



DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

Docket ID FEMA-2012-0004

RIN 1660-AA75

Debris Removal: Eligibility of Force Account Labor Straight-Time Costs under the Public Assistance Program for Hurricane Sandy

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final Rule.

SUMMARY: This rule finalizes, without change, an interim final rule that published in the Federal Register on November 9, 2012, authorizing reimbursement of force account labor under the Public Assistance Program for debris removal work related to Hurricane Sandy.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

This rule finalizes, without change, an interim final rule (IFR) that published in the Federal Register on November 9, 2012, authorizing reimbursement of force account

labor under the Public Assistance Program for debris removal work related to Hurricane Sandy. Below, we provide (1) general background on FEMA's debris removal program; (2) a discussion of the specific IFR at issue, which deals with a narrow band of debris removal activities related to Hurricane Sandy; and (3) a discussion of comments received on the IFR. A series of regulatory analyses and implementing language follow.

I. Background

Every year, disasters strike communities throughout the United States. When an incident is of such magnitude that it is beyond the capabilities of the State, Tribal and local governments to efficiently respond, a Governor may request that the President declare that an emergency or major disaster exists in the State, under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5121-5207.

If the President declares an emergency or major disaster, FEMA may award Public Assistance grants to assist State and local governments (including Indian Tribal governments) and certain private nonprofit (PNP) organizations, as defined in subpart H of 44 CFR part 206 (collectively referred to as "applicants," "grantees," or "subgrantees"), with the response to and recovery from major disasters and emergencies. Specifically, the Public Assistance Program provides assistance for debris removal, emergency protective measures, and permanent restoration of infrastructure serving a public purpose.

Sections 403(a)(3)(A), 407, and 502(a)(5) of the Stafford Act authorize FEMA to provide assistance to eligible applicants to remove debris from public and private property following a Presidential major disaster or emergency declaration, when in the

public interest. See 42 U.S.C. 5170b(a)(3)(A), 5173, and 5192. Removal must be necessary to eliminate immediate threats to lives, public health, and safety; eliminate immediate threats of significant damage to improved public or private property; or ensure the economic recovery of the affected community-at-large.¹ See 44 CFR 206.224(a). The debris must be the result of the disaster and located in the disaster area, and the applicant must have the legal responsibility to remove the debris. See 44 CFR 206.223(a). To ensure these requirements are met, FEMA has issued extensive guidance on oversight processes and procedures to monitor debris removal activities.

In general, FEMA regulations at 44 CFR 206.228 authorize reimbursement of overtime, but not regular time, for an applicant's own labor forces and equipment, referred to as "force account labor," performing debris removal work. The regular time (also called "straight-time") salaries and benefits of permanently employed personnel are generally not eligible in calculating allowable costs. However, FEMA can reimburse reasonable costs associated with a debris contract, including the cost of contract workers' regular time as well as overtime. This creates an incentive for applicants to contract for debris removal work, even after relatively small events which could have been handled in part, or entirely, by an applicant's employees. State and local applicants have long requested reimbursement from FEMA for straight-time salaries for their force account labor who were pulled away from their normal day-to-day work to perform debris removal operations.

¹ In 44 CFR 206.224, FEMA also defines debris removal to be in the "public interest" when necessary to mitigate the risk to life and property by removing substantially damaged structures and associated appurtenances as needed to convert property acquired through a FEMA hazard mitigation program to uses compatible with open space, recreation, or wetlands management practices. See 44 CFR 206.224(a)(4).

The Fiscal Year (FY) 2007 Department of Homeland Security Appropriations Act (Appropriations Act), Public Law 109-295, authorized FEMA to conduct a Public Assistance Pilot Program to reduce the costs to the Federal government of providing debris-related assistance to States and local governments, increase flexibility in the administration of assistance, and expedite the provision of assistance under sections 403(a)(3)(A), 502(a)(5), and 407 of the Stafford Act. 6 U.S.C. 777. Under the Force Account Labor provision of the Pilot Program, FEMA reimbursed the straight-time salaries and benefits of the applicant's employees who performed disaster-related debris and wreckage removal work. FEMA's objective in reimbursing force account labor was to provide applicants the opportunity and incentive to use their own employees for debris removal activities in situations where applicants determine that is the most appropriate method to perform the work. In its evaluation of the Pilot Program, FEMA found that debris removal operations and monitoring performed by force account labor improved efficient and timely debris removal by starting operations more expeditiously, reducing delays related to procuring and mobilizing contractors, and decreasing complaints and negotiations over costs and scopes of work. The Pilot Program ended on December 31, 2008.

