



## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Parts 77, 78, 79, 80, 201, and 206

[Docket ID: FEMA-2019-0011]

RIN 1660-AA96

### FEMA's Hazard Mitigation Assistance and Mitigation Planning Regulations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

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**SUMMARY:** This final rule revises the Federal Emergency Management Agency's Hazard Mitigation Assistance and mitigation planning regulations to reflect current statutory authority and agency practice.

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

**ADDRESSES:** The docket for this rulemaking is available for inspection using the Federal eRulemaking Portal at <http://www.regulations.gov> and can be viewed by following that Web site's instructions.

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### SUPPLEMENTARY INFORMATION:

#### I. Background and Discussion of the Rule

On August 28, 2020, the Federal Emergency Management Agency (FEMA) published a Notice of Proposed Rulemaking (NPRM) (85 FR 53474) to revise FEMA's Hazard Mitigation Assistance (HMA) program regulations to reflect current statutory

authority and agency practice.<sup>1</sup> FEMA’s HMA program regulations consist of the Flood Mitigation Assistance (FMA) grant program, the Hazard Mitigation Grant Program (HMGP), financial assistance for property acquisition and relocation of open space, and mitigation planning regulations. The NPRM proposed to revise the FMA grant program regulations to incorporate changes made by amendments to the National Flood Insurance Act of 1968 (NFIA).<sup>2</sup> The NPRM also proposed to update terms and definitions throughout the HMA and Mitigation Planning regulations to better align with uniform administrative requirements that apply to all Federal assistance.

The NPRM solicited public comment on these proposed changes. FEMA received five comments related to the rulemaking and one unrelated comment that was outside the scope of the rulemaking. (The unrelated comment was an expression of the commenter’s political views and therefore not germane to this rule). FEMA does not consider the one unrelated comment in this preamble. In this final rule, FEMA adopts the changes it proposed in the NPRM with some minor revisions in consideration of the related comments as well as Title 2 of the Code of Federal Regulations (CFR) part 200. FEMA describes the comments received and changes to the final rule below.

## **II. Summary and Discussion of Public Comments**

FEMA received five written responses to the amendments to its Hazard Mitigation Assistance (HMA) program regulations. All commenters submitted responses online at [regulations.gov](https://www.regulations.gov). FEMA reviewed each unique comment and considered whether to change the regulation in response to the comment. A summary of each comment and FEMA’s response is provided below. Responses are listed in order of Docket ID number.

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<sup>1</sup> FEMA has already implemented most of the changes discussed in this Final Rule through the *Hazard Mitigation Assistance Guidance* in 2013. See FEMA, *Hazard Mitigation Assistance Guidance*, Feb 27, 2015, available at [https://www.fema.gov/sites/default/files/2020-04/HMA\\_Guidance\\_FY15.pdf](https://www.fema.gov/sites/default/files/2020-04/HMA_Guidance_FY15.pdf) (last accessed Feb 5, 2021). FEMA is now updating its HMA regulations to reflect these changes.

<sup>2</sup> 42 U.S.C. 4001 *et seq.*

*Individual Citizen, Docket ID FEMA-2019-0011-0003*

This individual citizen recommended that FEMA eliminate the FMA program and reallocate those resources to be available for the purposes of obtaining open space.

FEMA appreciates this comment and recognizes the importance of maintaining open space as a critical component of many hazard mitigation programs; indeed, this is why the acquisition of open space is one of the eligible project types under FEMA's HMA programs. However, FEMA lacks authority to eliminate the FMA program because FEMA is required by statute to implement this program (42 U.S.C. 4104c(a)(1)-(3)).

FEMA also recognizes that a one size fits all approach to hazard mitigation is not aligned with the comprehensive community and hazard mitigation planning processes.

*Individual Citizen, Docket ID FEMA-2019-0011-0004*

This individual citizen recommended that the definition of "community" be expanded to include community organizations. In response, FEMA notes that "community" is defined in statute in 42 U.S.C. 4104c(h)(1) and as a result, FEMA cannot reinterpret, expand or change this definition. Although private nonprofits and other private sector entities such as businesses, industry associations, native corporations, and individuals are unable to apply for FEMA's HMA programs based on statute, FEMA encourages partnerships and recognizes that these entities can provide value to projects eligible for HMA funding.

*The Association of State Floodplain Managers, Docket ID FEMA-2019-0011-0005*

The Association of State Floodplain Managers (ASFPM) is an organization of professionals involved in floodplain management, flood hazard mitigation, the flood insurance, and flood preparedness, warning and recovery. The ASFPM Flood Mitigation Committee submitted a number of comments on behalf of the organization.

First, the ASFPM expressed concerns that the proposed 44 CFR 77.7(b) states that "[Pre-award] costs can only be incurred during the open application period for the FMA

program.” Under FEMA’s current practice, eligible pre-award costs may be incurred prior to application submission (limited by 44 CFR 79.8 to costs incurred during the open application period). However, it is not FEMA’s intent to disallow otherwise eligible pre-award costs that were incurred prior to the open application period. In response to this comment, FEMA has removed the statement referenced above from 44 CFR 77.7(b). Costs incurred prior to award may be reimbursed if they meet the eligibility requirements and are in compliance with 2 CFR part 200 Subpart E, Cost Principles. Pre-award costs include costs directly related to developing an application or subapplication that are incurred prior to the date of the grant award and are allowed subject to FEMA approval at time of award. Such costs may include gathering National Environmental Policy Act (NEPA) data or developing a Benefit Cost Analysis (BCA), preparing design specifications (including the development of elevation plans), or conducting workshops or meetings related to development and submission of subapplications.

Second, the ASFPM identified that the proposed 44 CFR 77.6(c)(2)(vi) states, “Non-localized flood risk reduction projects such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible,” which is inconsistent with recent Notices of Funding Opportunity (NOFOs) speaking to the eligibility of “community mitigation projects,” which could qualify as non-localized flood risk reduction projects. It is not FEMA’s intent for these project types to be ineligible under all circumstances. In response to this comment, FEMA has added language to 44 CFR 77.6(c)(2)(vi) for clarity and consistency with 42 U.S.C. 4014c(c)(3)(E), limiting funding to localized projects, except in rare instances. As a result, 44 CFR 77.6(c)(2)(vi) now reads, “Non-localized flood risk reduction projects such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible unless the Administrator specifically determines in approving a mitigation plan that such activities are the most cost-effective mitigation

activities for the National Flood Mitigation Fund.” This change to the regulatory text reflects a change in FEMA’s current practice and emphasizes that 42 U.S.C. 4014c allows the option to authorize these project types in very rare circumstances.

