



This document is scheduled to be published in the Federal Register on 08/22/2016 and available online at <http://federalregister.gov/a/2016-19536>, and on FDsys.gov

Billing Code: 9111-A6-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Parts 10, 60, 78, 79, 80, 206, and 209

Docket ID FEMA-2016-0018

RIN 1660-AA87

Removal of Environmental Considerations Regulations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: The Federal Emergency Management Agency (FEMA), a component of the Department of Homeland Security (DHS), is removing its environmental considerations regulations and replacing the regulations with a new Directive and Instruction on environmental planning and historical preservation requirements. DHS instituted procedures for environmental considerations that apply Department-wide (including FEMA) in a new Directive and Instruction. FEMA is issuing supplemental procedures to the new DHS Directive and Instruction; a Notice of Availability for these supplemental procedures appears in the Notice section of today's edition of the Federal Register.

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

FOR FURTHER INFORMATION CONTACT: Katherine Zeringue, Environmental Officer, Federal Emergency Management Agency, 400 C Street SW., Suite 313, Washington, DC 20472-3020; 202-212-2282, or Katherine.Zeringue@fema.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

The National Environmental Policy Act (NEPA)¹ declares a national policy to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation.² NEPA establishes a Council on Environmental Quality (CEQ) within the Executive Office of the President, composed of members who are appointed by the President with the advice and consent of the Senate, to analyze and interpret environmental trends and information of all kinds, to appraise programs and activities of the Federal government in light of NEPA's purpose, to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation, and to formulate and recommend national policies to promote the improvement of the quality of the environment.³

CEQ has promulgated regulations at 40 CFR parts 1500 to 1518. The CEQ regulations set out specific procedures that Federal agencies must follow to comply with NEPA.⁴ The CEQ regulations require each agency to "adopt procedures" to supplement the CEQ regulations.⁵

FEMA established its Environmental Considerations regulations via a final rule on June 18, 1980, which established part 10 of 44 CFR.⁶ Prior to publishing a final rule, FEMA published a proposed rule on December 6, 1979, seeking public comment on the

¹ 42 U.S.C. 4321, 4331-4335, 4344, 4365.

² See 42 U.S.C. 4321.

³ See 42 U.S.C. 4342; see also 42 U.S.C. 4344.

⁴ See 40 CFR 1507.1.

⁵ See 40 CFR 1507.3(a).

⁶ See 45 FR 41141.

new regulations.⁷ FEMA received two public comments on the proposed rule. FEMA has not substantively revised 44 CFR part 10 since promulgating a final rule in 1980.

II. Discussion of Removal of Part 10

FEMA was an independent agency when it promulgated part 10 in 1980. In 2003, FEMA became a component of the Department of Homeland Security (DHS).⁸ DHS initially issued Management Directive 5100.1 to ensure DHS components complied with the requirements of NEPA. On April 19, 2006, DHS promulgated a comprehensive Directive 023-01 to establish the policies and procedures for assuring compliance with NEPA. DHS components were required to comply with the DHS Directive unless a pre-existing regulation required an action conflicting with the Directive. On November 26, 2014, DHS issued revised NEPA implementing procedures, applicable to all DHS components, via a Directive and Instruction, which went into effect on March 26, 2015.⁹ The DHS Directive and Instruction are included in the docket for this rulemaking at www.regulations.gov.

Prior to the issuance of the 2006 DHS Directive and Instruction, DHS did not have Department-wide NEPA procedures, but rather, each component of DHS followed its own implementing procedures. FEMA's implementing procedures, as already noted, are at 44 CFR part 10.

As a component of DHS, FEMA is required to follow DHS Directives and Instructions that apply to the whole Department. As such, FEMA is removing 44 CFR

⁷ See 44 FR 70197.

⁸ Homeland Security Act of 2002, Public Law 107-296, 116 Stat. 2135 (Nov. 25, 2002). See also 6 U.S.C. 313 ("There is in the Department [of Homeland Security] the Federal Emergency Management Agency.")

⁹ See 79 FR 70538 (Nov. 26, 2014). DHS published a draft Directive and Instruction for public comment on June 5, 2014. See 79 FR 32563.

Part 10, so that it may follow completely the new DHS Directive and Instruction. Accordingly, FEMA is also removing references to Part 10 throughout the regulations at 44 CFR and, where appropriate, replacing them with references to applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy. The DHS Directive and Instruction allow each DHS component to issue supplemental procedures. FEMA is issuing supplemental procedures in the form of a Directive and Instruction, a Notice of Availability for which appears in the Notice section of today's edition of the Federal Register. The similarities and differences between 44 CFR Part 10 and the new supplemental procedures (the DHS Directive and Instruction and the FEMA Directive and Instruction) are described in the following section-by-section analysis. The changes to references to 44 CFR Part 10 are also discussed below.

III. Section-by-Section Analysis

A. 44 CFR 10.1 Background and Purpose.

Paragraph (a) of § 10.1 describes the purpose of 44 CFR Part 10: to implement the CEQ regulations and to provide policy and procedures to enable FEMA officials to be informed of and take into account environmental considerations when authorizing or approving major FEMA actions that significantly affect the environment of the United States. The new supplemental procedures have a broader scope than Part 10. Part 10 focuses solely on NEPA implementation; the new supplemental procedures will address all environmental and historic preservation compliance (commonly referred to as "EHP" compliance). EHP compliance includes NEPA compliance but is broader to include other legal requirements for environmental and historic preservation. For example, the new supplemental procedures address compliance with the National Historic Preservation

Act,¹⁰ the Endangered Species Act,¹¹ Executive Order 11988 “Floodplain Management,” and Executive Order 12148 “Protection of Wetlands,” in addition to NEPA compliance.¹²

The introductory paragraphs of the FEMA Directive and FEMA Instruction reflect this broader scope.¹³

Paragraphs (b) and (c) of § 10.1 restate the CEQ requirements directing all Federal agencies to adopt procedures to supplement the CEQ regulations, and that the provisions of Part 10 must be read together with the CEQ regulations and NEPA as a whole when applying the NEPA process. As stated above, the new DHS Directive and Instruction, as well as the FEMA Directive and Instruction, fulfill the CEQ requirement to adopt procedures to supplement the CEQ regulations.¹⁴

B. 44 CFR 10.2 Applicability and Scope.

¹⁰ 16 U.S.C. 470h-2(c).

¹¹ 16 U.S.C. 1531.

¹² The FEMA Directive and Instruction do not supersede 44 CFR Part 9, FEMA’s implementing regulations for EO 11988 and EO 11990 (the precursor to EO 12148). Rather, these documents provide guidance for FEMA’s implementing regulations of that EO.

¹³ The Introduction to the FEMA Directive and Section 1.5.A of the FEMA Instruction state the following: “Environmental stewardship, preservation of historic and cultural resources, and sustainability are complementary goals to the emergency management mission and activities of FEMA. FEMA promotes these goals to support development of resilient communities in light of disasters, sea level rise, climate change, and other impacts that threaten the human environment. Environmental, historic, and cultural resources are important considerations when preparing for, responding to, recovering from, and mitigating hazards to the United States. Protection and stewardship of the Nation’s natural resources including floodplains and wetlands, coastal barriers, forests and fauna, biodiversity, endangered species, habitats, and other natural landscapes provide increased protection to communities throughout the Nation and support resiliency. Consistent with the goals of environmental and historic preservation laws and the policies of DHS, FEMA promotes antidegradation and balances resource use and development with sustainability and use of renewable resources to manage these natural and cultural resources.”

¹⁴ See DHS Directive 023-01, Section I, “This Directive and the Instruction Manual adopt and supplement the CEQ regulations and are to be used in conjunction with those regulations.”

Section 10.2 states that Part 10 applies to FEMA, including any office or administration of FEMA, and the FEMA regional offices. The applicability is unchanged under the new procedures, which apply to all components of FEMA.¹⁵

C. 44 CFR 10.3 Definitions.

Paragraph (a) of § 10.3 defines “Regional Administrator” as “the Regional Administrator of the Federal Emergency Management Agency for the region in which FEMA is acting.” The Regional Administrator positions have not changed since FEMA promulgated Part 10 in 1980 but the Homeland Security Act sets forth the responsibilities of the Regional Administrators.¹⁶ The FEMA Directive and Instruction do not further define “Regional Administrator” per se, but the FEMA Directive does describe the Regional Administrator’s duties in detail at Section VI.C.

Paragraph (c) of § 10.3 defines “Environmental Officer” as the “Director, Office of Environmental Planning and Historic Preservation, Mitigation Directorate, or his or her designee.” The title of this position is relatively unchanged: the “Director of the Office of Environmental Planning and Historic Preservation (OEHP).” The FEMA Directive, which describes the duties of this position in section VI.E, states that this position is designated by the FEMA Administrator and has the authority and responsibility to administer the OEHP and ensure its functional integration into FEMA missions. The FEMA Directive and Instruction do refer to an “Environmental Officer,” but it is no longer the Director of OEHP. Now, the Environmental Officer has duties distinct from the Director of OEHP, and is designated by and reports directly to the

¹⁵ Section II of the FEMA Directive states that “Policies in this EHP Directive apply to all FEMA headquarters, regional and field offices, programs, and directorates inclusive of all associated operations and facilities and including Joint Field Offices (JFO).”

¹⁶ 6 U.S.C. 317. To view the organizational structure of FEMA and FEMA regions, go to this link: <http://www.fema.gov/about-agency>.

Director of OEHP. The FEMA Directive describes the duties of the Environmental Officer in Section VI.G.

Paragraph (b) of § 10.3 states that the other terms used in Part 10 are defined in the CEQ regulations at 40 CFR Part 1508. The DHS Directive includes all CEQ definitions that FEMA uses in its Directive and Instruction. These include definitions for “categorical exclusion (CATEX),”¹⁷ “environmental assessment (EA),”¹⁸ “environmental impact statement (EIS),”¹⁹ “finding of no significant impact,”²⁰ “human environment,”²¹ and “record of decision.”²²

D. 44 CFR 10.4 Policy

Section 10.4(a) sets forth FEMA’s goals to ensure that FEMA’s actions, including disaster planning, response and recovery, and hazard mitigation and flood insurance are carried out in a manner consistent with NEPA, and that all practical means and measures are used to protect, restore, and enhance the quality of the environment, and to avoid or minimize adverse environmental consequences. The introduction to the FEMA Directive generally includes these goals, and FEMA Instruction section 1.5 also generally sets forth the policies included in 44 CFR 10.4. For example, paragraph 10.4(a)(1), regarding achieving the use of the environment without degradation, and paragraph 10.4(a)(3), regarding achieving a balance between resource use and development within the sustained carrying capacity of the ecosystem involved, are now included in the introduction of the FEMA Directive and Section 1.5.A of the Instruction, which state that

¹⁷ 40 CFR 1508.4; DHS Instruction section II.

¹⁸ 40 CFR 1508.9; DHS Instruction section II.

¹⁹ 40 CFR 1508.11; DHS Instruction section II.

²⁰ 40 CFR 1508.13; DHS Instruction section II.

²¹ 40 CFR 1508.14; DHS Instruction section II.

²² 40 CFR 1505.2; DHS Instruction section II.

“FEMA promotes antidegradation and balances resource use and development with sustainability and use of renewable resources to manage these natural and cultural resources.” Paragraph (a)(2) of § 10.4, addressing the preservation of historic, cultural and natural aspects of national heritage, is addressed in sections 1.5.A and B of the FEMA Instruction. Sections 1.5.B.3.a and b state that FEMA will conduct NEPA and other EHP reviews early in the decision making process and before making a decision “that adversely affects natural or cultural resources,” and will tailor the NEPA process so as to spend minimal time and resources on decisions “that do not have potential to adversely affect natural and cultural resources.”

E. 44 CFR 10.5 Responsibilities

Section 10.5 sets out the responsibilities of the FEMA Regional Administrators, the Environmental Officer, the Heads of the Offices, Directorates, and Administrations of FEMA, and the Office of Chief Counsel.

The responsibilities of the FEMA Regional Administrators, which are in paragraph (a) of § 10.5, appear in section VI.C of the FEMA Directive. Note that many of the responsibilities of the FEMA Regional Administrators that appear in paragraph (a) of § 10.5 now fall under or are shared with other positions as outlined in the FEMA Directive, to reflect current FEMA practice. Paragraphs (a)(1) and (2) of § 10.5 require the Regional Administrators to prepare a finding of no significant impact, an EA (to be sent to the Environmental Officer and the Office of Chief Counsel), or EIS for each action not categorically excluded from Part 10 and falling within their respective jurisdictions. These duties appear generally under section VI.C, and more specifically under section VI.C.2.viii, of the FEMA Directive.

Paragraph (a)(3) of § 10.5 requires Regional Administrators to coordinate and provide information regarding environmental review with applicants for FEMA assistance. This duty appears in section VI.C.1.vii of the FEMA Directive, which states that Regional Administrators shall support early, proactive, and comprehensive outreach processes for EHP in their Regions with resource/regulatory agencies, applicants, and the public.

Paragraph (a)(4) of § 10.5 requires Regional Administrators to prepare and maintain an administrative record for each proposal that is determined to be categorically excluded from Part 10. Similarly, section VI.C.2.viii of the FEMA Directive states that Regional Administrators must ensure appropriate documentation of records of environmental consideration for CATEXs.

