridge v. Shapiro*, 455 U.S. 345 (1982) (master address register was part of the raw census data intended by Congress to be protected from disclosure under Census Act, therefore such information was exempted from disclosure under the Freedom of Information Act, and the confidentiality provisions of Census Act constituted a "privilege" within meaning of discovery provisions of Federal Rules of Civil Procedure).

[334] *See* United States Census Bureau, "TIGER® Overview," *available at* <http://www.census.gov/geo/ www/tiger/overview.html> (visited Jan. 5, 2003).

[335] Telephone conversation with Dan Sweeney, Math Operations Branch, U.S. Census Bureau, Jan. 2, 2003.

Bureau, we understand that FEMA is exploring the possibility that the Census Bureau would find value in the elevation data which FEMA plans to collect. Our brief research indicates that there are some groups within the Census Bureau using georeferenced data,[336] and, we understand the use of georeferenced data is increasing significantly as the Census Bureau prepares for the 2010 decennial census.[337] In addition to existing systems to keep track of locations in rural areas of the United States, which enable Census to say with certainty whether there is a structure at particular longitudinal and latitudinal coordinates, Census is investing significant resources to map much larger sections of the country in this manner for use in 2010. It appears possible, given the way its authorities are structured, that the Census Bureau could provide the funding for some layers of mapping activity that would then be performed under FEMA's authority (not Census' use-restricted Title XIII authority) and shared with both agencies.

2. Sharing data with other government agencies, or other organizations

Other organizations have address data or georeferenced data that may be useful to FEMA in establishing the elevation registry. For example, we understand that the United States Postal Service has very complete street address data, but that the data is not linked to any tax parcel or georeferencing, so that it could not be used by FEMA to match up latitude/longitude data with street addresses.[338] Similarly, FEMA might find more complete georeferenced address data from private sector organizations that use such data for their own purposes, such as the regional telephone companies, power and gas utilities, Federal Express, or the National Emergency Number (9-1-1) Association, although obtaining address data from a commercial entity would likely be very expensive.[339] Since researching the potential for sharing data with Postal Service or private sector organizations is outside the scope of our work, we have not pursued these avenues further.

3. Sharing of Community Tax Parcel Data and/or other Community Data Bases.

As discussed above, we believe that there are no significant legal restrictions that would prevent communities from sharing elevation data with FEMA. Although at first blush tax parcel data might appear more confidential in nature and more likely to trigger disclosure protections, upon review we have determined that the same conclusion also applies to tax parcel or tax assessment data. To summarize, records held by the State and local governments of each of these

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336 *Id.*

337 Telephone conversation with Gerald Gates, Chief, Office of Policy, U.S. Census Bureau, Jan. 7, 2003.

338 Telephone conversation with Andrew Flora, Linear Features and GPS Programs, U.S. Census Bureau, Jan. 3, 2003.

339 *Id.*

states are subject to freedom of information laws that require government agencies to make their records — including tax parcel and tax assessment data — available for inspection and copying on request.[340]

California. In California, the property tax assessor of any county with a population of 50,000 or more must maintain a list of transfers of interest in property going back two years. The list must be made available to the public, and must contain the names of the parties if available, the assessor's parcel number; the street address of the sales property; the date of transfer, the date of recording and recording reference number; and, where it is known by the assessor, the sales price.[341] A separate section of the California Code requires an assessor in a county with population exceeding 4,000,000 to open any of its office's records to public inspection.[342] In that case, the stated purpose of the statute is to permit identification of claimants who have been granted the homeowner's exemption. California law also specifically requires that information about the physical characteristics of property maintained by the assessor is a public record open to public inspection.[343] Property characteristics include, but are not limited to

> the year of construction of improvements to the property, their square footage, the number of bedrooms and bathrooms of all dwellings, the property's acreage, and other attributes of or amenities to the property, such as swimming pools, views, zoning classifications or restrictions, use code designations, and the number of dwelling units of multiple family properties.[344]

Fees are permitted for obtaining access to the records.

Finally, in California, where the assessor possesses a complete, accurate map of any land, the assessor may adopt numbers or letters for the parcels and revise the maps accordingly. If approved in the statutorily prescribed manner, this scheme may be used in lieu of other description of the land in all assessment proceedings and documents, and copies of these maps are required to be publicly displayed in the office of the assessor.[345]

Florida. The Clerks of the Circuit Courts of Florida are charged with recording all instruments required to be recorded in the county in which they reside.[346] These include

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340 *See* Cal. Civ. Code § 6250 et seq.; Fla. Stat. Ann. § 199.01 et seq.; La. Rev. Stat. Ann. § 44:1 to 44:6; and N.C. Gen. Stat. § 132 to 132-6.

341 *See* Cal. Rev. & Tax Code § 408.1.