Third, the ASFPM noted that the revised HMA regulations do not specifically list project scoping (previously known as “advance assistance”) as an eligible activity under the proposed 44 CFR 77.6(c). However, project scoping is an eligible activity under FEMA’s current practice. In response to this comment, therefore, FEMA has added paragraph (4) to the list of eligible activities in 44 CFR 77.6(c), it reads: “*Project Scoping*. Activities that enable subapplicants to develop complete subapplications for eligible mitigation activities including but not limited to data development.”

Fourth, the ASFPM commented that punishing a State for an individual community’s land use violation by withholding funding from the entire State (as outlined in the proposed 44 CFR 80.19(e)(2)) seems mismatched and extreme, and suggested that withholding award or assistance be limited to the community that is in violation. The relationship between the State as the recipient, and a local community as a subrecipient is defined in 2 CFR 200.1, 200.332, and 200.339. The penalty of holding the State accountable for a community violation is consistent with the State acting as the recipient of the grant and being primarily responsible for compliance with grant terms. As a result, FEMA has determined to retain in 44 CFR 80.19(e)(2) the option to enforce this penalty as a result of land use noncompliance. This is consistent with FEMA's current practice.

Fifth, the ASFPM identified the ongoing problem that States and communities are unable to access data on repetitive loss properties, severe repetitive loss properties, and National Flood Insurance Program (NFIP) insured structures due to FEMA’s current restriction on privacy data. The ASFPM stated that this information is needed for the purposes of FEMA’s application processes and the development of hazard mitigation plans. FEMA appreciates this feedback, is aware of this issue, and is currently working

to address this problem throughout the Federal Insurance and Mitigation Administration (FIMA). In working on this issue, it is FEMA's intent to arrive at a solution that will both protect government interests and property owners' privacy, while also making the information that is needed accessible to communities.

*Individual Citizen, Docket ID FEMA-2019-0011-0006*

This individual citizen spoke to the value and benefits of nature-based solutions and suggested that FEMA explicitly speak to nature-based solutions within the regulation. In response, FEMA notes that nature-based solutions are eligible under FMA under localized flood risk reduction projects or other activities as identified in a community's hazard mitigation plan, as has been FEMA's current practice. FEMA recognizes and embraces nature-based solutions as an approach to project design that can be applied to many different project types, but on its own is not a separate project type. Therefore, FEMA does not intend to identify and speak to nature-based solutions as a specific project type within the regulation. However, FEMA continues to advocate for the incorporation of nature-based solutions into mitigation activities funded through HMA grants.

*Individual Citizen, Docket ID FEMA-2019-0011-0007*

This individual citizen encouraged FEMA to allow for the use of eminent domain for the purpose of carrying out involuntary buyout projects. The commenter speaks to proposed 44 CFR 80.11(a), which states "Eligible acquisition projects are those where the property owner participates voluntarily, and the recipient/subrecipient will not use its eminent domain authority to acquire the property for the open space purposes should negotiations fail." FEMA does not intend to change the voluntary component of 44 CFR 80.11; however, FEMA offers clarification that this voluntary limitation is only applicable to open space projects. Voluntary property owner participation is not required under other project types. For example, if a community wanted to submit an application

for a flood retention or control project, it could exercise its eminent domain powers to acquire applicable parcels. Furthermore, in response to this comment, FEMA notes that it is up to recipients to prioritize and submit projects for funding as outlined in 44 CFR 77.3(b)(3).

### **III. Changes to Final Rule**

In response to the comment that noted inconsistencies with the regulatory text and Fiscal Year 2020 NOFOs for Flood Mitigation Assistance grants, the proposed 44 CFR 77.6(c)(2)(vi) now reads, “Localized flood risk reduction projects that lessen the frequency or severity of flooding and decrease predicted flood damages, and that do not duplicate the flood prevention activities of other Federal agencies. Non-localized flood risk reduction projects such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible unless the Administrator specifically determines in approving a mitigation plan that such activities are the most cost-effective mitigation activities for the National Flood Mitigation Fund.”

In response to the comment that project scoping (previously known as “advance assistance”) is not listed as an eligible activity under the proposed 44 CFR 77.6(c), FEMA has added § 77.6(c)(4): “*Project Scoping*. Activities that enable subapplicants to develop complete subapplications for eligible mitigation activities including but not limited to data development.”

In response to the comment that expressed concerns regarding the statement “[Pre-award] costs can only be incurred during the open application period for the FMA program,” this statement has been removed. Section 77.7(b) now reads, “Pre-award costs. FEMA may fund eligible pre-award costs related to developing the application or subapplication at its discretion and as funds are available. Recipients and subrecipients may be reimbursed for eligible pre-award costs for activities directly related to the development of the project or planning proposal. Costs associated with implementation

of the activity but incurred prior to award are not eligible. Therefore, activities where implementation is initiated or completed prior to award are not eligible and will not be reimbursed.”

In addition to the above and in order to align with 2 CFR part 200, FEMA removed its proposed definition of “management costs” in the proposed 44 CFR 77.2. The NPRM’s proposed definition of “management costs” inadvertently tied it to FEMA’s regulations implementing its authority under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”).<sup>3</sup> However, the FMA Program is not authorized under the Stafford Act, but rather the National Flood Insurance Act.<sup>4</sup> As a result, direct and indirect administrative costs are governed by the cost principles of 2 CFR part 200 Subpart E, and FEMA has added the phrase “(direct and indirect administrative costs pursuant to 2 CFR part 200 Subpart E)” in 44 CFR 77.7(a)(1)(i) to clarify this. Because the FMA Program is authorized under the National Flood Insurance Act, FEMA also added the National Flood Insurance Act both to the Authority citation for 44 CFR part 201 and to section 201.1. Lastly, to conform with updates to 2 CFR published on August 13, 2020,<sup>5</sup> and other updates to statutory citations, FEMA removed the phrase “to carry out an activity under the FMA program” in the definition of “recipient” in 77.2(h) and updated citations to 2 CFR part 200 and 25 U.S.C. 5131 as necessary.

#### **IV. Regulatory Analysis**

##### **A. Executive Order 12866, as amended, Regulatory Planning and Review**

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select

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<sup>3</sup> Pub. L. 93-288 (42 U.S.C. 5121-5207); *see* 44 CFR part 207.

<sup>4</sup> 42 U.S.C. 4104c.

<sup>5</sup> 85 FR 49506.



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.

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it.

FEMA did not receive any public comments relating to the RIA in the NPRM and has made no changes to this Regulatory Analysis as a result. Additionally, changes made to the Final Rule due to public comments were due to clarifications in regulatory text, and changes made to better conform the text with statute. These changes will not have an economic impact, and FEMA does not address them further in this analysis.

### ***Need for Regulation***

The Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12), Pub. L. 112-141, 126 Stat. 916, amended the National Flood Insurance Act of 1968 (NFIA) to require changes to FEMA's Hazard Mitigation Assistance (HMA) programs. FEMA implemented most of these changes through the *Hazard Mitigation Assistance Guidance* in 2013.<sup>6</sup> FEMA is now updating its HMA regulations to reflect these changes.