Paragraph (a)(5) of § 10.5 requires Regional Administrators to involve environmental agencies, applicants, and the public to the extent practicable in preparing EAs. The FEMA Directive describes this duty more generally as public outreach, falling under the positions of the Administrator (section VI.A.2.iv), the Heads of FEMA Offices, Programs, and Directorates (section VI.B.2.vi), the Regional Administrators (section VI.C.1.vii), the Director of the Office of Environmental Planning and Historic Preservation (section VI.E.1.iv), the Regional Environmental Officers (section VI.H.1.iii), and the EHP Program Coordinator (section VI.L.1.iv).

Paragraph (a)(6) requires the Regional Administrator to prepare, as required, a supplement to either the draft or final EIS. This duty falls under general NEPA compliance duties in the FEMA Directive. Section VI.B.2.vii of the FEMA Directive requires the Heads of Offices, Programs, and Directorates in FEMA to ensure the

completion of appropriate EHP documentation for actions within their responsibility. Section VI.C.2.viii includes the same requirement for the Regional Administrators, and section VI.D.1.vi includes the same requirement for Federal Coordinating Officers. Section VI.E.4.ii.a requires the Director of the Office of Environmental Planning and Historic Preservation to oversee and ensure these duties are fulfilled. Section VI.H.4.iii.a requires the Regional Environmental Officers to ensure completion of appropriate NEPA documentation as well.

Paragraph (a)(7) requires the Regional Administrator to circulate draft and final EISs. This duty is no longer necessary and the FEMA Directive and Instruction do not include this specific provision. The appropriate FEMA personnel (such as the Environmental Officer) handle internal agency circulation of any environmental documentation falling under their responsibility as part of normal business practice.

Paragraph (a)(8) requires Regional Administrators to ensure that decisions are made in accordance with the policies and procedures of NEPA and Part 10, and to prepare a concise public record of such decisions. The FEMA Directive includes these duties generally for the Administrator (section VI.A), the Heads of Offices, Programs, and Directorates in FEMA (section VI.B.2.i: “Ensure that all policies, programs, activities, and operations in their respective offices, programs, or directorates comply with all applicable EHP requirements” and section VI.B.2.vii: “Ensure completion of appropriate EHP documentation for actions within their responsibility. This responsibility includes ensuring that the action or project record includes adequate EHP documentation.”), the Regional Administrators (section VI.C.2.i: “Ensure that all policies, programs, activities, and operations in their regions comply with all applicable

EHP requirements”, section VI.C.2.ii: “Consider the effects of their decisions on environmental, historic, and cultural resources in accordance with NEPA, CEQ regulations, the DHS Instruction 023-01, the EHP Instruction, and this EHP Directive”, and section VI.C.2.viii: “Ensure appropriate documentation of EHP compliance for actions within their responsibility, such as Records of Environmental Consideration (RECs) for CATEXs, ... This includes ensuring that the administrative record incorporates EHP documentation and a public record of decisions made in accordance with the policies and procedures of NEPA and other EHP requirements.”), the Federal Coordinating Officer (section VI.D.1.ii: “Perform oversight and monitoring of the EHP review process” and section VI.D.1.vi: “Ensure appropriate documentation of the EHP review process for actions within their responsibility”), the Director of OEHP (section VI.E.2.i: “Provide the quality assurance and quality control function for OEHP”), and the Regional Environmental Officers (section VI.H.2: “Support EHP compliance within their Regions” and section VI.H.4.iii.a: “Support completion of the appropriate EHP review process, including the analyses and documentation for EHP requirements”).

Paragraph (a)(9) requires Regional Administrators to consider mitigating measures to avoid or minimize environmental harm, and, in particular, harm to and within floodplains and wetlands. The FEMA Directive includes this Regional Administrator responsibility in section VI.C.2.iv. The FEMA Directive also requires the Administrator to ensure FEMA Offices, Programs, and Directorates recommend EHP mitigation for FEMA’s direct actions and grant decisions when appropriate (section VI.A.1.vi), requires the Federal Coordinating Officer to incorporate EHP mitigation measures as appropriate and practicable (section VI.D.1.vii), and requires the

Environmental Officer to promote EHP mitigation as part of applicant projects and support enforcement of associated monitoring and EHP mitigation measures (section VI.G.3.i).

Paragraph (a)(9) requires the Regional Administrators to review and comment upon, as appropriate, EAs and impact statements of other Federal agencies and of State and local entities within their respective regions. The FEMA Directive includes this as a responsibility of the Environmental Officer, stating in section VI.G.2.vii that the Environmental Officer shall “Review and comment upon, as appropriate and following notification to and approval by DHS SEP, EAs and EISs prepared by other Federal agencies or State and local entities that affect FEMA programs.”

The responsibilities of the Environmental Officer appear in paragraph (b) of § 10.5. The FEMA Directive includes these duties under two separate positions, the Director of OEHP (section VI.E) and the Environmental Officer (section VI.G). The Director of OEHP oversees the position of the Environmental Officer.

Paragraph (b)(1) states that the Environmental Officer shall determine, on the basis of the EA, whether an EIS is required, or whether a finding of no significant impact shall be prepared. The FEMA Directive does not specifically address this particular task, but it does require the Environmental Officer to oversee the EHP review process (section VI.G.2.i), and the Office of Chief Counsel provides legal sufficiency reviews, when appropriate, for EHP analyses and documents (section VI.K.2.iv), and as such these entities assist in making the determination of whether an action requires an EIS.

Paragraph (b)(2) requires the Environmental Officer to review all proposed changes or additions to the list of CATEXs. This responsibility appears in section VI.G.1.i of the FEMA Directive, under the duties of the Environmental Officer.

Paragraph (b)(3) requires the Environmental Officer to review all findings of no significant impact. This responsibility falls generally under the duties of the Environmental Officer in section VI.G.2.v of the FEMA Directive, which states that the Environmental Officer shall review draft and final environmental documentation and analyses prepared by OEHP or other headquarters offices when EHP Approval Authority has not been delegated to those offices. If authority is delegated, this task may fall to the Regional Environmental Officer (section VI.H.2.v) or the EHP Program Coordinator (section VI.L.1.ix) as oversight and review of environmental documentation and analyses is included in EHP Approval Authority.

Paragraph (b)(4) requires the Environmental Officer to review all proposed draft and final environmental statements. As with the review of findings of no significant impact, this responsibility falls generally under the duties of the Environmental Officer in section VI.G.2.v of the FEMA Directive, which states that the Environmental Officer shall review draft and final environmental documentation and analyses prepared by OEHP or other headquarters offices when EHP Approval Authority has not been delegated to those offices. If authority is delegated, this task may fall to the Regional Environmental Officer (section VI.H.2.v) or the EHP Program Coordinator (section VI.L.1.ix).

Paragraph (b)(5) requires the Environmental Officer to publish the required notices in the Federal Register. While not mentioned specifically in the FEMA Directive,

this duty would fall under the Environmental Officer's general duties of overseeing the EHP review process for FEMA (section VI.G.2.i).

Paragraph (b)(6) requires the Environmental Officer to provide assistance in the preparation of EAs and impact statements and assign lead agency responsibility when more than one FEMA office or administration is involved. In the FEMA Directive, this duty falls under the Environmental Officer in section VI.G.3.ii, which states that the Environmental Officer shall determine which FEMA program will lead the EHP review process for a project that crosses multiple FEMA programs when the FEMA programs involved in the project cannot agree upon who will serve as the lead, and in section VI.G.2.iv, which states that the Environmental Officer will provide assistance in the preparation of environmental documentation in the Regions and Programs as appropriate and assign lead agency responsibility when more than one FEMA office or administration is involved.

Paragraph (b)(7) requires the Environmental Officer to direct the preparation of environmental documents for specific actions when required. While not mentioned specifically in the FEMA Directive, this duty would fall under the Environmental Officer's general duties of overseeing the EHP review process for FEMA (section VI.G.2.i).

Paragraph (b)(8) requires the Environmental Officer to comply with the requirements of Part 10 when the FEMA Administrator promulgates regulations, procedures, or other issuances making or amending Agency policy. The Director of OEHP retains this duty generally to follow the requirements of the Agency's NEPA procedures for any Agency-wide action. The FEMA Directive states that it is the policy

of FEMA to comply with all EHP Requirements, including all applicable laws, regulations, and executive orders, and it is the responsibility of the Heads of Offices, Programs, and Directorates with support from the Director of OEHP to comply with the Agency's policy (section VI.B.2.i and VI.E.2).

Paragraph (b)(9) requires the Environmental Officer to provide, when appropriate, consolidated FEMA comments on draft and final impact statements prepared for the issuance of regulations and procedures of other agencies. The FEMA Directive includes this requirement under the responsibilities of the Environmental Officer at section VI.G.2.vii, which states that the Environmental Officer shall review and comment upon, as appropriate, EAs and EISs of other Federal agencies.

Paragraph (b)(10) requires the Environmental Officer to review FEMA issuances that have environmental implications. While not mentioned specifically in the FEMA Directive, this duty would fall under the Environmental Officer's general duties of overseeing the EHP review process for FEMA (section VI.G.2.i).

Paragraph (b)(11) states that the Environmental Officer shall maintain liaison with CEQ, the Environmental Protection Agency, the Office of Management and Budget (OMB), other Federal agencies, and State and local groups, with respect to environmental analysis for FEMA actions affecting the environment. Under the DHS Directive section IV.B.2, the DHS Director of Sustainability and Environmental Programs (SEP) serves, unless otherwise delegated, as the single point of contact for DHS on NEPA and NEPA related-matters in interactions with CEQ, the OMB, the Advisory Council on Historic Preservation, and other Federal agency headquarters. Under the FEMA Directive section

VI.G.2.iii, the Environmental Officer serves as the liaison with other Federal, State, and local agencies regarding environmental analyses for FEMA actions.

The responsibilities of the Heads of the Offices, Directorates, and Administrations of FEMA, which are listed in paragraph (c) of § 10.5, appear in section VI.B of the FEMA Directive.

Paragraph (c)(1) requires the Heads of the Offices, Directorates, and Administrations of FEMA to assess environmental consequences of proposed and ongoing programs within their respective organizational units. Section VI.B.2.ii of the FEMA Directive requires these entities to assess EHP requirements of proposed, new, and ongoing programs, policies, plans and projects within their organizational units before they make decisions or take action. Section VI.B.1.ii requires these entities to incorporate EHP review processes into development of regulations, procedures, and other policies for compliance with EHP requirements.

Paragraph (c)(2) requires the Heads of the Offices, Directorates, and Administrations of FEMA to prepare and process EAs and EISs for all regulations, procedures and other issuances making or amending program policy related to actions which do not qualify for CATEXs. Under the FEMA Directive, this responsibility falls under the Regional Administrators to prepare an EA (to be sent to the Environmental Officer and the Office of Chief Counsel), or EIS for each action not categorically excluded from Part 10 and falling within their respective jurisdictions. These duties appear generally under section VI.C, and more specifically under section VI.C.2.viii, of the FEMA Directive.

Paragraph (c)(3) requires the Heads of the Offices, Directorates, and Administrations of FEMA to integrate environmental considerations into their decision making process. This responsibility appears in section VI.B.1.i of the FEMA Directive, which mirrors the language of paragraph (c)(3) and adds the requirement that the integration occur early in the decision making process.

Paragraph (c)(4) requires the Heads of the Offices, Directorates, and Administrations of FEMA to ensure that regulations, procedures and other issuances making or amending program policy are reviewed for consistency with the requirements of Part 10. As stated above, section VI.B.1.ii of the FEMA Directive requires these entities to incorporate EHP review processes into development of regulations, procedures, and other policies for compliance with EHP requirements.

Paragraph (c)(5) requires the Heads of the Offices, Directorates, and Administrations of FEMA to designate a single point of contact for matters pertaining to this part. The FEMA Directive, in section VI.L, designates this single point of contact as the EHP Program Coordinator, who serves as a technical EHP resource for a specific program office.

Paragraph (c)(6) requires the Heads of the Offices, Directorates, and Administrations of FEMA to provide applicants for FEMA assistance with technical assistance regarding FEMA's environmental review process. The FEMA Directive captures this duty in section VI.B.4.iv.d which stipulates that the Offices, Programs, and Directorates of FEMA must assist applicants or eligible entities in identifying the EHP requirements triggered by their proposed projects and the potential EHP mitigation measures that may affect project design. The FEMA Directive also lists this as a duty of

the Regional Environmental Officer in section VI.H.4.iii.e, which states that the Regional Environmental Officer shall provide technical assistance and guidance to applicants regarding EHP review processes.

The responsibilities of the Office of Chief Counsel, which are in listed paragraph (d) of § 10.5, appear in section VI.K of the FEMA Directive. Paragraph (d)(1) states that the Office of Chief Counsel shall provide advice and assistance concerning the requirements of Part 10. The list of specific duties in section VI.K of the FEMA Directive all fall under this requirement to provide advice and assistance regarding compliance with NEPA. Specifically, section VI.K.2.v requires the Office of Chief Counsel to provide guidance to the Director of OEHP, FPO, EO, EHP Program Coordinators, the Heads of Offices, Programs, and Directorates, and others as appropriate to assist FEMA in maintaining EHP compliance.

Paragraph (d)(2) requires the Office of Chief Counsel to review all proposed changes or additions to the list of CATEXs. The FEMA Directive includes this as a primary responsibility of the Environmental Officer with support from the Office of Chief Counsel (section VI.G.1.i and VI.K.1.iv).

Paragraph (d)(3) requires the Office of Chief Counsel to review all findings of no significant impact, and paragraph (d)(4) requires the Office of Chief Counsel to review all proposed draft and final EISs. These duties fall under section VI.K.2.iv of the FEMA Directive, which requires the Office of Chief Counsel to provide legal sufficiency reviews on EHP analyses and documents. These analyses and documents can include findings of no significant impact and proposed draft and final EISs.