II. Discussion of the Rule

This rule finalizes, without change, the IFR that published in the Federal Register on November 9, 2012 (77 FR 67285). The IFR implemented the Force Account Labor procedure of the Public Assistance Pilot Program for debris removal work related to Hurricane Sandy, a catastrophic disaster event of unprecedented magnitude and severity. The geographic breadth of this storm was exceptional, covering major portions of the

Mid-Atlantic and Northeast, and bringing devastation to much of the Eastern seaboard. In response to this event, FEMA issued the IFR to accelerate the nation's recovery by maximizing the use of force account labor.

The IFR revised 44 CFR 206.228(a)(2) to allow for the reimbursement of straight-or regular time salaries and benefits of a grantee's or subgrantee's permanently employed personnel for debris removal work performed due to Hurricane Sandy. In order to receive reimbursement, force account labor employees must work exclusively on Hurricane Sandy debris removal. They cannot combine Hurricane Sandy debris removal work with their normal work-related tasks or any other tasks, including tasks related to emergencies or major disasters declared by the President before October 27, 2012. Finally, reimbursement is restricted to 30 consecutive calendar days. These provisions provide an incentive to applicants to maximize the use of their force account labor, thus lessening the need to secure and oversee contract labor, and encouraging them to allot 100 percent of the work time of their regular staff to Hurricane Sandy debris removal, thereby contributing to a quicker and more efficient recovery.

Eligible activities include disaster-related debris and wreckage removal work for any major disaster or emergency declared by the President on or after October 27, 2012, in response to Hurricane Sandy under Category A, Debris Removal, and/or Category B, Emergency Protective Measures. In practice, FEMA treats debris removal work the same whether it is under Category A or under Category B. Therefore, the IFR made straight-or regular time salaries and benefits for an eligible applicant's force account labor eligible in calculating the cost of eligible Category A and/or Category B debris removal work. The IFR did not allow for the reimbursement of straight- or regular time salaries and benefits

of a grantee's or subgrantee's permanently employed personnel for any other emergency protective measures under Category B.

Non-Substantive Changes.

The IFR added a reference to “grantee” in paragraph (a)(2) of section 206.228; previously that section referred only to “subgrantees.” The eligibility of force account labor costs outlined in 44 CFR 206.228(a)(2) applies to grantees as well as subgrantees. States and Tribes act as the grantees for the Public Assistance Program. Applicants who are successful in obtaining Public Assistance are identified as “subgrantees.” Since State, Tribal, and local government agencies are eligible applicants for Public Assistance, States may act as the grantee, as well as the subgrantee. While most work is performed by the subgrantees, it is possible that grantees could perform eligible debris removal and/or permanent work, and therefore incur straight-time force account labor costs for those activities. To be more accurate, the IFR added “grantee” to paragraph (a)(2) of section 206.228. The IFR also established a cross reference to the exception for host state evacuation and sheltering in 44 CFR 206.202.

Sandy Recovery Improvement Act of 2013 (SRIA)

After publication of the IFR, Public Law 113-2 (SRIA) was enacted. Section 1102 of SRIA authorizes FEMA to implement a pilot program for Public Assistance “alternative procedures” until such time as FEMA can promulgate such procedures via notice and comment rulemaking. 42 U.S.C. 5189f(f). One of these alternative procedures includes reimbursement of straight time for debris removal work. 42 U.S.C. 5189f(e)(2)(D). FEMA initiated a pilot program for debris alternative procedures, including the provision for reimbursement of straight time for debris removal work, in

June of 2013. FEMA plans to use information and data gathered from the pilot program to initiate a separate rulemaking related to more comprehensive implementation of the debris alternative procedures under section 1102.

III. Discussion of Public Comments

FEMA received three comments on the IFR (two private associations, one private citizen). One commenter recommended that FEMA reimburse “over-time hours of emergency and city personnel or any hours that are expended beyond the normal working conditions.” FEMA currently does reimburse overtime force account labor costs for all emergency work. See 44 CFR 206.228(a)(2). The IFR allowed for reimbursement of straight time for certain Hurricane Sandy-related debris removal activities, for the reasons described above.

One commenter supported the IFR but recommended that FEMA provide more flexibility by allowing waivers and extensions to the 30-day limitation. FEMA respectfully declines to incorporate the commenter’s recommendation. Waivers and extensions would create an administrative burden and would ultimately delay debris removal operations. This rule was instituted in the weeks immediately following Sandy to support as expeditious a recovery as possible from that storm; the focus of the rule was on recovery from the immediate aftermath. FEMA chose 30 days to capture that period. Therefore, FEMA has elected not to allow waivers of and extensions to the 30-day limitation.