Following guidance in OMB Circular A-4, FEMA assessed the impacts of this rule against a no-action baseline as well as a pre-statutory baseline. The no-action baseline is an assessment against what the world would be like if the rule is not adopted. The pre-statutory baseline is an assessment against what the world would be like if the relevant statute(s) had not been adopted and, in this case, already been implemented through guidance.

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<sup>6</sup> FEMA, Hazard Mitigation Assistance Guidance, Feb 27, 2015, available at [https://www.fema.gov/sites/default/files/2020-04/HMA\\_Guidance\\_FY15.pdf](https://www.fema.gov/sites/default/files/2020-04/HMA_Guidance_FY15.pdf) (last accessed Feb 5, 2021).

Under a no-action baseline, this rule results in cost savings to FEMA, and familiarization costs to HMA recipients. Under a pre-statutory baseline, this rule results in familiarization costs to HMA recipients, cost savings to FEMA, distributional impacts, and qualitative benefits, but no marginal costs. The annual distributional impact of this rule is estimated at \$24.96 million<sup>7</sup> in increased transfers from FEMA to HMA recipients.

FEMA addressed the substantive changes in this analysis and presented how they affect costs, benefits, and transfers. The remaining changes are nonsubstantive, meaning they are technical and include definitional updates and other changes that modernize and standardize regulations, reduce redundancy, or increase readability. The nonsubstantive changes do not have an economic impact. FEMA included a detailed marginal analysis table that summarizes the substantive and nonsubstantive changes in this rule and the related impacts in the public docket for this rulemaking available on [www.regulations.gov](http://www.regulations.gov) under Docket ID FEMA-2019-0011-0002.

### ***Affected Population***

This rule affects all recipients of FEMA's Flood Mitigation Assistance (FMA) grants. Recipients include 56 State and territorial governments and 574 Indian Tribal governments.<sup>8</sup> Local governments and governmental organizations such as flood districts and sewer districts are considered subrecipients and must apply through a State or Indian Tribal government. For simplicity, FEMA refers to the affected population as "recipients" throughout the analysis, except in cases where there are different requirements for recipients or subrecipients.

### ***Baselines***

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<sup>7</sup> In the NPRM, FEMA incorrectly stated in the introductory text of the RIA that the annual distributional impact of the rule was \$4.16 million in transfers. 86 FR 53474 at 53490. However, this was a clerical error which appeared in that sentence and was not repeated in the remainder of the document. As noted in the remainder of the RIA, the correct estimate was \$28.4 million. 86 FR 53474 at 53491 (Table 1); 53495 (text and Footnote 113); and 53496 (Table 8-A-4).

<sup>8</sup> Indian Entities Recognized by, and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 FR 7554, (Jan. 29, 2021).

BW-12 made substantial changes to FEMA’s HMA programs. FEMA implemented most of these changes via the HMA Guidance in 2013. FEMA is now codifying those changes in this rule. Following guidance in OMB Circular A-4, FEMA assessed the impacts of this rule against a pre-statutory baseline covering 2006-2012 (pre-BW-12) and a no-action baseline covering 2013-2019<sup>9</sup> (post-BW-12).

The pre-statutory baseline shows the effects of the rule compared to the current regulations (i.e., as if FEMA had not already implemented the changes through the HMA Guidance). The no-action baseline shows the effects of the rule compared to current FEMA practice (i.e., compared to the HMA Guidance, which reflects FEMA’s current practice, but not the current regulations).

Under the pre-statutory baseline, the rule has distributional impacts and qualitative benefits. The distributional impacts affect recipients of Repetitive Loss (RL) grants and Severe Repetitive Loss (SRL) grants that were combined into the FMA program pursuant to BW-12. Under BW-12, RL and SRL properties received increased assistance, while standard mitigation properties received decreased assistance. Under the no-action baseline, the only impacts are implementation costs and Federal cost savings. Table 1 shows the impacts of this rule under the pre-statutory and no-action baselines.

Table 1. Annual Effects of Rule under Pre-Statutory and No-Action Baselines (2019\$)

<b>Baseline</b>	<b>Costs</b>	<b>Benefits</b>	<b>Transfers</b>
Pre-Statutory	\$1,041 (year 1 only)	Qualitative	\$24.96 million from FEMA to grant recipients
No-Action	\$1,041 (year 1 only)	\$81,159	None

**Effects**

The primary effects of BW-12 that are codified by this rule resulted from changes in the Federal cost shares. A cost share is the portion of the costs of a Federally assisted

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<sup>9</sup> 2019 is the last year complete data is available.

project or program borne by the Federal Government. FEMA pays a portion of the cost of a project, or the Federal cost share, and the recipient pays the remaining share.

*FMA Grant Cost Sharing Changes.* The current regulations still reflect the pre-BW-12 cost share provisions of the RL and SRL grant programs. BW-12 modified these two programs and FEMA implemented the modifications in the 2013 HMA Guidance. The newly expanded FMA program now serves the recipients of these grant programs.

BW-12 increased the RL Federal cost share from 75 percent to between 75 and 90 percent, and increased the SRL Federal cost share from between 90 and 100 percent to 100 percent. Table 2 shows the cost shares by type of grant.

Table 2. Cost Share by Type of Grant

<b>Baseline</b>	<b>RL</b>		<b>SRL</b>	
	FEMA Cost Share	Recipient Cost Share	FEMA Cost Share	Recipient Cost Share
Pre-Statutory (2006-2012) Pre-BW-12	75%	25%	90% to 100%	10% to 0%
No-Action (2013-2019) Post-BW-12	75-90%	10-25%	100%	0%

*Lowering the Cap and Removing the Frequency Restriction.*

Prior to BW-12, FMA funds for the development or update of the flood portion of community multi-hazard mitigation plans were capped at \$150,000 in Federal funding for States and \$50,000 for communities, with a total cap of \$300,000 in Federal funding for applications statewide. FEMA could not award State or community planning grants more than once every 5 years.

BW-12 limited FMA grant funds to develop or update the flood portion of community multi-hazard mitigation plans to a \$50,000 Federal share to any recipient or a \$25,000 Federal share to any subrecipient. BW-12 also removed the restriction on awarding State or community planning grants more than once every 5 years. FEMA discusses the impacts of these changes in the costs section.

*Shifting from State Allocations to Competition.* Prior to BW-12, FEMA annually allocated FMA program funding to recipients based on the number of insured properties and RL properties present within the recipient's jurisdiction. Recipients that did not meet the minimum threshold to receive a target allocation had to apply against funds that were set aside for this purpose. BW-12 replaced this process with a fully competitive program that selects subapplications against agency priorities identified annually. This change allows FEMA to identify and mitigate properties with the highest risk from flooding, thereby providing the greatest savings to the NFIP.