F. 44 CFR 10.6 Making or amending policy.

Section 10.6 states that for all regulations, procedures, or other issuances making or amending policy, the head of the FEMA office or administration establishing such policy shall be responsible for application of Part 10 to that action. This responsibility continues to be that of the Heads of Offices, Programs, and Directorates under the FEMA Directive (section VI.B.2.i). As noted above, § 10.5(b)(8) requires the Environmental Officer to comply with the requirements of Part 10 when the FEMA Administrator promulgates regulations, procedures or other issuances making or amending Agency policy. Under the FEMA Directive, the Director of OEHP retains this duty generally to follow the requirements of the Agency's NEPA procedures for any Agency-wide action. The FEMA Directive states that it is the policy of FEMA to comply with all EHP Requirements, including all applicable laws, regulations, and executive orders, and it is the responsibility of the Heads of Offices, Programs, and Directorates with support from the Director of OEHP to comply with the Agency's policy (section VI.B.2.i and VI.E.2).

G. 44 CFR 10.7 Planning.

Early Planning

Paragraph (a) of § 10.7 states that the Regional Administrator shall integrate the NEPA process with other planning at the earliest possible time to ensure that planning decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. The FEMA Directive mirrors this language in its list of Regional Administrator responsibilities in section VI.C.1.i. More generally, the FEMA Instruction in section 1.5.B.3.a states that it is the policy of FEMA to conduct NEPA and other EHP reviews early in the decision making process and before making a decision that adversely affects natural or cultural resources or limits the choices of alternatives to satisfy an

Agency objective. Other requirements to integrate EHP review early in the process appear throughout the FEMA Directive and Instruction; for example, section 1.5.B.3.f of the Instruction states that it is the policy of FEMA to clearly convey EHP requirements, expectations, timelines, and information needs to applicants as early in the project lifecycle as possible, and section VI.B.1.i of the Directive states that it is the responsibility of the Heads of Offices, Programs, and Directorates in FEMA to integrate EHP considerations early into their decision making. In addition, the FEMA Instruction in section 3.1 addresses steps for applying NEPA early in the decision-making process.

Lead agency

Paragraph (b) of § 10.7 states that to determine the lead agency for policy making in which more than one FEMA office or administration is involved or any action in which another Federal agency is involved, FEMA offices and administrations shall apply criteria defined in §1501.5 of the CEQ regulation,²³ and if there is disagreement, the FEMA offices and/or administrations shall forward a request for lead agency determination to the Environmental Officer. The regulation states that the Environmental Officer will determine lead agency responsibility among FEMA offices and administration, and in those cases involving a FEMA office or administration and another Federal agency, the Environmental Officer will attempt to resolve the differences.²⁴ Finally, the regulation states that if unsuccessful, the Environmental Officer will file the request with CEQ for determination.²⁵

²³ 40 CFR 1501.5 addresses when a lead agency is required, the process for determining a lead agency, and the responsibilities of the lead agency.

²⁴ 44 CFR 10.7(b)(1) & (2).

²⁵ 44 CFR 10.7(b)(2).

The FEMA Directive, at section VI.G.2.iv, assigns the Environmental Officer the responsibility of assigning lead agency responsibility when more than one FEMA office or administration is involved in the preparation of environmental documentation. The FEMA Instruction more fully addresses “Lead and Cooperating Agencies,” including the involvement of other Federal agencies, in section 3.3. The DHS Instruction, section V.F, provides the overarching general requirements for “Cooperating and Joint Lead Agency Relationships.” As FEMA is a component of DHS, DHS acts as the liaison with CEQ; if the Environmental Officer is unable to resolve any differences with another Federal agency, the Environmental Officer would raise it to DHS which in turn may liaise with CEQ on the matter.

Technical assistance to applicants

Paragraph (c) of § 10.7 addresses the requirements of § 1501.2(d) of the CEQ regulations which require agencies to provide for early involvement in action which, while planned by private applicants or other non-Federal entities, require some form of Federal approval. The FEMA Instruction addresses technical assistance in section 2.2.B.

Paragraph (c)(1)(i) states that the heads of the FEMA offices and administration shall prepare where practicable, generic guidelines describing the scope and level of environmental information required from applicants as a basis for evaluating their proposed actions, and make those guidelines available upon request. Section 2.2.B.3 of the FEMA Instruction discusses program responsibilities in providing guidance to applicants for collection of information for EHP review.

Paragraph (c)(1)(ii) requires the Regional Administrator to provide the guidance on a project-by-project basis to applicants seeking assistance from FEMA. Section 2.2 of

the FEMA Instruction describes in detail how Programs and EHP staff will provide guidance to all applicants whenever there is a proposed action.

Paragraph (c)(1)(iii) states that upon receipt of an application for agency approval, or notification that an application will be filed, the Regional Administrator shall consult as required with other appropriate parties to initiate and coordinate the necessary environmental analyses. Section 2.2.B.5 of the FEMA Instruction mirrors this language.

Paragraph (c)(2) lists the responsibilities of applicants and other non-Federal entities to facilitate the requirements of § 1501.2(d) of the CEQ regulations. The FEMA Directive and Instruction apply to FEMA, not directly to applicants or other non-Federal entities. As the EHP procedures will now appear in guidance documents (the FEMA Directive and Instruction), FEMA is not including direct requirements on applicants in those documents. However, the guidance does require FEMA to provide the same information to applicants as is included in paragraph (c)(2) of § 10.7 (e.g., information regarding studies and surveys the applicant may conduct, when to submit applications, and the process for consulting with Federal, regional, State, and local agencies).

H. 44 CFR 10.8 Determination of requirement for environmental review.

The introduction to § 10.8 addresses the first step in applying the NEPA process, namely, the determination of whether to prepare an EA or an EIS. The introduction to § 10.8 states that early determination will help ensure that necessary environmental documentation is prepared and integrated into the decision making process. It also states that EISs will be prepared for all major Agency actions significantly affecting the quality of the human environment. Paragraph (a) states that in determining whether to prepare

an EIS, the Regional Administrator will first determine whether the proposal is one which normally requires an EIS, or normally does not require either an EIS or an EA (CATEX).

Sections 3.1 and 3.2 of the FEMA Instruction address NEPA implementing procedures for FEMA and comprehensively address the elements in the introduction and paragraph (a) of § 10.8. Specifically, section 3.1 of the FEMA Instruction addresses the application of NEPA early in the FEMA decision making process. Section 3.2 of the FEMA Instruction explains the process of determining the appropriate level of NEPA review, as part of a process referred to as “scoping,” and also covers the process of determining whether a statutory exclusion or CATEX applies. Section 3.2.B explains the process for determining the significance of a proposed action. Section 3.2.B.1 lists typical classes of actions that require an EA, and sections 3.2.B.2 list typical classes of actions that require an EIS.

1. 10.8(b): Actions that normally require an EIS.

Paragraph (b) of § 10.8 addresses actions that normally require an EIS. Paragraph (b)(1) states that in some cases, it will be readily apparent that a proposed action will have significant impact on the environment, in which case, the Regional Administrator will begin the process of preparing an EIS. While there is not an exact correspondence to this provision in the FEMA Directive or Instruction, the procedures set out in the FEMA Instruction at section 3.2.B will capture any actions that seem likely, without the need for in-depth analysis, to have significant impact on the environment.

Paragraph (b)(2) sets out criteria for determining those actions that normally do require an EIS: (i) an action that will result in an extensive change in land use or the commitment of a large amount of land, (ii) an action that will result in a land use change

which is incompatible with the existing or planned land use of the surrounding area, (iii) an action where many people will be affected, (iv) an action where the environmental impact of the project is likely to be controversial, (v) an action that will, in large measure, affect wildlife populations and their habitats, important natural resources, floodplains, wetlands, estuaries, beaches, dunes, unstable soils, steep slopes, aquifer recharge areas, or delicate or rare ecosystems, including endangered species; (vi) an action that will result in a major adverse impact upon air or water quality; (vii) an action that will adversely affect a property listed on the National Register of Historic Places; (viii) an action that is one of several actions underway or planned for an area and the cumulative impact of these projects is considered significant; (ix) an action that holds potential for threat or hazard to the public; and (x) an action that is similar to previous actions that were determined to require an EIS. The FEMA Instruction includes an updated list of these elements in section 3.2.B.2. The list in section 3.2.B.2 includes an additional element to reflect that an EIS may be required for the creation, modifications to the implementation, or reformation of a nationwide FEMA program, with known or potentially significant impacts to the environment. FEMA also removed elements from the list that are no longer necessary to include, in conformance with the DHS Directive and Instruction.

Paragraph (b)(3) of § 10.8 states that in any case involving an action that normally does not require an EIS, the Regional Administrator may prepare an EA to determine if an EIS is required. There is no direct corollary to this provision in the FEMA Directive or Instruction; however, under section 3.2.B.1 of the FEMA Instruction, the Regional Environmental Officer or other FEMA official with EHP Approval Authority may prepare an EA as part of the process of determining the significance of an action.

2. 10.8(c): Statutory Exclusions.

Paragraph (c) of § 10.8 lists the actions that are statutorily excluded from NEPA by section 316 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act²⁶ (Stafford Act); these actions include action taken or assistance provided under sections 402,²⁷ 403,²⁸ 407,²⁹ or 502³⁰ of the Stafford Act, and action taken or assistance provided under section 406³¹ of the Stafford Act that has the effect of restoring facilities substantially as they existed before a major disaster or emergency.³² Neither the DHS Directive and Instruction nor the FEMA Directive and Instruction contain these statutory exclusions. The appearance of the exclusions in statute (at 42 U.S.C. 5159) precludes the necessity of listing them in guidance. The exclusions still apply to actions that fall under them, but FEMA is no longer listing these exclusions in either regulation or guidance.

3. 10.8(d): CATEXs.

The introduction to paragraph (d) of § 10.8 reiterates CEQ regulation 40 CFR 1508.4 which provides for the categorical exclusion of actions that do not individually or cumulatively have a significant impact on the human environment and for which, therefore, neither an EA nor EIS is required. The DHS Instruction at section V.B.1 reiterates the CEQ regulation. As described more fully below, the DHS Instruction in Appendix A includes a list of all DHS CATEXs, including FEMA's CATEXs.

²⁶ 42 U.S.C. 5121 – 5207.

²⁷ 42 U.S.C. 5170a, General Federal assistance FEMA may provide under a Presidential major disaster declaration.

²⁸ 42 U.S.C. 5170b, Essential assistance (often referred to as “emergency protective measures”) FEMA may provide under a Presidential major disaster declaration.

²⁹ 42 U.S.C. 5173, Assistance FEMA may provide for debris removal.

³⁰ 42 U.S.C. 5192, Federal emergency assistance FEMA may provide under a Presidential emergency declaration.

³¹ 42 U.S.C. 5172, Assistance FEMA may provide for the repair, restoration, and replacement of damaged facilities.

³² See 42 U.S.C. 5159.

10.8(d)(1): CATEXs: Criteria.

Paragraph (d)(1) of § 10.8 addresses the criteria FEMA uses for determining those categories of actions that normally do not require either an EA or EIS, including actions that have (i) minimal or no effect on environmental quality, (ii) no significant change to existing environmental conditions, and (iii) no significant cumulative environmental impact. There is no direct correlation of paragraph (d)(1) to the DHS Directive or Instruction; however, section V.B of the DHS Instruction details the DHS process for adding to, revising, or deleting items on the DHS list of CATEXs. Under section V.B.2 of the DHS Instruction, a proposed action must meet three conditions in order to be categorically excluded: (1) it must clearly fit into a CATEX category listed in Appendix A, (2) it is not a piece of a larger action, and (3) no extraordinary circumstances exist. Extraordinary circumstances are discussed more fully below.

10.8(d)(2): CATEXs: List of exclusion categories.

Paragraph (d)(2) of § 10.8 lists FEMA's CATEXs. For the most part, the list is unchanged in the DHS Instruction. The DHS Instruction lists the CATEXs that apply to the entire Department in sections A through G, and N of Appendix A.³³ It lists the CATEXs that apply only to FEMA in section M of Appendix A. The CATEXs that are listed in paragraph (d)(2), along with any differences between (d)(2) and the DHS Instruction, are noted as follows:

³³ Each section covers specific activities, as follows: Section A, Administrative and Regulatory Activities; Section B, Operational Activities; Section C, Real Estate Activities; Section D, Repair and Maintenance Activities; Section E, Construction, Installation, and Demolition Activities; Section F, Hazardous/Radioactive Materials Management and Operations; Section G, Training and Exercises; Section N, Federal Assistance Activities. CATEXs are numbered within each section; for example, A1, A2, A3; B1, B2, B3.

44 CFR 10.8(d)(2)(i): Administrative actions such as personnel actions, travel, or procurement of supplies in support of normal day-to-day activities and disaster related activities. The DHS Instruction covers administrative actions generally in section A of Appendix A. It covers personnel actions and travel in CATEX A1, and it covers procurement in CATEX A6.

44 CFR 10.8(d)(2)(ii): Preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents related to actions that qualify for CATEXs. There is no direct correlation to this CATEX in the DHS Instruction.

However, the DHS Instruction does include a CATEX (A3) for these documents if they are (1) strictly of an administrative or procedural nature, (2) they implement, without substantive change, statutory or regulatory requirements, (3) they implement, without substantive change, procedures, manuals, and other guidance documents, (4) they interpret or amend an existing regulation without changing its environmental effect, (5) they provide technical guidance on safety or security matters, or, (6) they provide guidance for the preparation of security plans.