342 *See* Cal. Rev. & Tax Code § 408.2.

343 *See* Cal. Rev. & Tax Code § 408.3.

344 *Id*.

345 *See* Cal. Gov't Code § 60253.

346 *See* Fla. Stat. Ann. § 28.222(1).

> deeds, leases, bills of sale, agreements, mortgages, notices or claims of lien, notices of levy, tax warrants, tax executions, and other instruments relating to the ownership, transfer, or encumbrance of or claims against real or personal property or any interest in it; extensions, assignments, releases, cancellations, or satisfactions of mortgages and liens; and powers of attorney relating to any of the instruments.[347]

All of these data are likely to have street addresses associated with the recordings about the properties, in addition to information about the parcel for tax purposes. The clerk of the circuit court may maintain books where maps, plats, and drawings are recorded.[348] All of these records are required to be open to the public for inspection.[349]

Louisiana. In every municipality of Louisiana, the clerk is required to keep a book with a record of

> all deeds to individuals, and the list of lands sold to the municipality by the tax collector, showing (a) description of the land, (b) as whose property sold, (c) date of sale, (d) amount of taxes, costs, and damages due, and to whom the costs are owing, (e) when redeemed, (f) by whom redeemed, (g) date of redemption, and (h) amount paid therefore.[350]

A series of opinions by the Attorney General of Louisiana makes clear that records of assessors, including computer records, are public records available for inspection, with minor exceptions.[351]

North Carolina. Although North Carolina does not seem to have a specific law making records of the tax assessor, tax parcels, or registrar of deeds publicly available, these records are not exempt from the public records statute.[352] In addition, public records are required to be disclosed in any media in which the agency is capable of providing them.[353] Address data, which is part of the automatic number location identification information contained in a county 911

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[347] *Id.* § 28.222(3)(a).

[348] *See id.* § 28.222(5).

[349] *See id.* § 28.222(6).

[350] La. Rev. Stat. Ann. § 33:421.

[351] *See* 1946 Op. Atty. Gen. 48, at 774 (assessment rolls for State Tax Collector for City of New Orleans are public records and any elector or taxpayer may examine or take photographs of them); 1987 Op. Atty. Gen. 301 (May 4, 1987; 1990 Op. Atty. Gen. 330 (computer information generated by the office of the assessor is subject to the Public Records Law); 1987 Op. Atty. Gen. 301-A (June 11, 1987).

[352] *See* N.C. Gen. Stat. § 132-1 (defining public records and stating North Carolina's policy that public records are property of the people, and therefore "the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law").

[353] *See* N.C. Gen. Stat. § 132-6.2.

database, is not a public record.[354] However, the fact that such data is not available to the public at large via the public records statute does not necessarily mean that FEMA could not obtain the data. Further coordination with the State of North Carolina would be necessary to determine whether acquisition of automatic number locator information were possible (assuming it would be of use to FEMA).

In North Carolina, a specific statute governs geographical information systems. Databases and data files of GIS information developed and operated by counties and cities are designated as public records.[355] The county or city is required to provide public access to its GIS information by public access terminals or "other output devices" and to furnish copies in "documentary" or electronic form to anyone requesting at reasonable cost.[356] However, as a condition of furnishing an electronic copy, the county or city may require a certification in writing that the copy will not be resold or otherwise used for trade or commercial purposes.[357] Presumably, use by the federal government would not be a commercial purpose, although if FEMA intended to disclose GIS information obtained from North Carolina to the public at large, FEMA would not be able to attach a 'no resale or commercial use' restriction to the data.[358] As a result, coordination with North Carolina authorities would be appropriate to determine how best to obtain and use the GIS data.

It is important to note that the existence of a public records law permitting the disclosure of records relating to tax parcels, tax assessments, or recording of deeds is only an indication that the data is publicly available, and, therefore, there should be no legal impediment preventing the State from disclosing the data to FEMA. We do not expect, however, that FEMA would actually obtain property or address data by employing a State's public records law, which is

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[354] *See* N.C. Gen. Stat. § 132-1.5.

[355] *See* N.C. Gen. Stat. § 132-10.

[356] *See id.*

[357] *See id.*

[358] *See* Freedom of Information Act, 5 U.S.C. § 552(a)(prohibiting a federal agency from inquiring as to the purpose of a request for information except for the purpose of calculating fees); OMB Circular No. A-130, *supra*, at 8.a. (requiring dissemination of information to the public to be on "equitable" terms).

generally an inefficient way of obtaining records or information. On the contrary, we expect that FEMA would conclude agreements with the State as to how best to obtain data that will fulfill the needs of the National Flood Insurance Program.

CONCLUSION

Based on the analysis set forth in some detail above, we do not see that FEMA is precluded by law from creating, populating, maintaining, or disseminating elevation data in an elevation registry.