### ***Costs***

Costs for this rule result from implementation of the rule, rather than the 2013 HMA Guidance. FEMA estimated these costs against the no-action baseline since these are directly attributable to updating the text of the regulation, and not program changes that FEMA already implemented.

*Familiarization Costs.* FEMA estimated familiarization costs for States, but not for local emergency management divisions or jurisdictions. FEMA assumed States regularly update their emergency response networks and notify local emergency management divisions on any changes. FEMA believes that States will continue to disseminate the new information through each State's established process. FEMA assumed that each State grant recipient will have two personnel that will need to familiarize themselves and understand the rule by reading the existing and new regulations to understand the changes. FEMA expects each person to spend one hour to become familiar with the changes. FEMA assumes that the rule is likely to be reviewed by each State's Emergency Management Director and one administrative support personnel. FEMA assumes that the U.S. Bureau of Labor Statistics (BLS) occupations

Emergency Management Director (SOC: 11-9160, mean hourly wage \$39.68)<sup>10</sup> and First-Line Supervisor of Office and Administrative Support Workers (SOC: 43-1010, mean hourly wage \$28.91)<sup>11</sup> are most representative of these roles in a State. Using the 1.46 multiplier,<sup>12</sup> the fully loaded wage rates are \$57.93 and \$42.21 respectively. The estimated total cost of recipients making themselves familiar with the rule is \$5,608 in year 1 (\$1,041 per year annualized at 7 percent over 7 years, and \$900 at 3 percent). ((56 recipients x 1 hour x \$57.93 wage) + (56 recipients x 1 hour x \$42.21 wage) = \$5,608)

*Summary of Costs.* FEMA estimated the rule has familiarization costs of \$5,608 in the first year of implementation. FEMA assumed that all staff and resources will come from existing sources and thus represent an opportunity cost.

### ***Benefits***

This rule will be beneficial to both FEMA and Hazard Mitigation Grant recipients. While the benefits are not quantifiable, FEMA believes that changes implemented by BW-12 allow it to target the most vulnerable properties, and streamline the mitigation grant process. Under the no-action baseline, most changes in this rule are technical and include definitional updates and other changes made to harmonize FEMA regulations with current FEMA practices and HMA guidance, modernize and standardize the regulations, reduce redundancy, or increase readability. These changes are largely nonsubstantive and do not have an economic impact.

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<sup>10</sup> May 2019 National Occupational Employment and Wage Rates, National File (xls), First-Line Supervisors of Office & Admin Support Workers (SOC: 43-1010, Average, Column Title: H\_Mean). Accessed and downloaded Feb 8, 2021. <https://www.bls.gov/oes/tables.htm>.

<sup>11</sup> May 2019 National Occupational Employment and Wage Rates, National File (xls), Emergency Management Directors (SOC: 11-9160, Average, Column Title: H\_Mean). Accessed and downloaded Feb 8, 2021. <https://www.bls.gov/oes/tables.htm>.

<sup>12</sup> December 2019 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, page 4 (\$37.73/\$25.91). Accessed and downloaded Feb 8, 2021. [https://www.bls.gov/news.release/archives/ecec\\_06182020.pdf](https://www.bls.gov/news.release/archives/ecec_06182020.pdf).

*Cost Savings.* FEMA estimated annual costs savings of \$81,159 resulting from removal of the definition of “market value” at 44 CFR 79.2(f) and (g). The removal of “market value” is new to this regulation and was not implemented in previous guidance. Currently, the regulation requires FEMA to use the market value of a structure when making grant determinations. Removal of this requirement allows FEMA to consider the value of the structure listed on the flood insurance policy when considering a grant request related to a vulnerable structure, rather than the “market value.” This results in a reduction in the time it takes FEMA personnel to review a grant application. Using “market value” required additional research and appraisals, whereas the flood insurance property value is readily available to FEMA personnel. FEMA estimates that this change reduces the personnel time it takes to review a grant application by an estimated 2 hours per review for a total of \$81,159 annually. The removal of “market value” may impact grant amounts due to possible differences from the insured value, but FEMA does not have data available to estimate this impact.

FEMA based its estimates on the estimated annual average number of FMA grant applications that required a market value review between 2013 and 2019 and the wage rates of the personnel reviewing the grants. The annual average number of grant requests was 545. Table 3 shows the annual number of grant requests for vulnerable properties that required a market value review between 2013 and 2019.

Table 3. Annual Grant Requests Requiring Market Value Review

<b>Year</b>	<b>FMA Program</b>
2013	552
2014	374
2015	678
2016	832
2017	743
2018	485
2019	149
Total	3,813
Annual Average	545

Reviews of the grant applications can vary widely from simple—all documentation accompanies the request and requires very little follow-up—to complex. For this analysis, FEMA chose to capture the variability in the grant application reviews by using a weighted average of the hours it takes to complete the reviews. FEMA estimated that 25 percent of the reviews are simple; these reviews take 8 hours each on average to complete. Reviews of applications that are average in their complexity comprise 50 percent of the reviews and are assumed to take 12 hours each. Twenty-five percent of the reviews are complex and take 16 hours on average to complete.<sup>13</sup> Taking a weighted average of the times listed and using the distribution of 25 percent simple/50 percent average/25 percent complex, FEMA estimated that grant application reviews take 12 hours on average to complete.  $[(0.25 \times 8) + (0.50 \times 12) + (0.25 \times 16)] = 12$  hours)

Program Specialists (GS 13, step 5) and contracted Civil Engineers conduct the reviews, the Program Specialists conduct 75 percent of reviews and the Civil Engineers conduct the remaining 25 percent. The fully-loaded average hourly wage for GS 13, step 5 at the FEMA regional locations is \$77.20<sup>14</sup> and FEMA estimates \$66.23<sup>15</sup> is the fully-loaded hourly wage rate for Civil Engineers. Using the 12-hour average estimate for reviewing the grant application, FEMA estimated that each year it spends \$486,952 on average to review FMA grant applications.  $[(545 \text{ grant reviews} \times 12 \text{ hours per review} \times \$77.20 \text{ hourly wage for Program Specialist} \times 0.75) + [(545 \text{ grant reviews} \times 12 \text{ hours per review} \times \$66.23 \text{ hourly wage for Civil Engineer} \times 0.25)] = \$486,952.05$

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<sup>13</sup> FEMA personnel who review the FMA grant requests provided the information on the average time to review and the discussion of complexity.

<sup>14</sup> Based on the OPM General Schedule of Pay, January 2019, the average base wage of GS 13, step 5 in each of the FEMA regional office locations is \$52.88 (Boston, MA; New York, NY; Philadelphia, PA; Atlanta, GA; Chicago, IL; Denton, TX; Kansas City, MO; Denver, CO; Oakland, CA; and Bothell, WA), which is multiplied by a 1.46 benefits multiplier (December 2018, BLS Employer Costs for Employee Compensation) to get a fully loaded wage rate of \$77.20 / hour. Accessed and downloaded Feb 9, 2021. <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2019/general-schedule/>.