44 CFR 10.8(d)(2)(iii): Studies that involve no commitment of resources other than manpower and associated funding. There is no direct correlation to this CATEX in the DHS Instruction. However, the DHS Instruction does include a CATEX (A4) for information gathering, data analysis and processing, information dissemination, review, interpretation, and development of documents, including studies, reports, proposals, analyses, literature reviews; computer modeling; and non-intrusive intelligence gathering activities.

44 CFR 10.8(d)(2)(iv): Inspection and monitoring activities, granting of variances, and actions to enforce Federal, State, or local codes, standards, or regulations.

There is no direct correlation to this CATEX in the DHS Instruction. The DHS Instruction does not include a CATEX for the granting of variances. It does include several CATEXs that cover inspection, monitoring, and enforcement activities as follows: CATEX C10, Real property inspections to ensure compliance with deed or easement restrictions; CATEX M1, with respect to FEMA's administration of the National Flood Insurance Program, actions associated with inspections and monitoring, enforcement of Federal, State, Tribal, or local floodplain management codes, standards, or regulations, except for the suspension of communities from the National Flood Insurance Program; CATEX M11, information and data gathering and reporting in support of emergency and disaster response and recovery activities, including ground and aerial reconnaissance and structure inspection; and CATEX N1, with respect to administrative actions associated with grants management, conducting inspections, financial audits, and monitoring activities.

44 CFR 10.8(d)(2)(v): Training activities and both training and operational exercises utilizing existing facilities in accordance with established procedures and land use designations. Section G of Appendix A of the DHS Instruction covers training and exercises. In particular, it covers in CATEX G1 training of homeland security personnel, including international, Tribal, State, and local agency representatives using existing facilities where the training occurs in accordance with applicable permits and other requirements for the protection of the environment. In addition, CATEX G2 covers projects, grants, cooperative agreements, contracts, or activities to design, develop, and

conduct national, State, local, or international exercises to test the readiness of the nation to prevent or respond to a terrorist attack or a natural or manmade disaster and where conducted in accordance with existing facility or land use designations.

44 CFR 10.8(d)(2)(vi): Procurement of goods and services for support of day-to-day and emergency operational activities, and the temporary storage of goods other than hazardous materials, so long as storage occurs on previously disturbed land or in existing facilities. CATEX A6 of the DHS Instruction covers procurement of non-hazardous goods and services, and storage, recycling, and disposal of non-hazardous materials and wastes, that complies with applicable requirements and is in support of routine administrative, operational, or maintenance activities. Storage activities must occur on previously disturbed land or in existing facilities. Examples include but are not limited to: office supplies, equipment, mobile assets, utility services, chemicals and low level radio nuclides for laboratory use, deployable emergency response supplies and equipment, and waste disposal and contracts for waste disposal in established permitted landfills and facilities.

44 CFR 10.8(d)(2)(vii): The acquisition of properties and the associated demolition/removal or relocation of structures under any applicable authority when the acquisition is from a willing seller, the buyer coordinated acquisition planning with affected authorities, and the acquired property will be dedicated in perpetuity to uses that are compatible with open space, recreational, or wetland practices. CATEX N3 of the DHS Instruction covers Federal assistance for the acquisition of properties and associated demolition/removal when the acquisition is from a willing seller and land is deed restricted to open space, recreational, wildlife habitat, or wetland uses in perpetuity.

CATEX N6 covers Federal assistance for the relocation of structures and facilities, including the realignment of linear facilities that are part of a bigger system, when they do not involve ground disturbance of more than one acre. This category does not apply to the following: actions that involve hardening or armoring of stream banks, unless they use stream or stream bank bioengineering techniques that improve fish passage or habitat; realignment actions affecting a regulatory floodway if they result in any increase in flood levels during the base flood discharge; or actions occurring seaward of the limit of moderate wave action (or V zone when the limit of moderate wave action has not been identified).

44 CFR 10.8(d)(2)(viii): Acquisition or lease of existing facilities where planned uses conform to past use or local land use requirements. CATEX C1 of the DHS Instruction covers acquisition of an interest in real property that is not within or adjacent to environmentally sensitive areas, including interests less than a fee simple, by purchase, lease, assignment, easement, condemnation, or donation, which does not result in a change in the functional use of the property.

44 CFR 10.8(d)(2)(ix): Acquisition, installation, or operation of utility and communication systems that use existing distribution systems or facilities, or currently used infrastructure rights-of-way. CATEX E1 of the DHS Instruction covers construction, installation, operation, maintenance, and removal of utility and communication systems (such as mobile antennas, data processing cable, and similar electronic equipment) that use existing rights-of-way, easements, utility distribution systems, and/or facilities. This is limited to activities with towers where the resulting total height does not exceed 200 feet and where the Federal Communications

Commission would not require an EA or EIS for the acquisition, installation, operation or maintenance.

44 CFR 10.8(d)(2)(x): Routine maintenance, repair, and grounds-keeping activities at FEMA facilities. CATEX D3 in the DHS Instruction covers repair and maintenance of Department³⁴-managed buildings, roads, airfields, grounds, equipment, and other facilities which do not result in a change in functional use or an impact on a historically significant element or setting (e.g., replacing a roof, painting a building, resurfacing a road or runway, pest control activities, restoration of trails and firebreaks, culvert maintenance, grounds maintenance, existing security systems, and maintenance of waterfront facilities that does not require individual regulatory permits).

44 CFR 10.8(d)(2)(xi): Planting of indigenous vegetation. CATEX N12 of the DHS Instruction covers Federal assistance for planting of indigenous vegetation.

44 CFR 10.8(d)(2)(xii): Demolition of structures and other improvements or disposal of uncontaminated structures and other improvements to permitted off-site locations, or both. CATEX E4 of the DHS Instruction covers the removal or demolition, along with subsequent disposal of debris to permitted or authorized off-site locations, of non-historic buildings, structures, other improvements, and/or equipment in compliance with applicable environmental and safety requirements.

44 CFR 10.8(d)(2)(xiii): Physical relocation of individual structures where FEMA has no involvement in the relocation site selection or development. Although the DHS Instruction does not include a CATEX exactly on point with this provision, CATEX N6, which covers Federal assistance for the relocation of structures and facilities, including

³⁴ The DHS Instruction in Section II defines “Department” to include FEMA.

the realignment of linear facilities that are part of a bigger system, when they do not involve ground disturbance of more than one acre, addresses it most closely.

44 CFR 10.8(d)(2)(xiv): Granting of community-wide exceptions for floodproofed residential basements meeting the requirements of 44 CFR 60.6(c) under the National Flood Insurance Program. This CATEX is not discussed in the FEMA Directive or Instruction because since the addition of this CATEX, the National Flood Insurance Program has concluded it is unnecessary, as work on basements is not considered a major Federal action subject to NEPA review.

44 CFR 10.8(d)(2)(xv): Repair, reconstruction, restoration, elevation, retrofitting, upgrading to current codes and standards, or replacement of any facility in a manner that substantially conforms to the preexisting design, function, and location. This CATEX is covered in part by the statutory exclusion at 42 U.S.C. 5159, and in part by CATEX N7 of the DHS Instruction which covers Federal assistance for the reconstruction, elevation, retrofitting, upgrading to current codes and standards, and improvements of pre-existing facilities in existing developed areas with substantially completed infrastructure, when the immediate project area has already been disturbed, and when those actions do not alter basic functions, do not exceed capacity of other system components, or modify intended land use. CATEX N7 also states that this category does not include actions within or affecting streams or stream banks or actions seaward of the limit of moderate wave action (or V zone when the limit of moderate wave action has not been identified).

44 CFR 10.8(d)(2)(xvi): Improvements to existing facilities and the construction of small scale hazard mitigation measures in existing developed areas with substantially completed infrastructure, when the immediate project area has already been disturbed,

and when those actions do not alter basic functions, do not exceed capacity of other system components, or modify intended land use, provided the operation of the completed project will not, of itself, have an adverse effect on the quality of the human environment. This FEMA CATEX, similar to the FEMA CATEX at 44 CFR 10.8(d)(2)(xv), is covered by CATEX N7 of the DHS Instruction.

44 CFR 10.8(d)(2)(xvii): Actions conducted within enclosed facilities where all airborne emissions, waterborne effluent, external radiation levels, outdoor noise, and solid and bulk waste disposal practices comply with existing Federal, State, and local laws and regulations. CATEX B1 of the DHS Instruction, while slightly different than the FEMA CATEX, covers actions within enclosed facilities; specifically, CATEX B1 covers research, development, testing, and evaluation activities, or laboratory operations conducted within existing enclosed facilities consistent with previously established safety levels and in compliance with applicable Federal, Tribal, State, and local requirements to protect the environment when it will result in no, or de minimus, change in the use of the facility. CATEX B1 requires an EA (and possibly an EIS) if the operation will substantially increase the extent of potential environmental impacts or is controversial.

44 CFR 10.8(d)(2)(xviii): Planning and administrative activities in support of emergency and disaster response and recovery. Paragraphs (A) through (E) of § 10.8(d)(2)(X)(viii) cover these activities as follows:

44 CFR 10.8(d)(2)(xviii)(A): Activation of the Emergency Support Team and convening of the Catastrophic Disaster Response Group at FEMA headquarters. CATEX M10 of the DHS Instruction covers activation of response and recovery frameworks and operations (e.g., National Response Framework, National Disaster Recovery Framework,

National Response Coordination Center, Regional Response Coordination Center, Emergency Response Teams, Incident Management Assistance Teams, Emergency Support Functions, Recovery Support Functions).

44 CFR 10.8(d)(2)(xviii)(B): Activation of the Regional Operations Center and deployment of the Emergency Response Team, in whole or in part. This FEMA CATEX, similar to the FEMA CATEX at 44 CFR 10.8(d)(2)(xviii)(A), is covered by CATEX M10 of the DHS Instruction.

44 CFR 10.8(d)(2)(xviii)(C): Deployment of Urban Search and Rescue teams. CATEX M3 of the DHS Instruction covers Urban Search and Rescue (USR) activities, including deployment of USR teams.

44 CFR 10.8(d)(2)(xviii)(D): Situation Assessment including ground and aerial reconnaissance. CATEX M11 of the DHS Instruction covers information and data gathering and reporting in support of emergency and disaster response and recovery activities, including ground and aerial reconnaissance and structure inspection.

44 CFR 10.8(d)(2)(xviii)(E): Information and data gathering and reporting efforts in support of emergency and disaster response and recovery and hazard mitigation. This FEMA CATEX, similar to the FEMA CATEX at 44 CFR 10.8(d)(2)(xviii)(D), is covered by CATEX M11 of the DHS Instruction.

44 CFR 10.8(d)(2)(xix): Emergency and disaster response, recovery and hazard mitigation activities under the Stafford Act. Paragraphs (A) through (O) of § 10.8(d)(2)(xix) cover these activities as follows:

44 CFR 10.8(d)(2)(xix)(A): General Federal Assistance (section 402 of the Stafford Act). This provision is statutorily excluded from NEPA by 42 U.S.C. 5159. The DHS Instruction does not include statutory exclusions in its list of CATEXs.

44 CFR 10.8(d)(2)(xix)(B): Essential Assistance (section 403 of the Stafford Act). This provision is statutorily excluded from NEPA by 42 U.S.C. 5159. The DHS Instruction does not include statutory exclusions in its list of CATEXs.

44 CFR 10.8(d)(2)(xix)(C): Debris Removal (section 407 of the Stafford Act). This provision is statutorily excluded from NEPA by 42 U.S.C. 5159. The DHS Instruction does not include statutory exclusions in its list of CATEXs.

44 CFR 10.8(d)(2)(xix)(D): Temporary Housing (section 408 of the Stafford Act),
except locating multiple mobile homes or other readily fabricated dwellings on sites,
other than private residences, not previously used for such purposes. CATEX N14(b) of the DHS Instruction generally covers the Individuals and Households Program (IHP) (authorized by section 408 of the Stafford Act), which includes temporary housing. However, CATEX N14(b) excludes any grant that will be used for purchasing mobile homes or other readily fabricated dwellings.

44 CFR 10.8(d)(2)(xix)(E) Unemployment Assistance (section 410 of the Stafford Act). CATEX N14(a) of the DHS Instruction covers unemployment assistance under section 410 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(F): Individual and Family Grant Program (section 411 of the Stafford Act), except for grants that will be used for restoring, repairing or building private bridges, or purchasing mobile homes or other readily fabricated dwellings. The

Individual and Family Grant Program is a defunct program (the IHP superseded it) and the DHS Instruction does not include it in its list of CATEXs.

44 CFR 10.8(d)(2)(xix)(G): Food Coupons and Distribution (section 412 of the Stafford Act). CATEX N14(c) of the DHS Instruction covers food coupons and distribution under section 412 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(H): Food Commodities (section 413 of the Stafford Act). CATEX N14(d) of the DHS Instruction covers food commodities under section 413 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(I): Legal Services (section 415 of the Stafford Act). CATEX N14(e) of the DHS Instruction covers legal services under section 415 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(J): Crisis Counseling Assistance and Training (section 416 of the Stafford Act). CATEX N14(f) of the DHS Instruction covers crisis counseling and training under section 416 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(K): Community Disaster Loans (section 417 of the Stafford Act). CATEX N14(g) of the DHS Instruction covers community disaster loans under section 417 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(L): Emergency Communications (section 418 of the Stafford Act). CATEX N14(h) of the DHS Instruction covers emergency communications under section 418 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(M): Emergency Public Transportation (section 419 of the Stafford Act). CATEX N14(i) of the DHS Instruction covers emergency public transportation under section 419 of the Stafford Act.