One commenter inquired whether the IFR applied to eligible nonprofit entities (specifically rural electric cooperatives). FEMA responds that nonprofit entities, including rural electric cooperatives, are eligible for Public Assistance pursuant to 44

CFR 206.221 and 44 CFR 206.222. The straight- or regular time salaries and benefits of personnel of eligible nonprofit entities, including rural electric cooperatives, would be eligible if they otherwise meet the criteria of the IFR, that is, the debris removal work is performed as the result of Hurricane Sandy and is the only work performed by straight-time personnel for the relevant timeframe.

The commenter also suggested that FEMA apply the IFR to all major disasters and emergencies rather than limiting it to Hurricane Sandy work. FEMA plans to use information and data gathered from the pilot program to initiate a separate rulemaking related to more comprehensive implementation of the debris alternative procedures under section 1102.

IV. Regulatory Analysis

A. National Environmental Policy Act (NEPA)

Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 et. seq., an agency must prepare an environmental assessment or environmental impact statement for any rulemaking that significantly affects the quality of the human environment. As explained below, FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an environmental assessment or environmental impact statement.

Section 316 of the Stafford Act exempts from the NEPA requirements debris removal actions undertaken under Sections 402, 403, 407, or 502 of the Act. Rulemaking actions related to actions statutorily excluded are not themselves excluded from the application of NEPA. NEPA implementing regulations governing FEMA activities at 44

CFR 10.8(d)(2)(ii) categorically exclude the preparation, revision, and adoption of regulations from the preparation of an EA or EIS, where the rule relates to actions that qualify for categorical exclusions. FEMA's "List of exclusion categories" at 44 CFR 10.8(d)(2)(ii) categorically excludes the preparation, revision, and adoption of regulations related to actions that qualify for categorical exclusions. Further, essential assistance under section 403 and debris removal under section 407 of the Stafford Act are categorically excluded at 44 CFR 10.8(d)(2)(xix)(B) and (C). These categorical exclusions cover all debris removal actions under the Stafford Act.

Finally, FEMA has evaluated the potential for extraordinary circumstances as required in 44 CFR 10.8(d)(3) and determined that the procedure authorized under this rule does not change its environmental effect. The straight-time force account labor provision does not change the nature or extent of debris removal activities reimbursed by FEMA. The potential for reimbursement of straight-time force account labor provides applicants with more flexibility to perform debris removal work with their own employees in addition to, or in place of, contractors, but does not affect the eligibility of debris removal actions under this Program. An environmental assessment was not prepared for this rulemaking action because a categorical exclusion applies and no extraordinary circumstances exist.

B. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501 et seq., an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. The collection of information associated with the Public

Assistance Program is approved under OMB Control No. 1660-0017, which expires on June 30, 2016. This rule does not contain any new collections of information.

C. Executive Order 12866, Regulatory Planning and Review & Executive Order 13563, Improving Regulation and Regulatory Review

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the rule has not been reviewed by the Office of Management and Budget.

The rule provides (unquantified) benefits that are vitally important to further FEMA’s mission. This rule increases efficiency, flexibility, and reduces the costs of performing debris removal work after Hurricane Sandy. The rule affects States, Indian Tribal governments, local governments, as well as certain private non-profit organizations that have been affected by Hurricane Sandy, by maximizing the use of force account labor for debris removal, thus accelerating the recovery process.

Review of FEMA’s existing debris regulations revealed that they could be expanded to provide for more efficient and timely debris removal after a disaster. As discussed earlier in this preamble, the reimbursement of force account labor for debris removal under the Pilot Program improved efficient and timely debris removal. In

reimbursing force account labor, FEMA provided applicants with an incentive to perform the work in-house, as well as improve oversight of debris removal operations. Therefore, FEMA is expanding the debris regulations to incorporate this procedural improvement in response to Hurricane Sandy.

D. Executive Order 13132, Federalism

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States and, to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed this rule under Executive Order 13132 and has concluded that this rule does not have federalism implications as defined by Executive Order 13132. FEMA has determined that this rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion. This rulemaking amends a voluntary grant program that may be used by State, local and Tribal governments and eligible private nonprofit organizations to receive Federal grants to assist in the recovery from disasters. States are not required to seek grant funding, and this rulemaking does not limit their policymaking discretion.

E. Executive Order 12898, Environmental Justice

Under Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” (59 FR 7629, Feb. 16, 1994), as amended, FEMA incorporates environmental justice into its policies and programs. Executive Order 12898 requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin. FEMA has incorporated environmental justice into its programs, policies, and activities, as well as this rulemaking. This proposed rulemaking contains provisions that ensure that FEMA’s activities will not have a disproportionately high or adverse effect on human health or the environment or subject persons to discrimination because of race, color, or national origin.