<sup>15</sup> Based on Bureau of Labor Statistics May 2019 National Employment and Wage Rate, National File (xls), a Civil Engineer, SOC 17-2050, has a base wage of \$45.36, which is multiplied by a benefits multiplier of 1.46 (December 2019, BLS Employer Costs for Employee Compensation) to get a fully loaded wage rate of \$66.23 / hour. Accessed and downloaded Feb 8, 2021. <https://www.bls.gov/oes/tables.htm>.



FEMA estimated that removing the definition of “market value” will reduce its administrative burden by 2 hours per review. This results in each review taking 10 hours instead of 12, on average. Using the same calculation as above and 10 hours instead of 12 hours per review, FEMA’s average amount spent each year on reviewing FMA grant applications will be \$405,793 and results in an estimated annual cost savings of \$81,159. (\$486,952 - \$405,793 = \$81,159)

*Clarification of Mitigation Grant Terms and Conditions.* The current HMA grant program regulations contain inconsistencies or vague language that may cause confusion. Specifically, FEMA will add definitions for “Federal award” and “pass-through entity;” and replace definitions of “grantee,” “subgrant,” and “subgrantee” with “recipient,” “subaward,” and “subrecipient,” respectively. These changes will make the HMA regulations consistent with FEMA’s other regulations.

*Revising, Adding, or Removing Definitions.* FEMA is revising existing definitions for clarification purposes, add several definitions to conform with BW-12 and current agency practice, and delete others that are obsolete. FEMA believes the changes are clear and more consistent with definitions used in 2 CFR part 200 and the HMA Guidance.<sup>16</sup>

*Shifting from Standard Mitigations to RL and SRL Structures.* One of the main focuses of this rulemaking is on mitigation grants made to properties in the NFIP that have been repeatedly subject to costly loss claims. FEMA provides a range of available mitigation options including the FMA program to address vulnerable RL and SRL structures. Once a structure is mitigated through one of the programs, it could be protected from flooding, and can be removed from the repetitive flood loss list of unmitigated properties insured by the NFIP. This reduces the flood vulnerability to RL and

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<sup>16</sup> Hazard Mitigation Assistance Guidance (HMA Guidance), Feb. 8, 2021, available at [https://www.fema.gov/sites/default/files/2020-04/HMA\\_Guidance\\_FY15.pdf](https://www.fema.gov/sites/default/files/2020-04/HMA_Guidance_FY15.pdf) (last accessed Feb. 9, 2021).

SRL structures, preventing further losses to the policyholders, as well as to FEMA. This benefit applies to the pre-statutory baseline, but not the no-action baseline because recipients and FEMA both realized this benefit beginning in 2013 when FEMA implemented it through the HMA Guidance.

*Shifting from State Allocations to Competition.* Before BW-12, FMA program funding was based on an allocation methodology that required an analysis of the number of insured properties and RL properties present within a jurisdiction and each State was allocated a share of the overall available funding. BW-12 changed this process to a fully-competitive program that allows FEMA to select subapplications according to FEMA priorities no matter the location.

This change lifted the constraints that were formerly in place against multiple eligible subrecipients in the same jurisdiction with vulnerable properties, allowing a more adequate coverage area within and across States and contributing to the increase in the size and volume of RL and SRL properties covered by each grant. FEMA is able to identify and mitigate properties with the highest risk from flooding and provide the greatest savings to the NFIP. This benefit applies to the pre-statutory baseline, but not the no-action baseline because recipients and FEMA both realized this benefit beginning in 2013 when FEMA implemented it through the HMA Guidance.

*Eliminating the Limit on In-Kind Contributions.* Eliminating the limit on in-kind contributions for a recipient's cost share modifies the nature, or make-up, of the recipient's contribution but does not change the overall dollar amount required for the recipient's contribution. FEMA believes this is advantageous because recipients and subrecipients are able to leverage their own optimal mix of in-kind and cash to meet their portion of the cost-share. There is no change to transfers between FEMA and grantees because the cost share does not change; however, the make-up of the recipient's portion changes.

*Summary of Benefits.* Under a no-action baseline FEMA believes this rule will promote a better understanding of the FMA program by updating the regulations that govern the HMA programs to conform with adjustments made by BW-12 and current agency practice. These changes will clarify existing requirements and help facilitate the flood portion of the Hazard Mitigation Grant Program processes.

FEMA estimated annual cost savings of \$81,159 per year. Removing the definition of “market value” leads to cost savings to FEMA. Removing this definition will reduce the time it takes to conduct an initial grant application review by 2 hours.

Under a pre-statutory (pre-BW-12) baseline, FEMA believes there are considerable benefits associated with the shift to entirely competitive awards for the grants instead of the previous State-specific allocations, as well as the more flexible in-kind match option. The shift to more vulnerable RL and SRL properties by modifying the cost shares and giving priority to applications with the most vulnerable properties are expected to reduce the frequency of loss claims and promote community resiliency through mitigation. There are also qualitative benefits due to the elimination of the cap on FMA funding for States and communities and the opening of the program to a fully competitive award system. These changes enhance FEMA’s ability to administer the FMA program in a more streamlined and cost effective manner. Removing State allocations of grant resources and accepting in-kind State contributions further streamline the program. Collectively, these benefits justify the rule and update FEMA’s regulations to reflect current statutory authority.

### ***Transfers***

*Federal Cost Shares.* The adjustments in cost shares made by BW-12 result in distributional impacts, with certain grant programs receiving relative increases and

decreases in grant funds. To analyze the impact of changes to the cost shares, FEMA summarized available mitigation project data for standard, RL, and SRL grants.<sup>17</sup>

Between 2006 and 2012 (pre-BW-12), FEMA provided a total of 390 grants to 244 recipients for 1,014 properties. The value of those grants was \$292,374,087, with FEMA paying \$205,762,109 and recipients paying \$86,611,978. Table 4 shows the distribution of these grants by category.