44 CFR 10.8(d)(2)(xix)(N): Fire Management Assistance Grants (section 420 of the Stafford Act). CATEX N14(j) of the DHS Instruction covers fire management assistance grants under section 420 of the Stafford Act,

44 CFR 10.8(d)(2)(xix)(O): Federal Emergency Assistance (section 502 of the Stafford Act). This provision is statutorily excluded from NEPA by 42 U.S.C. 5159. The DHS Instruction does not include statutory exclusions in its list of CATEXs.

44 CFR 10.8(d)(3): CATEXs: Extraordinary circumstances.

Paragraph (d)(3) of § 10.8 covers extraordinary circumstances. It requires an EA to be prepared if extraordinary circumstances exist such that an action that is categorically excluded from NEPA may have a significant adverse environmental impact. Similarly, under the DHS Instruction at section V.B.2.c, the presence of an extraordinary circumstance precludes the application of a CATEX. Paragraphs (i) through (x) of § 10.8(d)(3) list the extraordinary circumstances that may have a significant environmental impact. The extraordinary circumstances listed in paragraphs (d)(3)(i) through (x), along with any differences between (d)(3)(i) through (x) and the DHS Instruction, are as follows:

44 CFR 10.8(d)(3)(i) Greater scope or size than normally experienced for a particular category of action. The DHS Instruction at section V.B.2.c.viii correlates almost exactly to this provision, but adds the word “significantly” before “greater scope or size.”

44 CFR 10.8(d)(3)(ii) Actions with a high level of public controversy. The DHS Instruction at section V.B.2.c.vi covers actions likely to be controversial. Specifically, it covers actions where the effect on the quality of the human environment is likely to be

highly controversial in terms of scientific validity, likely to be highly uncertain, or likely to involve unique or unknown environmental risks, including effects that may result from the use of new technology or unproven technology. However, it states that controversy over, including public opposition to, a proposed action absent any demonstrable potential for significant environmental impacts does not itself constitute an extraordinary circumstance.

44 CFR 10.8(d)(3)(iii) Potential for degradation, even though slight, of already existing poor environmental conditions. The DHS Instruction in section V.B.2.c.ix covers actions that have the potential for significant degradation of already existing poor environmental conditions, as well as the initiation of a potentially significant environmental degrading influence, activity, or effect in areas not already significantly modified from their natural condition.

44 CFR 10.8(d)(3)(iv) Employment of unproven technology with potential adverse effects or actions involving unique or unknown environmental risks. As noted above, the DHS Instruction at section V.B.2.c.vi covers effects that may result from the use of unproven technology likely to involve unique or unknown environmental risks.

44 CFR 10.8(d)(3)(v) Presence of endangered or threatened species or their critical habitat, or archaeological, cultural, historical, or other protected resources. The DHS Instruction at section V.B.2.c.iii covers actions that may have a potentially significant effect on historic properties (e.g., districts, sites, buildings, structures, or objects) that are listed in or eligible for listing in the National Register of Historic Places, affect traditional cultural properties or sacred sites, or lead to the loss or destruction of a significant scientific, cultural, or historical resource.

44 CFR 10.8(d)(3)(vi) Presence of hazardous or toxic substances at levels which exceed Federal, State, or local regulations or standards requiring action or attention. The DHS Instruction at section V.B.2.c.v covers a potential or threatened violation of a Federal, State, or local law or requirement imposed to protect the environment, including Federal, Tribal, State, or local requirements to control hazardous or toxic substances.

44 CFR 10.8(d)(3)(vii) Actions with the potential to affect special status areas adversely or other critical resources such as wetlands, coastal zones, wildlife refuge and wilderness areas, wild and scenic rivers, sole or principal drinking water aquifers. The DHS Instruction at section V.B.2.c.ii covers actions that may have a potentially significant effect on species or habitats protected by the Endangered Species Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, Magnuson-Stevens Fishery Conservation and Management Act, or other law protecting a species or habitat. In addition, the DHS Instruction at section V.B.2.c.iv covers actions that may have a potentially significant effect on an environmentally sensitive area.³⁵

44 CFR 10.8(d)(3)(viii) Potential for adverse effects on health or safety. The DHS Instruction at section V.B.2.c.i covers actions that may have a potentially significant effect on public health or safety.

44 CFR 10.8(d)(3)(ix) Potential to violate a Federal, State, local, or Tribal law or requirement imposed for the protection of the environment. The DHS Instruction at

³⁵ The DHS Instruction defines “environmentally sensitive area” as an area designated by law, regulation, or executive order that merits special protection or stewardship because of its value as a natural, historic, or cultural resource. Examples include, but are not limited to: (1) proposed or designated critical habitat for threatened or endangered species; (2) properties listed or eligible for listing on the National Register of Historic Places; and (3) areas having special designation or recognition such as prime or unique agricultural lands, coastal zones, designated wilderness or wilderness study areas, wild and scenic rivers, 100 year floodplains, wetlands, sole source aquifers, Marine Sanctuaries, National Wildlife Refuges, National Parks, National Monuments, essential fish habitat, etc. (emphasis added).

section V.B.2.c.v covers actions that may have a potential or threatened violation of a Federal, State, or local law or requirement imposed to protect the environment.

44 CFR 10.8(d)(3)(x) Potential for significant cumulative impact when the proposed action is combined with other past, present, and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves. The DHS Instruction at section V.B.2.c.x covers actions related to other actions with individually insignificant, but cumulatively significant impacts.

44 CFR 10.8(d)(4): CATEXs: Documentation.

Paragraph (d)(4) of § 10.8 requires the Regional Administrator to prepare and maintain an administrative record of each proposal that is determined to be categorically excluded from the preparation of an EA or EIS. The DHS Instruction at section V.B.4 requires a record of environmental consideration whenever a CATEX denoted by an asterisk is applied³⁶ in order to document that potential impacts to the human environment have been appropriately considered and the determination that the proposed action is either appropriately categorically excluded or must be analyzed further through an EA or EIS process. In addition, the DHS Instruction acknowledges there may be instances where a DHS component may choose to prepare a record of environmental consideration when it is not otherwise required. It is not mandatory, however.

44 CFR 10.8(d)(5): CATEXs: Revocation.

Paragraph (d)(5) of § 10.8 requires the Regional Administrator to revoke a determination of a CATEX and require full environmental review if, subsequent to granting an exclusion, the Regional Administrator determines that due to changes in the

³⁶ CATEXs denoted by an asterisk include classes of actions that have a higher possibility of involving extraordinary circumstances that may preclude the use of a CATEX. See DHS Instruction section V.B.4.

proposed action or in light of new findings, the action no longer meets the requirements for a CATEX. Although there is no specific provision directly on point in the new DHS or FEMA Directives or Instructions, the FEMA Instruction in section 2.2.E does require FEMA to communicate to applicants the need to notify FEMA of any changes to the proposed action, alternatives, or project schedule; the FEMA Instruction specifically states that when changes to project plans create substantial changes or significant new circumstances or information relevant to EHP reviews, FEMA will seek assistance from applicants so FEMA can prepare supplemental or additional EHP analyses as required under EHP requirements.

44 CFR 10.8(d)(6): CATEXs: Changes to the list of exclusion categories.

Paragraph (d)(6) of § 10.8 requires FEMA to continually review and refine the list of exclusion categories as additional categories are identified and experience is gained in the CATEX process. Paragraph (d)(6) also outlines the internal process for a FEMA entity to recommend additions or changes to the list. The DHS Instruction in section V.B.3 addresses the establishment, deletion, and revision of CATEXs. Under the DHS Instruction, components forward proposals to substantively revise or establish new CATEXs (together with justification) to the Director of SEP for approval. Proposals to substantively revise or establish new CATEXs require an administrative record that meets CEQ standards and are subject to both CEQ review and public comment. SEP reviews such proposals to determine whether the CATEX is appropriate for inclusion in the DHS-wide list or a component-specific list. SEP revises Appendix A, Table 1 to include approved new or substantially revised CATEXs. In addition, components notify SEP of non-substantive revisions to or deletions of component-specific CATEXs so that

SEP can amend the table accordingly. Finally, all CATEXs and the list of extraordinary circumstances are reviewed by SEP in consultation with the components at least every 7 years to ensure they are still appropriate, and to identify any changes that may be needed in light of additional experience gained in applying the CATEXs to proposed DHS actions.

4. 44 CFR 10.8(e): Actions that normally require an EA.

Paragraph (e) of § 10.8 requires the Regional Administrator to prepare an EA when a proposal is not one that normally requires an EIS and does not qualify as a CATEX. Similarly, the DHS Instruction in section V.C.2.a states that when a proposed action is not in a category of actions described in an available DHS CATEX and there is not enough information to determine that the proposed action will have significant environmental impacts requiring an EIS, the EA process is used to determine, through environmental impact evaluation and opportunity for public involvement, if the impacts on the quality of the human environment would be significant or not.

5. 44 CFR 10.8(f): Documentation

This paragraph 10.8(f) is duplicative of paragraph 10.8(d)(4), which is addressed earlier in this preamble.

6. 44 CFR 10.8(g): Actions that normally require an EA

This paragraph 10.8(g) is duplicative of paragraph 10.8(e), which is addressed earlier in this preamble.

I. 44 CFR 10.9 Preparation of EAs.

1. 44 CFR 10.9(a) When to prepare.

Paragraph (a) of § 10.9 requires the Regional Administrator to begin preparation of an EA as early as possible after the determination that an assessment is required, and may prepare an assessment at any time to assist planning and decision making. The DHS Instruction covers preparation of an EA in section V.C. It does not specifically state that an EA should be prepared as early as possible, but it does state that a component can decide to prepare an EA as a best practice planning tool to inform decision-makers on the environmental impacts of its actions.

2. 44 CFR 10.9(b) Content and format.

Paragraph (b) of § 10.9 covers the content and format of an EA, and requires the EA to include the purpose and need for the proposed action, a description of the proposed action, alternatives considered, environmental impact of the proposed action and alternatives, listing of agencies and persons consulted, and a conclusion of whether to prepare an EIS. The DHS Instruction includes the same requirements in section V.C.8.

3. 44 CFR 10.9(c) Public participation.

Paragraph (c) of § 10.9 requires the Regional Administrator to involve environmental agencies, applicants, and the public, to the extent practicable, in preparing EAs. In determining “to the extent practicable,” it requires the Regional Administrator to consider the magnitude of the proposal, likelihood of public interest, the need to act quickly, the likelihood of meaningful public comment, national security classification issues, the need for permits, and the statutory authority of the environmental agency regarding the proposal.

The DHS Instruction at section V.C.7 covers the public involvement process involving an EA. It states that public involvement requirements can be met during

scoping at the start of an evaluation and/or by distributing a draft EA and draft finding of no significant impact for public review. It states that where a good faith effort has been used to seek out and involve the public in the drafting of an EA and no significant impacts (including potential for an impact on the quality of the human environment that is highly controversial) have been identified, a component can complete an EA and finding of no significant impact without circulating a draft document for public review. It states that a good faith effort includes consideration of the extent of other related public involvement efforts, as well as consideration of the following factors found in section IV.G of the DHS Instruction:

- The size and type of the proposed action.
- Whether the proposed action is of international, national, regional, or local interest.
- The potential environmental impacts of the proposed action.
- Extent of previous environmental analysis for the proposed action and/or the geographical location where the action would occur.
- Extent of anticipated controversy over the potential environmental effects of the proposed action, based on DHS experience with similar proposed actions.
- Urgency of the proposed action.
- National security classification of the proposed action.
- The presence of Tribal, minority, or low-income populations that may be impacted by the proposed action.

- Other laws and requirements to protect the environment that may require public review; for example, a determination of conformity with a State air quality implementation plan may require public review.

In addition, the FEMA Instruction at section 3.4.D.3 addresses public involvement, stating that FEMA will involve environmental agencies, applicants, tribes, and the public, to the extent practicable, in preparing EAs and EISs. It states that in determining “to the extent practicable” and appropriate public involvement methods and timing, FEMA will consider the following (which mirror paragraph (c) of § 10.9):

- Magnitude of the proposal;
- Likelihood of public interest;
- Need to act quickly;
- Likelihood of meaningful public comment;
- National security classification issues;
- Need for permits; and
- Statutory authority of environmental agency regarding the proposal.

4. 44 CFR 10.9(d) When to prepare an EIS.

Paragraph (d) of § 10.9 requires the Regional Administrator to prepare an EIS for all major Agency actions significantly affecting the quality of the human environment. It states that the test of what is a “significant” enough impact to require an EIS is found in the CEQ regulations at 40 CFR 1508.27 (defining “significantly”). Similarly, the DHS Instruction at section V.D.1 states that an EIS is prepared for major Federal actions significantly affecting the quality of the human environment (see 40 CFR Part 1502, criteria for an EIS), and in section V.D.2 states that a component prepares an EIS when

its proposed action and/or any reasonable alternative(s) would have significant environmental effects, including actions where an EA concluded that there would be significant impacts, and therefore preparation of an EIS was necessary. In addition, the FEMA Instruction at section 3.2.B.2 lists the types of actions likely to be significant and thus may trigger the preparation of an EIS.

5. 44 CFR 10.9(e) Finding of no significant impact.

