


## APPENDIX O — LEGAL COMMENTS ON WEB-BASED ELEVATION CERTIFICATES

This appendix documents the FEMA Law Associates (FLA) response to a query from Dewberry regarding potential legal issues raised by implementation of a web-based Elevation Certificate process. The following questions were asked:

1. What if either the surveyor, or the homeowner who hired the surveyor, doesn't want the EC entered into the elevation registry, is there anything illegal or questionable if FEMA sets up a web-enabled EC process that helps the surveyor to easily generate an EC but then also captures the information for insertion into the registry?
2. What if the homeowner who paid for the EC doesn't want the world to know that his/her house is floodprone?
3. Would we need to have a choice (yes or no) as to whether or not the data is entered into the registry? Perhaps we could simply state in the foreword comments that FEMA's web-enabled process has two purposes: (1) to help the surveyor prepare the EC correctly, and (2) to automatically enter the data into the registry. If the surveyor doesn't want to accept these conditions, don't use FEMA's web-enabled software to prepare the EC, but produce it the old-fashioned way by typing in the information on a blank form.

FLA's answers to these questions are attached. This document, printed from a .pdf file sent over the Internet, includes an example of an electronic signature from Ernest B. Abbott of FLA. A similar process could be used for applying the seal and signature of the surveyor or engineer authenticating an EC into the registry.

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October 31, 2003

Jerry Sparks  
Dewberry & Davis, LLC  
8401 Arlington Boulevard  
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Re: Comments on Surveyor Web-Based  
Elevation Certificate Process

Dear Jerry:

You have asked me to comment on several legal questions that have emerged during your continued work on FEMA's Evaluation of Alternatives in Obtaining Structural Elevation Data project. Your questions, and my comments on them, are set forth below.

1. What if either the surveyor, or the homeowner who hired the surveyor, doesn't want the Elevation Certificate entered into the National Elevation Registry, is there anything illegal or questionable if FEMA sets up a web-enabled Elevation Certificate process that helps the surveyor to easily generate an Elevation Certificate but then also captures the information for insertion into the Registry?

I do not believe there is anything either illegal or questionable if FEMA sets up a web-enabled process helping the surveyor to generate Elevation Certificates and which captures the information for insertion in the Registry.

Recall that there is no legal relationship whatsoever between FEMA and a surveyor providing an Elevation Certificate to a homeowner. The contract between the surveyor and the homeowner will govern the use of the data being provided to the homeowner by the surveyor. Certainly a homeowner could specify in this contract that the surveyor may not provide this data to any third party, or may not make it publicly available. If the homeowner did so, then the surveyor could not use a 'web-enabled' Elevation Certificate process without violating the surveyor's contractual promises to the homeowner.

However, if the reason that the homeowner has ordered an Elevation Certificate is to obtain or maintain flood insurance, the homeowner must intend that the Elevation Certificate be provided to an agent, to a WYO company, or to FEMA directly to allow the policy to be issued. Our Report concluded that FEMA could, after amending the WYO Arrangement and the Transaction and Record Reporting and Processing Plan, arrange for WYO companies to provide this data to FEMA and that FEMA could then place this data on the Registry. Thus, FEMA can clearly modify its regulations and policies to specify that WYO companies may only issue policies if the requisite elevation data has been entered into a web-enabled interface (either by the agent from a hard copy or by the surveyor) and if there is a certification that the information originates from a licensed surveyor. But note that FEMA is not imposing a requirement on the surveyor.

Similarly, if the reason that the homeowner ordered an elevation certificate was in order to obtain a building or remodeling permit from a community, then the community's floodplain management regulations, adopted in order to join the NFIP, require that the elevation information in this certificate be publicly available. And if the community is a CRS community, the community must require that these publicly available Elevation Certificates be in the form prescribed by FEMA. Many communities even (for extra CRS credit) submit the elevation data electronically to FEMA. (Note: I am not aware that FEMA contemplates a change to its floodplain management regulations to somehow require submission of data to communities from a web-enabled process—this was not clear from your question.)

2. What if the homeowner who paid for the Elevation Certificate doesn't want the world to know that his/her house is floodprone?

We concluded in our Report that the Registry as contemplated by FEMA would not be a Privacy Act System of Records and that elevation information held by insurance agents and WYO companies, once transferred to FEMA, could be placed in the Registry. We also concluded that FEMA could place any elevation information obtained from communities onto the Registry. It follows that an owner's desire to keep secret a property's flood risk would not preclude elevation information from appearing in the Registry if the owner applied for flood insurance or for a building permit. Indeed, as noted above, FEMA has already required that the elevation information of some households be made publicly available.

3. Would we need to have a choice (yes or no) as to whether or not the data is entered into the Registry? Perhaps we could simply state in the foreword comments that FEMA's web-enabled process has two purposes, (1) to help the surveyor prepare the Elevation Certificate correctly, and (2) to automatically enter the data into the Registry. If the surveyor doesn't want to accept these conditions, don't use FEMA's

web-enabled software to prepare the EC, but produce it the old-fashioned way by typing in the information on a blank form.

As noted above, I do not believe that FEMA must give households the choice of whether or not elevation information or indication of flood risk is placed in the Registry. Moreover, I do not recommend that FEMA develop a form that implies that an owner can keep elevation information on a property out of the Registry – this implication appears to me to be misleading or downright false. Even if the homeowner did not provide FEMA (through WYO carriers) elevation data as part of an application for NFIP insurance, we have concluded that FEMA may itself contract for and obtain elevation information about properties (using “remote sensing technologies”) without a landowner’s consent. We also concluded in our Report that FEMA may place in the Elevation Registry old elevation information about properties that has been obtained from communities. And if FEMA so required when creating the Registry, we concluded in our Report that if a homeowner submits a hard copy of the Elevation Certificate to an insurance agent or WYO company, FEMA can specify that this elevation data must be transmitted to FEMA, and that FEMA could then place that data into the Registry. For all of these reasons, FEMA should not indicate that the elevation data being submitted for purposes of obtaining flood insurance will not be placed into the Registry.

I do agree that it would be worthwhile for the “forward” (I presume to the Elevation Certificate made available to surveyors) should state that its use will both help the surveyor prepare the Elevation Certificate correctly, and that it will automatically enter the data into the Registry. FEMA would not be well served by trying to hide the fact that elevation information required for insurance under the NFIP is in the public domain.

I hope that this response is helpful. Please do not hesitate to call if you have any further questions.

Sincerely,

Ernest B. Abbott