Table 4. Pre-BW-12 Mitigation Projects and Associated Value by Grant Category (2019\$)

Year	Standard (≤75% Federal Cost Share)			Repetitive Loss (75% Federal Cost Share)			Severe Repetitive Loss (90-100% Federal Cost Share)		
	# of Grants	Value of Grants	Federal Share Obligated	# of Grants	Value of Grants	Federal Share Obligated	# of Grants	Value of Grants	Federal Share Obligated
2006	93	\$39,020,873	\$28,914,463	-			2	\$150,655	\$150,655
2007	85	\$46,309,864	\$33,827,089	-			-		
2008	70	\$37,110,276	\$25,084,903	-			1	\$35,166	\$31,649
2009	54	\$81,136,958	\$59,026,566	3	\$3,027,774	\$2,475,759	3	\$653,292	\$587,963
2010	35	\$32,715,929	\$22,915,763	2	\$1,480,940	\$897,864	-		
2011	17	\$17,530,961	\$11,234,999	-			-		
2012	25	\$33,201,399	\$20,614,436	-			-		
Average	54	\$41,003,751	\$28,802,603	0.71	\$644,102	\$481,946	0.86	\$119,873	\$110,038
Total	379	\$287,026,260	\$201,618,219	5	\$4,508,714	\$3,373,623	6	\$839,113	\$770,267

The 390 grants from pre-BW-12 were one of three types – Standard Mitigation (up to 75 percent Federal cost share); RL (75 percent Federal cost share); or SRL (90-100 percent Federal cost share). Prior to BW-12, there were 379 Standard Mitigation grants with a total value of \$287,026,260. FEMA’s share was \$201,618,219 and the recipients’ share was \$85,408,041 (70 percent average Federal cost share). For RL grants, there were five grants with a total value of \$4,508,714. FEMA’s share was \$3,373,623 and the recipients’ share was \$1,135,091 (75 percent Federal cost share). For SRL grants, there

<sup>17</sup> FEMA assumes that the mitigation project level grant data with applications comprising mixed property categories resulting in blended cost share percentages (any total cost share not equal to 100 percent, 90 percent, or 75 percent Federal) would be rounded up to the nearest threshold category. This would not round up project values or Federal cost shares in dollar terms, only their tabulation and consideration as RL or SRL. An application with a determined Federal cost share of 91-99 percent would be counted as part of the 100 percent SRL category, while applications with 76-89 percent Federal cost shares would be counted as part of the 90 percent Federal RL category.

were six grants made with a total value of \$839,113. FEMA’s share was \$770,267 and the recipients’ share was \$68,846 (92 percent Federal cost share).

Post-BW-12 (2013-2019), FEMA provided a total of 624 grants to 1,153 recipients for 9,737 properties. The total value of those grants was \$829,481,486.

FEMA’s share was \$758,759,675 and recipients’ share was \$70,721,811. Table 5 shows the distribution of these grants by category.

Table 5. Post-BW-12 Mitigation Projects and Associated Value by Grant Category (2019\$)

Year	Standard (≤75% Federal Cost Share)			Repetitive Loss (75-90% Federal Cost Share)			Severe Repetitive Loss (100% Federal Cost Share)		
	# of Grants	Value of Grants	Federal Share Obligated	# of Grants	Value of Grants	Federal Share Obligated	# of Grants	Value of Grants	Federal Share Obligated
2013	18	\$10,917,788	\$7,205,740	5	\$12,120,501	\$10,302,426	65	\$100,175,666	\$90,158,099
2014	28	\$8,888,593	\$5,333,156	5	\$6,853,281	\$5,825,289	68	\$74,883,110	\$75,631,941
2015	16	\$7,317,656	\$5,488,242	8	\$33,763,761	\$30,049,747	80	\$124,352,333	\$119,378,240
2016	26	\$11,975,567	\$8,861,920	12	\$29,656,451	\$25,207,983	99	\$173,836,284	\$159,929,381
2017	33	\$13,673,605	\$10,118,468	5	\$5,941,663	\$4,990,997	59	\$80,043,231	\$74,440,205
2018	5	\$5,261,224	\$3,525,020	16	\$27,467,838	\$24,171,697	44	\$76,784,839	\$74,481,294
2019	6	\$2,001,833	\$1,301,191	5	\$5,663,833	\$4,814,258	21	\$17,902,429	\$17,544,380
Average	19	\$8,576,609	\$5,976,248	8	\$17,352,475	\$15,051,771	62	\$92,568,270	\$87,366,220
Total	132	\$60,036,266	\$41,833,737	56	\$121,467,328	\$105,362,397	436	\$647,977,892	\$611,563,541

These 624 grants were one of three types – Standard Mitigation (up to 75 percent Federal cost share); RL (75-90 percent Federal cost share); or SRL (90-100 percent Federal cost share) (all post-BW-12 cost shares). There were 132 Standard Mitigation grants with a total value of \$60,036,266. FEMA’s share was \$41,833,737 and the recipients’ share was \$18,202,529 (70 percent average Federal cost share). For RL grants, there were 56 grants with a total value of \$121,467,328. FEMA’s share was \$105,362,397 and the recipients’ share was \$16,104,931 (87 percent Federal cost share). For SRL grants, there were 436 grants made with a total value of \$647,977,892. FEMA’s share was \$611,563,541 and the recipients’ share was \$36,414,351 (94 percent Federal cost share).

These grants often include some ineligible costs, including cost overruns or underruns, the use of insurance proceeds that FEMA deducted as a duplication of benefits,<sup>18</sup> or Increased Cost of Compliance (ICC),<sup>19</sup> so the actual cost shares do not equal the percentages listed above. For example, although SRL grants have a 100 percent Federal cost share, the actual average Federal share was 94 percent.

*Changing Cost Share Amounts and to a Fully Competitive Grant Process for FMA.*

Changing the cost shares had a distributional impact, where the proportion of Federal funds increased while the recipients' proportion decreased by the same amount. Similarly, the shift from State allocations of grant funding to a competitive-based program that allows grants to be allocated to the most vulnerable properties, resulted in distributional impacts where recipients in certain States receive more in grant funding where others see a decrease. FEMA was not able to isolate this effect from the effect of changing the cost shares, since they were implemented at the same time.

First, FEMA analyzed the shift in grant priorities as a distributional impact between grant programs. This was done by subtracting the total value of grants pre-BW-12 from the total value of grants post-BW-12 for each program, showing the relative

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<sup>18</sup> Duplication of Benefits refers to assistance from more than one source that is used for the same mitigation purpose or activity. The purpose may apply to the whole project or only part of it. HMA funds cannot duplicate funds received by or available to applicants or subapplicants from other sources for the same purpose. Examples of other sources include insurance claims, other assistance programs (including previous project or planning grants and subawards from HMA programs), legal awards, or other benefits associated with properties or damage that are the subject of litigation. HMA does not require that property owners seek assistance from other sources (except for insurance claims). However, it is the responsibility of the property owner to report other benefits received, any applications for other assistance, the availability of insurance proceeds, or the potential for other compensation, such as from pending legal claims for damages, relating to the property. References: Sec. 312 of the Stafford Act; 44 CFR 79.6(d)(7); Hazard Mitigation Assistance Guidance (February 27, 2015), Part III, D.5, pages 31-32; HMA Tool for Identifying Duplication of Benefits [https://www.fema.gov/sites/default/files/2020-04/HMA\\_Guidance\\_FY15.pdf](https://www.fema.gov/sites/default/files/2020-04/HMA_Guidance_FY15.pdf) (last accessed Feb 9, 2021).