Paragraph (e) of § 10.9 states that if the Regional Administrator determines on the basis of the EA not to prepare an EIS, the Regional Administrator shall prepare a finding of no significant impact in accordance with 40 CFR 1501.4(e) of the CEQ regulations. It states that the assessment and the finding shall be submitted to the Environmental Officer and the Office of Chief Counsel for approval, and if such approval is obtained, the Regional Administrator shall then make the finding of no significant impact available to the public as specified in 40 CFR 1506.6 of the CEQ regulations. Finally, paragraph (e) states that a finding of no significant impact is not required when the decision not to prepare an EIS is based on a CATEX.

The DHS Instruction in section V.C.9 states that a component's final determination on the environmental impacts of a proposed action is required upon the completion of an EA. It states that the EA process concludes with a finding of no significant impact when (1) the evaluation of the impacts of the proposed action on the human environment indicates that the environmental effects would not be significant, or (2) the component commits to including measures in the proposed action that mitigate impacts to a level of insignificance. The DHS Instruction states that a finding of no significant impact is a separate document from an EA, but may be integrated into any

other appropriate decision-making document that can be made publicly available, provided it includes the minimum content requirements in Section V.C.10 of the DHS Instruction.

The FEMA Instruction in section 3.2.A.2.b states that upon documenting a CATEX, the NEPA process is complete (implying a finding of no significant impact is not required). Section VII of the FEMA Directive describes procedures, program requirements, and delegation of EHP Approval Authority required to approve findings of no significant impacts.

6. 44 CFR 10.9(f) Environmental Officer or Office of Chief Counsel

Disallowance.

Paragraph (f) of § 10.9 states that if the Environmental Officer or Office of Chief Counsel disagrees with the finding of no significant impact, the Regional Administrator shall prepare an EIS, and prior to preparation of an EIS, the Regional Administrator shall forward a notice of intent to prepare an EIS to the Environmental Officer, who shall publish such notice in the Federal Register.

As stated above, section VII of the FEMA Directive addresses program requirements and delegations of EHP Approval Authority for findings of no significant impacts. The dual signatory process outlined in section VII of the FEMA Directive is an updated structure that operates similarly to the structure outlined in 44 CFR Part 10. Under the FEMA Directive, the Director of OEHP or delegate must approve a finding of no significant impact, and the Office of Chief Counsel serves in an advisory role. The Environmental Officer or delegate would consult with the Office of Chief Counsel and take under advisement the legal counsel provided.

7. 44 CFR 10.9(g) EIS determination of Regional Administrator.

Paragraph (g) of § 10.9 states that the Regional Administrator³⁷ may decide on his/her own to prepare an EIS, and in such case, the Regional Administrator shall forward a notice of intent to prepare the EIS to the Environmental Officer who shall publish such notice in the Federal Register. EHP responsibilities outlined in the FEMA Directive represent a new structure which operates differently than the structure set out in 44 CFR Part 10. Under the new structure, the Regional Administrator would notify the appropriate EHP personnel in his/her region to prepare the notice of intent (FEMA Instruction section 3.2.B.2).

J. 44 CFR 10.10 Preparation of EISs.

1. 44 CFR 10.10(a) Scoping.

Paragraph (a) of § 10.10 states that after determination that an EIS will be prepared and publication of the notice of intent, the Regional Administrator will initiate the scoping process in accordance with 40 CFR 1501.7 of the CEQ regulations. The FEMA Instruction in section 3.2.A.1 states that FEMA will determine the range of issues that need to be addressed and the level of documentation required during the scoping process, and as part of the scoping process, FEMA may establish time limits for the NEPA process and hold early scoping meetings to engage stakeholders and the public at large. It states that the FEMA official with the appropriate level of EHP approval authority will lead these scoping efforts.

2. 44 CFR 10.10(b) Preparation.

³⁷ The regulatory text incorrectly refers to “Regional Director”; FEMA updated internal titles by technical amendment in 2009 (74 FR 15328) but overlooked the update for this reference.

Paragraph (b) of § 10.10 states that based on the scoping process, the Regional Administrator will begin preparation of the EIS, and detailed procedures for preparation of the EIS are provided in Part 1502 of the CEQ regulations. The DHS Instruction addresses preparation of the EIS in section V.D and also refers to Part 1502 of the CEQ regulations. The FEMA Instruction discusses EIS preparation in Chapter 3 and includes appropriate references to the DHS Instruction and CEQ regulations.

3. 44 CFR 10.10(c) Supplemental EISs.

Paragraph (c) of § 10.10 states that the Regional Administrator may at any time supplement a draft or final EIS, and that the Regional Administrator shall prepare a supplement to either a draft or final EIS when required under the criteria set forth in 40 CFR 1502.9(2).³⁸ It states that the Regional Administrator will prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft or final statement and will introduce the supplement into their formal administrative record.

The DHS Instruction in section V.D.6 addresses supplemental EISs. It states that a component may prepare a supplemental EIS (SEIS) if there are substantial changes to the proposal that are relevant to environmental concerns or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposal or its impacts, and refers to 40 CFR 1502.9(c)(1). It states that a component may also supplement a draft EIS (DEIS) or Final EIS (FEIS) at any time to further the evaluation presented in the original EIS.

³⁸ This appears to be a typo, as there is no 40 CFR 1502.9(2). The correct cite is most likely 40 CFR 1502.9(c), which addresses circumstances that would warrant a supplemental EIS and procedures for preparing one.

The DHS Instruction further states that components prepare, circulate, and file a supplement to a DEIS or FEIS in the same manner as any other DEIS or FEIS, except that scoping is optional for an SEIS (referring to 40 CFR 1502.9(c)(4)), and that public notice methods are chosen that are appropriate for reaching persons who may be interested in or affected by the proposal; if an FEIS is supplemented after a record of decision has been completed, the component must complete a new record of decision and publishes a notice of availability of the record of decision and the supplemental information in the Federal Register.

The FEMA Instruction briefly addresses supplemental analyses at section 3.6.F and refers back to the DHS Instruction at section V.D.6.

4. 44 CFR 10.10(d) Circulation of EISs.

Paragraph (d) of § 10.10 requires the Regional Administrator to circulate draft and final EISs as prescribed in 40 CFR 1502.19³⁹ of the CEQ regulations, and that prior to signing off on a draft or final EIS, the Regional Administrator shall obtain the approval of the Environmental Officer and the Office of Chief Counsel. The FEMA Instruction at section 3.5.B.3. requires FEMA to follow 40 CFR 1502.19. As discussed above, the FEMA Directive addresses EHP Approval Authority of FEMA personnel, which reflects a different internal agency approval structure than that outlined in 44 CFR Part 10.

K. 44 CFR 10.11 Environmental information.

³⁹ 40 CFR 1502.19 addresses circulation of the EIS and requires agencies to circulate it to (1) any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved, (2) any appropriate Federal, State or local agency authorized to develop and enforce environmental standards, (3) the applicant, (4) any person, organization, or agency requesting the EIS, and (5) in the case of a final EIS, any person, organization, or agency which submitted substantive comments on the draft.

Section 10.11 states that interested persons may contact the Environmental Officer or the Regional Administrator for information regarding FEMA's compliance with NEPA. The FEMA Directive is intended for internal circulation within FEMA, not as a general reference for the public, so it does not include guidance for the general public. The FEMA Instruction at section 2.2 discusses Program responsibilities for supporting applicants throughout the EHP process including meeting requirements for notification and consultation with affected and interested parties (section 2.2.B.3). In addition, the DHS Directive and Instruction are on the DHS website at <http://www.dhs.gov/national-environmental-policy-act>, and FEMA will post the FEMA Directive and Instruction on the FEMA public website at www.fema.gov/media-library/assets/documents/118323. The public may find further information about FEMA's EHP process and requirements at www.fema.gov/office-environmental-planning-and-historic-preservation.

L. 44 CFR 10.12 Pre-implementation actions.

1. 44 CFR 10.12(a) Decision making.

Paragraph (a) of § 10.12 requires the Regional Administrator to ensure that decisions are made in accordance with the policies and procedures of NEPA, and that the NEPA process is integrated into the decision making process. The FEMA Directive in section VI.A requires the FEMA Administrator to consider the impacts of decisions on the human environment before actions are taken or decisions are made (VI.A.2.i), to regularly articulate the value of EHP (which includes NEPA) in the FEMA decision making process to managers and staff (VI.A.1.ii), and to fully integrate the EHP

requirements into planning and decision-making for all policies, programs, activities, and operations of FEMA (VI.A.1.v).

Paragraph (a) of § 10.12 also addresses the existence of a variety of FEMA programs, notes that each program will necessarily have different decision making procedures, and notes that review and approval authority may be exercised at various levels. As noted above, the FEMA Directive addresses EHP Approval Authority which can exist at various different FEMA levels (e.g., Heads of Offices, Programs, or Directorates; the Regional Administrators; Federal Coordinating Officers; Regional Environmental Officers), as well as the option for delegation of authority to appropriate personnel.

Finally, paragraph (a) of § 10.12 lists specific requirements that the Regional Administrator must follow under NEPA, for example, to consider the specific alternatives analyzed in an EIS when evaluating the proposal which is the subject of the EIS. The DHS Directive and Instruction and FEMA Directive and Instruction (section 3.2.C) include the same requirements and do not deviate from those listed in § 10.12, as these requirements are dictated by NEPA and the CEQ regulations.

2. 44 CFR 10.12(b) Record of decision.

Paragraph (b) of § 10.12 states that in those cases requiring an EIS, the Regional Administrator at the time of his/her decision, or if appropriate, his/her recommendation to Congress, shall prepare a concise public record of that decision. It states that the record of decision is not intended to be an extensive, detailed document for the purpose of justifying the decision, but rather, it is a concise document that sets forth the decision and

describes the alternatives and relevant factors considered as specified in 40 CFR 1505.2. Finally, it states that the record of decision will normally be less than 3 pages in length.

The DHS Instruction in section V.D.10 addresses the record of decision. It states that when a component decides whether or not to take action on a proposal covered by an EIS, it prepares a record of decision which contains the requirements listed in 40 CFR 1505.2. It states that a record of decision is a separate document from the EIS, and may be integrated into any other appropriate decision-making document that can be made publicly available provided that the content requirements are met, presents all the factors an agency considered when it reached its decision on whether to, and if so how to, proceed with the proposed action.

The FEMA Instruction in section 3.5.B.3 also addresses the record of decision, stating that an EIS will conclude with a record of decision to provide a concise public record of the decision whether to proceed with a proposed action. It states that a record of decision will complete the NEPA process, and will include the basis for the decision, summarize any EHP mitigation measures, and describe the alternatives and relevant factors considered during the NEPA process. It states that it will identify the environmentally preferred alternative, which is the alternative that will promote the national environmental policy as expressed in NEPA Section 101.

Neither the DHS Instruction nor the FEMA Instruction recommends a specific page length, but both refer to the “concise” nature of the document.

3. 44 CFR 10.12(c) Mitigation & 44 CFR 10.12(d) Monitoring.

Paragraph (c) of § 10.12 addresses mitigation throughout the NEPA process and paragraph (d) of § 10.12 addresses monitoring of the mitigation. Specifically, paragraph

(c) states that the Regional Administrator shall consider mitigating measures to avoid or minimize environmental harm and, in particular, harm to or within flood plains and wetlands. It states that mitigation measures or programs will be identified in the EIS and made available to decision makers, and that mitigation and other conditions established in the EIS or during its review and committed as part of the decision shall be implemented by the Regional Administrator.

Paragraph (d) states that if the Regional Administrator determines that monitoring is applicable for established mitigation, a monitoring program will be adopted to assure the mitigation measures are accomplished, and that the Regional Administrator shall provide monitoring information, upon request, as specified in 40 CFR 1505.3 (regarding monitoring). Finally, it states that this does not include standing or blanket requests for periodic reporting.

The DHS Instruction at section V.E addresses mitigation and monitoring together and provides requirements similar to those stated in § 10.12. It states that when a component commits to mitigation measures to reduce or eliminate potential adverse effects of an action, it is essential that the component implements the measures and monitors their effectiveness. It states that components commit to appropriate, practical, and implementable mitigation measures identified in a finding of no significant impact or record of decision that they have sufficient legal authority to implement or impose on applicants.

The DHS Instruction describes mitigation measures as practical and implementable, i.e., those that are reasonably expected to achieve their intended purpose; implementable mitigation measures require not only that the component have the

appropriate legal authority, but also that it can reasonably foresee the availability of resources for performing the mitigation. It states that where the mitigation is being imposed on an applicant for DHS funding or approval to perform their proposed action, components make the mitigation a condition of DHS approval of the applications from persons or organizations external to DHS (referring to the CEQ regulation on monitoring at 40 CFR 1505.3).

The DHS Instruction stresses that adequately documenting and monitoring mitigation advances NEPA's purpose of informed and transparent environmental decision-making, and that failure to implement, document, and/or monitor mitigation may undermine the integrity of the NEPA analysis, and may compromise the adequacy of the NEPA compliance effort. Once a component has committed to mitigation measures, the DHS Instruction requires all decisions to modify or suspend those measures to be made in consultation with the DHS Office of General Counsel and the component's respective Environmental Planning Program Manager.⁴⁰

The FEMA Instruction also addresses mitigation and monitoring together, in section 2.3.A. It states FEMA will consider EHP mitigation measures to avoid or minimize impacts identified during the EHP review process. It states that avoidance measures are the preferred method of EHP mitigation, and only when avoidance cannot be achieved because it is not feasible, practicable, or reasonable, may FEMA consider minimizing, rectifying, or compensating for the impacts of the action, in that order. It states that EHP mitigation measures will be identified in EHP review documentation as well as appropriate award documents and made available to decision makers, and that if

⁴⁰ This is FEMA's Director of the Office of Environmental Planning and Historic Preservation. See FEMA Directive section VI.E.