The purpose of this rule is to implement a debris-related Public Assistance Pilot Program procedure. This rule reimburses straight- or regular time wages for the permanent employees of Public Assistance applicants while they perform disaster-related debris and wreckage removal activities related to Hurricane Sandy for a period of 30 consecutive calendar days. Reimbursing straight- or regular time for an applicant’s permanent employees who perform debris removal work will provide an incentive for applicants to complete debris removal work themselves rather than entering into contracts to perform the work. Removing debris expeditiously provides value to the American people by creating safer communities and reducing loss of life and property, enables communities to recover more rapidly from disasters, and lessens the financial impact of

disasters on individuals, the United States Department of the Treasury, State, local, and Tribal communities.

No action that FEMA can anticipate under this rule will have a disproportionately high and adverse human health or environmental effect on any segment of the population. Accordingly, the requirements of Executive Order 12898 do not apply to this rule.

F. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

FEMA has reviewed this rule under Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, Nov. 9, 2000). Under Executive Order 13175, FEMA may not issue a regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute. In reviewing this rule, FEMA finds that because Indian Tribal governments are potentially eligible applicants under the Public Assistance Program, this rule may impact Indian Tribal governments. However, this rule does not have “tribal implications” as defined in the Executive Order. Eligibility to receive reimbursement for force account labor for debris removal operations will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. This rule does not impose substantial direct compliance costs on Indian Tribal governments nor does it preempt tribal law, impair treaty rights nor limit the self-governing powers of Indian Tribal governments.

G. Regulatory Flexibility Act Statement

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612, and section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 note, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations and local governments). The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. This rule did not require a notice of proposed rulemaking and therefore is exempt from the requirements of the RFA.

H. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 et seq., requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. UMRA exempts from its definition of “Federal intergovernmental mandate” regulations that establish conditions of Federal assistance or provide for emergency assistance or relief at the request of any State, local, or Tribal government. Therefore, this rule is not an unfunded Federal mandate under that Act.

I. Executive Order 12988, Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, “Civil Justice Reform” (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

J. Executive Order 12630, Governmental Actions and Interference with
Constitutionally Protected Property Rights

FEMA has reviewed this rule under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” (53 FR 8859, Mar. 18, 1988) as supplemented by Executive Order 13406, “Protecting the Property Rights of the American People” (71 FR 36973, June 28, 2006). Sections 403(a)(3)(A) and 407 of the Stafford Act, 42 U.S.C. 5170b and 5173, respectively, provide FEMA authority to fund debris removal from private property provided that the State or local government arranges an unconditional authorization for removal of the debris, and agrees to indemnify the Federal government against any claim arising from the removal. The regulations implementing Sections 403 and 407 of the Stafford Act at 44 CFR 206.224 establish the requirement that debris removal be in the “public interest” in order to be eligible for reimbursement. Generally, debris removal from private property following a disaster is the responsibility of the property owner. However, large-scale disasters may deposit enormous quantities of debris on private property over a large area resulting in widespread immediate threats to the public-at-large. In these cases, the State or local government may need to enter private property to remove debris to: eliminate immediate threats to life, public health, and safety; eliminate immediate threats of significant damage to improved property; or ensure economic recovery of the affected community to the benefit of the community-at-large. In these situations, debris removal from private property may be considered to be in the public interest and thus may be eligible for reimbursement under the Public Assistance Program. See 44 CFR 206.224(b). FEMA will work with States affected by a disaster to designate those areas where the debris is so

widespread that removal of the debris from private property is in the “public interest” pursuant to 44 CFR 206.224, and thus is eligible for FEMA Public Assistance reimbursement on a case-by-case basis. This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

K. Congressional Review of Agency Rulemaking

FEMA is sending this rule to Congress and to the Government Accountability Office pursuant to the Congressional Review of Agency Rulemaking Act (Congressional Review Act)(CRA), Pub. L. 104-121, 110 Stat. 873 (March 29, 1996) (5 U.S.C. 801 et seq). This rule is not a “major rule” within the meaning of the CRA.

List of Subjects in 44 CFR Part 206

Administrative practice and procedure, Coastal zone, Community facilities, Disaster assistance, Fire prevention, Grant programs-housing and community development, Housing, Insurance, Intergovernmental relations, Loan programs-housing and community development, Natural resources, Penalties, Reporting and recordkeeping requirements.

PART 206—FEDERAL DISASTER ASSISTANCE

Accordingly, 44 CFR 206.228 of the interim final rule published on November 9, 2012 (77 FR 67285) is adopted as a final rule without change.

Date: August 1, 2014

W. Craig Fugate
Administrator,
Federal Emergency Management Agency.

[FR Doc. 2014-18709 Filed 08/06/2014 at 8:45 am; Publication Date: 08/07/2014]