<sup>19</sup> Increased Cost of Compliance (ICC) provides up to \$30,000 to help cover the cost of mitigation measures that will reduce flood risk. ICC coverage is a part of most standard flood insurance policies available under the NFIP <https://www.fema.gov/media-library/assets/documents/1130> (last accessed Feb 9, 2021).

decreases and increases by type of FMA grant caused by making the grants competitive and shifting funding to riskier properties.<sup>20</sup>

- The seven-year total share of standard mitigation grants decreased by \$226,989,994 post-BW-12 (\$60,036,266 - \$287,026,260).
- The seven-year total share of RL grants increased by \$116,958,614 post-BW-12 (\$121,467,328 - \$4,508,714).
- The seven-year total share of SRL grants increased by \$647,138,779 post-BW-12 (\$647,977,892 - \$839,113).

This shows the total seven-year relative increases and decreases between FMA programs in terms of post-BW-12 grant funding: (-\$226,989,994 for standard grants + \$116,958,614 for SL grants + \$647,138,779 SRL grants = \$537,107,399).

Table 6 shows changes in the total number of grants as well as the Federal and non-Federal shares for all grants pre-BW-12 and post-BW-12 with the percent change in grants and funding.

Table 6. Change in Average Annual Number of Grants and Funding Pre-BW-12 to Post-BW-12 (2019\$)

	Pre-BW-12	Percent Pre-BW-12	Post-BW-12	Percent Post-BW-12	Percent Change
<b>Standard Mitigation</b>					
Grants per Year	54	97.2%	19	21.3%	-75.9%
Funding per year	\$41,003,751	98.2%	\$8,576,609	7.2%	-90.9%
<b>Repetitive Loss</b>					
Grants per Year	0.71	1.3%	8	9%	+7.7%
Funding per year	\$644,102	1.5%	\$17,352,475	14.6%	+13.1%
<b>Severe Repetitive Loss</b>					
Grants per Year	0.86	1.5%	62	69.7%	+68.2%
Funding per year	\$119,873	0.3%	\$92,568,270	78.1%	+77.8%

When comparing pre-BW-12 standard mitigation grants to post-BW-12, the average annual total amount of funding dropped from \$41 million to \$8.6 million. For

<sup>20</sup> These figures include a large increase in grant funding post-BW-12 for the 3 programs resulting from Congressional appropriations that are not due to changes in from this rule. This increase in overall funding is not “held constant” in the comparisons shown. From 2006-2012, total funding was \$292.4 million and from 2013-2019, total funding was \$829.5 million.

RL structures, the average annual amount of funding increased from \$0.64 million to \$17.4 million. For SRL structures, the average annual funding increased from \$0.12 million to \$92.6 million when compared to pre-BW-12. This reflects BW-12 shifting priority from standard mitigations to RL and SRL structures. FEMA's data indicate a trend toward both larger project sizes and an increased number of RL and SRL projects.

FEMA then analyzed the distributional impacts of the Federal cost shares that resulted from both the shift in priorities and the changes in cost shares. The Federal cost share for standard mitigation grants remained at 70 percent over the post-BW-12 period. The cost share for RL grants increased from an average of 75 percent pre-BW-12 to 87 percent post-BW-12. SRL grants had an average 92 percent cost share pre-BW-12 and a 94 percent cost share post-BW-12. FEMA also analyzed the change in the Federal cost share for the three grant categories together, which shows the impact of BW-12 changes to cost share amounts as well as shifting funding to RL and SRL grants, which have higher cost shares.

The total Federal share of all FMA grant categories pre-BW-12 was 70.4 percent  $[(\$205,762,109 \div \$292,374,087) \times 100]$ . Post BW-12, the Federal share was 91.5 percent  $[(\$758,759,675 \div \$829,481,486) \times 100]$ . The increase in transfers from FEMA to grantees as a result of the changed cost shares and changed priorities, in terms of post-BW-12 grant funding, was \$174,739,761  $(91.5 \text{ percent} - 70.4 \text{ percent} \times \$829,481,486)$  over seven years, or an average increase of \$24,962,823 per year.

Under a no-action baseline, this rule results in no transfer impacts, as FEMA has already implemented the updated cost share percentages in the 2013 HMA Guidance. Under a pre-statutory (pre-BW-12) baseline, the revisions to the cost share and re-prioritization to grants with higher cost shares result in distributional transfer impacts shifting funding to the most vulnerable properties and an increase in transfers from



FEMA to grant recipients. The discounted total seven-year transfers from FEMA to grant recipients are \$174,739,761 million (\$24.96 million annual average).<sup>21</sup>

*Mitigation Planning Grants.* BW-12 lowered the funding cap on the amount of money that could be used for the flood portion of the individual multi-hazard mitigation plans from \$150,000 in recipients and \$50,000 for subrecipients to \$50,000 per recipient and \$25,000 per subrecipient, but removed a restriction that grantees could only receive funding for planning grants once every 5 years. Lowering the cap on Federal funds results in decreased funding per applicant. However, FEMA believes this is offset by the removal of the frequency restriction, which results in a negligible change in the number of approved applications and awards. FEMA found that the data does not show a substantial change in the number of applications, and thus FEMA assumed that the removal of the 5-year restriction is countered by the lowered cap on funding, resulting in minimal distributional impacts as shown in Table 7. Because FEMA implemented these changes concurrently, FEMA was unable to isolate the effects of individual changes.

Year	Applications	Approved Grants	Average Grant Amount
2006	167	92	\$291,961
2007	561	481	\$88,076
2008	523	374	\$83,738
2009	491	346	\$83,738
2010	364	288	\$82,992
2011	417	363	\$104,024
2012	173	155	\$144,992
<b>Average Pre-BW-12</b>	<b>385</b>	<b>300</b>	<b>\$125,646</b>
2013	260	228	\$117,107
2014	293	264	\$89,362
2015	351	315	\$94,685
2016	329	287	\$173,348
2017	422	377	\$100,049
2018	287	248	\$151,711
2019	149	116	\$105,929
<b>Average Post-BW-12</b>	<b>299</b>	<b>262</b>	<b>\$118,884</b>

<sup>21</sup> The annualized amounts for 3 percent and 7 percent are equal to the estimated annual transfers of \$24.96 million because the amounts for each year are identical and the first year is discounted.

Since 2013, FEMA has applied the new caps on funding for FMA planning grants per recipient and subrecipient. The caps align with and reflect FEMA’s shift to focus the majority of FMA program funds on mitigating the risk to the most vulnerable properties. FEMA is no longer constrained by any limit on how often a recipient or subrecipient can receive a planning grant or the total amount that can be granted to a recipient. Further, the lower caps per recipient and subrecipient allow FEMA to assist more recipients and subrecipients.