FEMA determines that monitoring is applicable for established EHP mitigation, a monitoring program will be adopted to assure EHP mitigation measures are implemented and intended outcomes are accomplished (section 2.3.B.2).

M. 44 CFR 10.13 Emergencies.

Section 10.13 states that in the event of an emergency, the Regional Administrator may be required to take immediate action with significant environmental impact. It states that the Regional Administrator shall notify the Environmental Officer of the emergency action at the earliest possible time so that the Environmental Officer may consult with CEQ, and in no event shall any Regional Administrator delay an emergency action necessary for the preservation of human life for the purpose of complying with the provision of this directive or the CEQ regulations. Section VI of the DHS Instruction addresses emergency actions, outlining four phases to apply when performing NEPA activities during an emergency: (1) secure lives and protect property, (2) determine applicability of NEPA, (3) notification of SEP, (4) determine level of NEPA evaluation.

The FEMA Instruction addresses emergencies in § 2.5 and covers the following circumstances: (1) Legal Exemption. FEMA will determine whether a legal exemption related to the proposed emergency action exists and, if so, the EHP requirements to which the exemption applies; (2) Principles, Requirements, and Guidelines do not apply when there is emergency work essential to save lives and protect property, public health, and safety performed under Sections 403 and 502 of the Stafford Act (42 U.S.C. 5170b and 5192); (3) Stafford Act declaration: FEMA may provide funding for emergency actions taken in direct response to a disaster event that were not subject to EHP review provided the actions satisfy other eligibility requirements as established by FEMA programs; (4)

Programmatic EHP Review and Existing Documentation: In cases where programmatic consultations, memoranda of agreement, biological assessments, general permits, and environmental analyses have already been conducted for the emergency action, FEMA will incorporate the existing documentation into its own analyses and documentation; (5) Emergency Consultations and Notifications: If the emergency action is not legally exempted and a previous analysis covering the action does not exist, emergency consultation with the appropriate resource/regulatory agency may be required. FEMA will consult with the appropriate resource/regulatory agency as soon as possible. The FEMA Instruction defines “emergency” for purposes of this section.⁴¹

N. 44 CFR 10.14 Flood plains and wetlands.

Section 10.14 states that for any action taken by FEMA in a flood plain or wetland, the provisions of Part 10 are supplemental to, and not instead of, the provisions of the FEMA regulation implementing Executive Order 11988, Floodplain Management, and Executive Order 11990, Protection of Wetlands (44 CFR Part 9). The introduction paragraph of Chapter 2 of the FEMA Instruction refers to other EHP requirements including Executive Orders 11988 and 11990, and indicates that the FEMA Directive and Instruction do not serve as implementing procedures for those requirements. The FEMA Directive and Instruction do not take the place of 44 CFR Part 9.

⁴¹ The FEMA Instruction defines “emergency” as “A natural or man-made disaster or other phenomenon of an exceptional, inevitable, and irresistible character demanding immediate action for the protection of human life, public safety, public health, or the environment and avoidance of significant loss of property if it relates to one of the other factors. This definition includes but is not limited to situations triggering emergency and major disaster declarations by the President under the Stafford Act.” The Stafford Act defines “emergency” for purposes of a Presidential emergency declaration as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” See 42 U.S.C. 5122(1).

O. 44 CFR Part 60 Criteria for Land Management and Use.

Section 60.6 states that the decision whether an EIS or other environmental document will be prepared, will be made in accordance with the procedures set out in 44 CFR Part 10. Because NEPA compliance procedures will no longer be set out in Part 10, but are set out in CEQ regulations, DHS implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and stating that the decision will be made in accordance with applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy.

P. 44 CFR Part 78 Flood Mitigation Assistance

Section 78.11 states that projects must be in conformance with 44 CFR Part 10, and any applicable environmental laws and regulations. FEMA is simply removing the reference to Part 10. This change reflects that projects must conform with applicable environmental laws and regulations, including NEPA requirements, even though those requirements are no longer set out in Part 10.

Q. 44 CFR Part 79 Flood Mitigation Grants

Section 79.3 states that it is FEMA's responsibility to "[c]omply with applicable Federal statutory, regulatory, and Executive Order requirements related to environmental and historic preservation compliance, including reviewing and supplementing, if necessary, the environmental analyses conducted by the State and subgrantee in accordance with part 10 of this chapter." 44 CFR 79.3(a)(6). FEMA is replacing the reference to Part 10 with a reference to applicable laws, regulations, and agency policy, as FEMA will comply with applicable CEQ regulations and Department and Agency-wide NEPA implementing procedures.

Section 79.6 states that mitigation grant projects must be in conformance with “part 9 of this chapter, Floodplain management and protection of wetlands, part 10 of this chapter, Environmental Considerations, §60.3 of this subchapter, Flood plain management criteria for flood-prone areas, and other applicable Federal, State, tribal, and local laws and regulations.” 44 CFR 79.6(d)(2). FEMA is simply removing the reference to Part 10. This change reflects that projects must conform with applicable environmental laws and regulations, including NEPA requirements, even though those requirements are no longer set out in Part 10.

R. 44 CFR Part 80 Property Acquisition and Relocation for Open Space

Section 80.5 describes FEMA’s responsibility to “[c]omply with applicable Federal statutory, regulatory, and Executive Order requirements related to environmental and historic preservation compliance, including reviewing and supplementing, if necessary, the environmental analyses conducted by the State and subgrantee in accordance with part 10 of this chapter.” 44 CFR 80.5(a)(5). FEMA is replacing the reference to Part 10 with a reference to applicable laws, regulations, and agency policy, as FEMA will comply with applicable CEQ regulations and Department and Agency-wide NEPA implementing procedures.

S. 44 CFR Part 206 Federal Disaster Assistance

Section 206.110 states that “[a]ssistance provided under this subpart must comply with the National Environmental Policy Act (NEPA) and other environmental laws and Executive Orders, consistent with 44 CFR part 10.” 44 CFR 206.110(l). Because NEPA compliance procedures are set out in CEQ regulations, DHS implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and revising

the paragraph to reflect that NEPA compliance procedures are set out in applicable laws, regulations, and policies.

Section 206.117, Housing Assistance, states that “[a]ny site upon which a FEMA-provided housing unit is placed must comply with applicable State and local codes and ordinances, as well as 44 CFR part 9, Floodplain Management and Protection of Wetlands, and 44 CFR part 10, Environmental Considerations, and all other applicable environmental laws and Executive Orders.” 44 CFR 206.117(b)(1)(ii)(C). Because NEPA compliance procedures are set out in CEQ regulations, DHS implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and revising the paragraph to reflect that NEPA compliance procedures are set out in applicable laws, regulations, and policies.

Section 206.220, Public Assistance Eligibility, states that the regulations under 44 CFR Part 10 apply to public assistance. Because the requirements formerly in Part 10 are now set out in applicable regulation, implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and clarifying that public assistance must conform to requirements in applicable environmental and historic preservation laws, regulations, and agency policies.

Section 206.434 states that in order to be eligible for the Hazard Mitigation Grant Program, a project must be in conformance with 44 CFR Part 10. Because the requirements formerly in Part 10 are now set out in applicable regulation, implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and clarifying that a project must conform to requirements in applicable environmental and historic preservation laws, regulations, and agency policies.

Section 206.436 requires that the hazard mitigation application include environmental information consistent with 44 CFR Part 10. FEMA is removing the reference to Part 10 and replacing it with a reference to applicable environmental and historic preservation laws, regulations, and agency implementing policies.

T. 44 CFR Part 209 Supplemental Property Acquisition and Elevation Assistance

Section 209.6 states that in order to be eligible, projects must conform with 44 CFR part 9, Floodplain Management and Protection of Wetlands; 44 CFR part 10, Environmental Considerations; and any applicable environmental and historic preservation laws and regulations. 44 CFR 209.6(b)(3). Because the requirements formerly in Part 10 are now set out in applicable regulation, implementing procedures, and supplemental instructions, FEMA is removing the reference to Part 10 and clarifying that projects must conform to requirements in applicable environmental and historic preservation laws, regulations, and agency policies.

IV. Regulatory Analysis

Administrative Procedure Act

The Administrative Procedure Act (APA) requires agencies to provide public notice and seek public comment on substantive regulations. See 5 U.S.C. 553. The APA, however, provides limited exceptions to this requirement for notice and public comment. See 5 U.S.C. 553(b). FEMA did not undertake notice and comment for this final rule because this final rule is a rule of “agency organization, procedure, or practice” and is exempt from notice and comment under section 553(b)(A) of the APA. 5 U.S.C. 553(b)(A). This rule addresses FEMA’s internal agency procedures for carrying out NEPA, and maintains existing practice within FEMA for completing the NEPA process.

FEMA is removing these internal agency procedures from regulation and replacing them with an internal Directive and Instruction. Notice and opportunity for public comment are not required because the internal procedures do not affect or impose substantive requirements on the public.

Section 553(d) of the APA also requires agencies to provide a 30-day delayed effective date for substantive rules. See 5 U.S.C. 553(d). However, FEMA finds that this final rule may be made effective immediately because it has good cause pursuant to section 553(d)(3) of the APA (5 U.S.C. 553(d)). This final rule removes internal agency NEPA procedures from the Code of Federal Regulations and replaces them with a Directive and Instruction. These procedures do not affect or impose substantive requirements on the public, but rather apply to internal agency procedure. Moreover, the Directive and Instruction maintain existing practice within FEMA for completing the NEPA process. Therefore, FEMA finds that this final rule may be made effective immediately upon publication in the Federal Register.

Executive Order 12866, as amended, 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.

This rule removes FEMA regulations in 44 CFR Part 10 which have been replaced by new Department of Homeland Security procedures. FEMA will no longer be implementing Environmental and Historic Preservation requirements through regulation. Instead, it will follow DHS procedures and supplement them through the issuance of an internal Directive and Instruction. As such, this rule change will remove unnecessary FEMA regulations. The policies and procedures in this final rule maintain the existing practice within FEMA for completing the NEPA process and thus, no additional costs on the public are expected. FEMA expects this rule to result in additional opportunity costs to FEMA staff that are estimated to cost \$619,242 over ten years at a 7% discount rate.

The Directive describes the responsibilities of senior FEMA staff with regards to Environmental and Historic Preservation (EHP) policies as well as procedures for all EHP analyses and associated decision documents. The Instruction, which is more detailed than the Directive, provides guidance for the implementation of NEPA and other EHP requirements across FEMA.

The transition to the Directive and Instruction only makes minimal changes to the procedures identified in 44 CFR Part 10 with regards to responsibilities. For example, 44 CFR Part 10.3(c) defines the Environmental Officer as the Director of the Office of Environmental and Historic Preservation (OEHP) or his or her designee while the Directive establishes the Environmental Officer as a separate position. By policy, the Environmental Officer has been a separate position designated by the Director of OEHP. Thus, there is no impact to current procedures. The Directive also shifts responsibility for reviewing proposed changes to Categorical Exclusions (CATEXs) from the Office of

Chief Counsel to the Environmental Officer with support from the chief counsel. In practice, the review of CATEXs has always had significant input from the Environmental Officer, so this rule only shifts the final sign-off from the Chief Counsel to the Environmental Officer while not dramatically impacting the workload of either office.

Other associated changes involve shifting responsibilities to DHS. For instance, the Department is now responsible for adding to, revising, or deleting items on the DHS list of CATEXs. In addition, the DHS Director of Sustainability and Environmental Programs is now the liaison with the CEQ, EPA, OMB, and other Federal agencies which was previously the responsibility of the FEMA Environmental Officer.

The Directive and Instruction provide instruction on the implementation of the new internal requirements to FEMA programs. Specifically, FEMA programs are now required to develop EHP implementation plans and update them every 3 years. FEMA estimates this will entail an average of 200 hours per program including staff work and management review. To estimate cost, FEMA uses the equivalent of a GS-13 Step 5 in the Washington Metro Area. Wage rates have been multiplied by 1.46 to account for benefits, and other associated employment costs to estimate the fully-loaded wage rate.⁴² The fully loaded wage of a GS-13 Step 5 is \$72.01 ($\$49.32 \times 1.46 = \72.01).⁴³ This equates to an initial cost of \$14,401 (200 hours x \$72.01 = \$14,401) per program. FEMA

⁴² Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 1. "Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, December 2015." Available at http://www.bls.gov/news.release/archives/ecec_03102016.htm. Accessed July 12, 2016. Calculated by dividing total compensation for all workers of \$33.58 by wages and salaries for all workers of \$23.06 per hour (yields a benefits multiplier of approximately 1.46 x wages).

⁴³ Office of Personnel Management 2015 General Schedule hourly wage for the locality pay area of Washington – Baltimore-Northern Virginia, DC-MD-VA-WV-PA retrieved from https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2015/DCB_h.pdf.

expects that development of EHP implementation plans will impact the 3 major grant programs and have a limited effect on FEMA facilities staff which FEMA equates to 0.5 of a program for the purposes of analysis. This results in an estimated total of \$50,405 ($\$14,401 \times 3.5 \text{ programs} = \$50,405$) across FEMA. FEMA anticipates these requirements will be completed with existing resources and do not require any new Federal or contractor employees and thus considered as opportunity costs. FEMA estimates the 3 year updates will require an average of 100 hours to review. This results in an estimated review cost of \$25,203 ($\$72.01 \times 100 \text{ hours} \times 3.5 \text{ programs} = \$25,203$).

FEMA programs with EHP responsibilities are also required to undergo an EHP concurrence process that is expected to entail between 200 and 500 hours per program annually. To estimate cost, FEMA uses the equivalent of a GS-12 Step 5 in the Washington Metro Area at a fully loaded wage of \$60.56 ($\$41.48 \times 1.46 = \60.56). The resulting additional unit cost across the major programs ranges between \$12,112 ($\$60.56 \times 200\text{hrs} = \$12,112$) and \$30,280 ($\$60.56 \times 500 \text{ hours} = \$30,280$), with a primary estimate of \$21,196 ($\$60.56 \times 350 \text{ hours} = \$21,196$) annually. The total annual EHP concurrence process costs ranges between \$42,392 ($\$12,112 \times 3.5 = \$42,392$) and \$105,981 ($\$30,280 \times 3.5 = \$105,981$) with a primary estimate of \$74,187 ($\$21,196 \times 3.5 = \$74,187$). FEMA intends to use its existing staff and funding to carry out these functions and thus such costs are again only considered as opportunity costs.

Based on the above cost estimates, the estimated first year costs of the new procedures range from \$92,797 ($\$50,405 + \$42,392$) to \$156,386 ($\$50,405 + \$105,981$) with a primary estimate of \$124,592 ($\$50,405 + \$74,187$). The estimated annual costs after the first year range from \$42,392 to \$105,981 with a primary estimate

of \$74,187 per year except in years with EHP Implementation Plan Updates. These updates are anticipated to occur in years three, six, and nine. The estimated total undiscounted costs over 10 years ranges from \$549,934 to \$1,185,824 with a primary estimate of \$867,884. Discounted at 3% over 10 years leads to an estimated annualized cost ranging from \$55,572 to \$119,161 with a primary estimate of \$87,367. At a 7% discount rate, the annualized costs range from \$56,371 to \$119,960 with a primary estimate of \$88,166. See Table 1 for additional details.

Table 1: 10 Year Costs of Directive and Instruction Changes

Year	Low	Primary	High
1	\$92,797	\$124,592	\$156,386
2	\$42,392	\$74,187	\$105,981
3	\$67,595	\$99,390	\$131,184
4	\$42,392	\$74,187	\$105,981
5	\$42,392	\$74,187	\$105,981
6	\$67,595	\$99,390	\$131,184
7	\$42,392	\$74,187	\$105,981
8	\$42,392	\$74,187	\$105,981
9	\$67,595	\$99,390	\$131,184
10	\$42,392	\$74,187	\$105,981
10-Year Undiscounted Total	\$549,934	\$867,884	\$1,185,824
10-Year Discounted at 3% Annualized at 3%	\$474,037	\$745,254	\$1,016,464
10-Year Discounted at 7% Annualized at 7%	\$55,572	\$87,367	\$119,161
10-Year Discounted at 7% Annualized at 7%	\$395,927	\$619,242	\$842,549
10-Year Discounted at 7% Annualized at 7%	\$56,371	\$88,166	\$119,960

As the rule only applies to DHS and FEMA internal procedures and does not impact the requirements of entities going through NEPA and EHP procedures, FEMA

does not anticipate any impacts to entities outside of the Department of Homeland Security.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), as amended, 5 U.S.C. 601-612, agencies must consider the impact of their rulemakings on “small entities” (small businesses, small organizations and local governments) when issuing a notice of proposed rulemaking. As FEMA is not issuing a proposed rule for this action, the RFA does not apply.

Unfunded Mandates Reform Act of 1995

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 (approximately \$157 million in 2015 dollars). The final rule does not result in the expenditure of State, local, and Tribal governments of greater than \$157 million in any given year. Therefore, this rule is not an unfunded Federal mandate under that Act.

National Environmental Policy Act of 1969 (NEPA)

Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321, 4331-4335, 4344, 4365, an agency must prepare an EA and EIS for any rulemaking that significantly affects the quality of the human environment. FEMA has determined that this rulemaking does not significantly affect the quality of the human environment and consequently has not prepared an EA or EIS.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3520, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency obtains approval from OMB for the collection and the collection displays a valid OMB control number. See 44 U.S.C. 3506, 3507. There are no information collections required under 44 CFR Part 10. There are specific FEMA programs that do collect information regarding environmental considerations for certain projects;⁴⁴ however, those collections are sponsored by separate program information collections and not under Part 10. Those collections are not affected by the removal of Part 10.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249, November 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects 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. Under this Executive Order, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

⁴⁴ E.g., OMB No. 1660-0017 for the Public Assistance Program; OMB No. 1660-0072 for the Hazard Mitigation Grant Program; OMB No. 1660-0022 for the Community Rating System (CRS) program.

This rule does not have Tribal implications. It governs internal agency procedure and does not place any requirements on Tribes.

Executive Order 13132, Federalism

Executive Order 13132, “Federalism,” 64 FR 43255, August 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 determined that this rule does not 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, and therefore does not have federalism implications as defined by the Executive Order.

Executive Order 11988, Floodplain Management.

Pursuant to Executive Order 11988, each agency is required to provide leadership and take action to reduce the risk of flood loss, to minimize the impact of floods on human safety, health and welfare, and to restore and preserve the natural and beneficial values served by floodplains in carrying out its responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; (2) providing Federally

undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities. In carrying out these responsibilities, each agency must evaluate the potential effects of any actions it may take in a floodplain; to ensure that its planning programs and budget requests reflect consideration of flood hazards and floodplain management; and to prescribe procedures to implement the policies and requirements of the Executive Order.

Before promulgating any regulation, an agency must determine whether the proposed regulations will affect a floodplain(s), and if so, the agency must consider alternatives to avoid adverse effects and incompatible development in the floodplain(s). If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in Executive Order 11988 is to promulgate a regulation that affects a floodplain(s), the agency must, prior to promulgating the regulation, design or modify the regulation in order to minimize potential harm to or within the floodplain, consistent with the agency's floodplain management regulations and prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain. The changes in this final rule will not have an effect on floodplain management. This rule addresses FEMA's internal agency procedures for carrying out NEPA, and maintains existing practice within FEMA for completing the NEPA process. When FEMA undertakes specific actions that may have effects on floodplain management, FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with this Executive Order. This serves as the notice that is required by the Executive Order.

Executive Order 11990, Protection of Wetlands.

Pursuant to Executive Order 11990, each agency must provide leadership and take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities. Each agency, to the extent permitted by law, must avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

In carrying out the activities described in the Executive Order, each agency must consider factors relevant to a proposal's effect on the survival and quality of the wetlands. Among these factors are: public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion; maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.

The changes in this final rule will not have an effect on land use or wetlands. This rule addresses FEMA’s internal agency procedures for carrying out NEPA, and maintains existing practice within FEMA for completing the NEPA process. When FEMA undertakes specific actions that may have such effects, FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with this Executive Order.

Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801-808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule, a concise general statement relating to the rule, including whether it is a major rule, the proposed effective date of the rule, a copy of any cost-benefit analysis, descriptions of the agency’s actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act, and any other information or statements required by relevant executive orders.

FEMA has sent this rule to the Congress and to GAO pursuant to the CRA. The rule is not a “major rule” within the meaning of the CRA. It will not have an annual effect on the economy of \$100,000,000 or more, it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, and it will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

List of Subjects

44 CFR Part 10

Environmental Impact Statements.

44 CFR Part 60

Flood insurance, Flood plains, Reporting and recordkeeping requirements.

44 CFR Parts 78 and 79

Flood insurance, Grant programs.

44 CFR Part 80

Disaster assistance, Grant programs.

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.

44 CFR Part 209

Administrative practice and procedure, Disaster assistance, Grant programs, Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, and under the authority of the Homeland Security Act of 2002, 6 U.S.C. 101 et seq., Department of Homeland Security Delegation 9001.1, and the National Environmental Policy Act, 42 U.S.C. 4321, 4331-4335, 4344, 4365, the Federal Emergency Management Agency amends 44 CFR Chapter I, as follows:

PART 10—[REMOVED AND RESERVED]

1. Remove and reserve part 10, consisting of §§ 10.1 through 10.14.

PART 60—CRITERIA FOR LAND MANAGEMENT AND USE

2. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

3. In § 60.6, revise the second sentence of paragraph (b)(2) to read as follows:

§ 60.6 Variances and exceptions.

* * * * *

(b)* * *

(2)* * * The decision whether an Environmental Impact Statement or other environmental document will be prepared, will be made in accordance with applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy. * * *

* * * * *

PART 78—FLOOD MITIGATION ASSISTANCE

4. The authority citation for part 78 continues to read as follows:

Authority: 6 U.S.C. 101; 42 U.S.C. 4001 et seq.; 42 U.S.C. 4104c, 4104d; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

5. In § 78.11, revise paragraph (b) to read as follows:

§ 78.11 Minimum project eligibility criteria.

* * * * *

(b) Be in conformance with 44 CFR part 9, Floodplain Management and Protection of Wetlands; Executive Order 12699, Seismic Safety of Federal and Federally Assisted or

Regulated New Building Construction; and any applicable environmental laws and regulations.

* * * * *

PART 79— FLOOD MITIGATION GRANTS

6. The authority citation for part 79 continues to read as follows:

Authority: 6 U.S.C. 101; 42 U.S.C. 4001 et seq.; 42 U.S.C. 4104c, 4104d; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

7. In § 79.3, revise paragraph (a)(6) to read as follows:

§ 79.3 Responsibilities.

(a) * * *

(6) Comply with applicable Federal statutory, regulatory, and Executive Order requirements related to environmental and historic preservation compliance, including reviewing and supplementing, if necessary, the environmental analyses conducted by the State and subgrantee in accordance with applicable laws, regulations, and agency policy;

* * * * *

8. In § 79.6, revise paragraph (d)(2) to read as follows:

§ 79.6 Eligibility.

* * * * *

(d) * * *

(2) Be in conformance with part 9 of this chapter, Floodplain management and protection of wetlands, §60.3 of this subchapter, Flood plain management criteria for

flood-prone areas, and other applicable Federal, State, tribal, and local laws and regulations;

* * * * *

PART 80—PROPERTY ACQUISITION AND RELOCATION FOR OPEN SPACE

9. The authority citation for part 80 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 et seq.; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

10. In § 80.5, revise paragraph (a)(5) to read as follows:

§ 80.5 Roles and responsibilities.

* * * * *

(a) * * *

(5) Complying with applicable Federal statutory, regulatory, and Executive Order requirements related to environmental and historic preservation compliance, including reviewing and supplementing, if necessary, environmental analyses conducted by the State and subgrantee in accordance with applicable laws, regulations, and agency policy;

* * * * *

PART 206—FEDERAL DISASTER ASSISTANCE

11. The authority citation for part 206 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101 et seq.; Department of Homeland Security Delegation 9001.1; sec. 1105, Pub. L. 113-2, 127 Stat. 43 (42 U.S.C. 5189a note).

12. In § 206.110, revise paragraph (l) to read as follows:

§ 206.110 Federal assistance to individuals and households.

* * * * *

(l) Environmental requirements. Assistance provided under this subpart must comply with the National Environmental Policy Act (NEPA) and other environmental laws, regulations, Executive Orders, and applicable agency policy.

* * * * *

13. In § 206.117, revise paragraph (b)(1)(ii)(C) to read as follows:

§ 206.117 Housing assistance.

* * * * *

(b) * * *

(1) * * *

(ii)* * *

(C) Any site upon which a FEMA-provided housing unit is placed must comply with applicable State and local codes and ordinances, as well as 44 CFR part 9, Floodplain Management and Protection of Wetlands, and all other applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy.

* * * * *

14. Revise § 206.220 to read as follows:

§ 206.220 General.

This subpart provides policies and procedures for determinations of eligibility of applicants for public assistance, eligibility of work, and eligibility of costs for assistance under sections 402, 403, 406, 407, 418, 419, 421(d), 502, and 503 of the Stafford Act. Assistance under this subpart must also conform to requirements of 44 CFR part 201, Mitigation Planning, 44 CFR part 206, subparts G—Public Assistance Project Administration, I—Public Assistance Insurance Requirements, J—Coastal Barrier Resources Act, and M—Minimum Standards, 44 CFR part 9—Floodplain Management, and other applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy.

15. In § 206.434, revise paragraph (c)(3) to read as follows:

§ 206.434 Eligibility.

* * * * *

(c) * * *

(3) Be in conformance with 44 CFR part 9, Floodplain Management and Protection of Wetlands, and other applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy;

* * * * *

16. In § 206.436, revise paragraph (c)(10) to read as follows:

§ 206.436 Application procedures.

* * * * *

(c) * * *

(10) Environmental information consistent with 44 CFR part 9, Floodplain Management and Protection of Wetlands, and other applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy.

* * * * *

PART 209—SUPPLEMENTAL PROPERTY ACQUISITION AND ELEVATION ASSISTANCE

17. The authority citation for part 209 continues to read as follows:

Authority: Pub. L. 106-113, Div. B, sec. 1000(a)(5) (enacting H.R. 3425 by cross-reference), 113 Stat. 1501, 1536; Pub. L. 106-246, 114 Stat. 511, 568; Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121, Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412.

18. In § 209.6, revise paragraph (b)(3) to read as follows:

§ 209.6 Project eligibility.

* * * * *

(b) * * *

(3) Conform with 44 CFR part 9, Floodplain Management and Protection of Wetlands, and other applicable environmental and historic preservation laws, regulations, Executive Orders, and agency policy.

* * * * *

Dated: August 2, 2016

W. Craig Fugate,
Administrator,
Federal Emergency Management Agency.

[FR Doc. 2016-19536 Filed: 8/19/2016 8:45 am; Publication Date: 8/22/2016]