***Alternatives***

Most of the changes in this rule are based on statute. FEMA has limited discretion in determining which changes to make. The changes that carry an economic impact under a pre-statutory (pre-BW-12) baseline are the changes to 44 CFR 79.4 (now 44 CFR 77.4): FMA Grant Federal Cost Shares and 44 CFR 79.6 (now 44 CFR 77.6): Flood Portion of Multi-Hazard Mitigation Plans. BW-12 prescribed these changes. These changes are neither new nor discretionary and FEMA did not consider alternatives.

Below, the OMB A-4 Accounting Statement presents the annualized costs, benefits, and transfer payments of the final rule in 2019 dollars using the no-action baseline. Accordingly, the below accounting statement shows the costs and benefits of this rule measured against what the world would be like if this rule were not adopted.

Table 8. A-4 Accounting Statement (2019\$) – No Action Baseline

Period of analysis: 2021 to 2030			
<i>Category</i>	<i>7 Percent Discount Rate</i>	<i>3 Percent Discount Rate</i>	<i>Source Citation (RIA, preamble, etc.)</i>
<i>BENEFITS</i>			
Annualized Monetized	\$81,159	\$81,159	Preamble (RA)
Annualized Quantified	N/A	N/A	

Qualitative	<ul style="list-style-type: none"> <li>Allows FEMA to target most vulnerable properties and streamline mitigation grant process.</li> <li>Modernize and standardize regulations to align current practice with other FEMA programs and increase readability.</li> </ul>		Preamble (RA)
<i>COSTS</i>			
Annualized Monetized	\$746	\$638	Preamble (RA)
Annualized quantified	N/A	N/A	
Qualitative	N/A		
<i>TRANSFERS</i>			
Annualized Monetized	0	0	Preamble (RA)
From/To	N/A		Preamble (RA)
<i>Category</i>	<i>Effects</i>		<i>Source Citation (RIA, preamble, etc.)</i>
State, Local, and/or Tribal Government	<ul style="list-style-type: none"> <li>Allows State, local, and Tribal governments to prioritize more vulnerable properties and simplifies the grant process.</li> </ul>		Preamble (RA)
Small business	<p>There were 391 small entity recipients from 2006-2019. Prior to BW-12, an average of 16 recipients per year were small entities. Post-BW-12, there was an average of 40 small entity recipients per year. Post-BW-12, small entities were more likely to receive RL or SRL grants and slightly less likely to receive standard mitigation grants, so the Federal cost shares (i.e., the portion of the grant funded by FEMA) for small entities were, on average, higher post-BW-12.</p>		Preamble (FRFA)
Wages	None		
Growth	None		

FEMA also assessed the impacts of this rule under the pre-statutory baseline. The pre-statutory baseline is an assessment against what the world would be like if the relevant statute(s) had not been adopted, and in this case, already been implemented through guidance. FEMA estimates the impact of the changes codified in this rule to primarily be an increase in transfers from FEMA to HMA recipients of \$24.96 million annualized, due to the targeting of higher risk properties for grant funding. Additionally, the changes codified by this rule shifted from State-based allocations to a competitive process, allowing FEMA to select applications according to FEMA priorities rather than by location. This rule also eliminated limits on in-kind contributions, allowing recipients more flexibility to cover their portion of the cost shares. FEMA implemented the pre-statutory provisions of this rule in the 2013 HMA Unified Guidance.

## **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires agency review of proposed and final rules to assess their impact on small entities. When an agency promulgates a notice of proposed rulemaking under 5 U.S.C. 553, the agency must prepare an Final Regulatory Flexibility Analysis (FRFA) unless it determines and certifies pursuant to 5 U.S.C. 605(b) that a rule, if promulgated, will not have a significant impact on a substantial number of small entities. FEMA believes this rule does not have a significant economic impact on a substantial number of small entities.

In accordance with the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121, 110 Stat. 857), FEMA examined the effects of the adjustments made by BW-12 and implemented by FEMA in the 2013 HMA Guidance on small entities. A small entity may be: a small independent business, defined as independently owned and operated, is organized for profit, and is not dominant in its field per the Small Business Act (5 U.S.C. 632); a small organization, defined as any not-for-profit enterprise which is independently owned and operated and is not dominant in its field (5 U.S.C. 601); or a small governmental jurisdiction (locality with fewer than 50,000 people) per 5 U.S.C. 601.

The rule directly affects all eligible FMA grant recipients. FEMA estimates that the changes from BW-12 affect FMA grant recipients that are small governmental jurisdictions with a population of less than 50,000, as defined at 5 U.S.C. 601(5).<sup>22</sup> To

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<sup>18</sup> See 5 U.S.C. 601(3)-(6). In general, the term “small entity” can have the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction” for purposes of this analysis. Specifically, section 601(3) defines a “small business” as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated that is not dominant in its field of operation. Section 601(4) defines a “small organization” as any not-for-profit enterprise that is independently owned and operated that is not dominant in its field of operation. Section 601(5) defines “small governmental jurisdiction” as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000. Accessed and downloaded Feb 24, 2021.

estimate the effects on small entities of the adjustments made by BW-12, and codified in this rule, FEMA used the same methodology used in the regulatory analysis.<sup>23</sup> In general, FEMA identified the affected population – recipients of FEMA’s FMA grants – and analyzed how the changes affect those recipients. Using those results, FEMA then evaluated which recipients qualified as “small entities.” Eligible FMA grant recipients may include States, U.S. territories, and Indian Tribal governments; subrecipients may include local governments and governmental organizations such as flood, sewer, and water districts. FEMA removed from its RFA dataset and analysis any recipients that are States and U.S. territories because they have populations greater than 50,000. FEMA also removed any Indian Tribal governments because they are not included in the definition of a small entity.<sup>24</sup> The remaining recipients were either local governments or governmental organizations. FEMA used the U.S. Census Bureau’s annual population estimates for 2019 produced by its Population Estimates Program (PEP)<sup>25</sup> to determine the population for each recipient.<sup>26</sup> Table 9 summarizes the number of small entities affected by the changes in BW-12.

Table 9: Estimated Number of Small Entities Affected by this Rule

	<b>Year</b>	<b>Grants to Small Entities</b>	<b>Properties within Grants</b>
Pre-BW-12	2006	30	67
	2007	25	39
	2008	16	14

[http://uscode.house.gov/view.xhtml?req=\(title:5 section:601 edition:prelim\) OR \(granuleid:USC-prelim-title5-section601\)&f=treesort&edition=prelim&num=0&jumpTo=true](http://uscode.house.gov/view.xhtml?req=(title:5 section:601 edition:prelim) OR (granuleid:USC-prelim-title5-section601)&f=treesort&edition=prelim&num=0&jumpTo=true).

<sup>23</sup> FEMA’s methodology is included in section IV. Regulatory Analysis of this final rule.

<sup>24</sup> The Regulatory Flexibility Act (RFA) defines a small entity as a small business, small nonprofit organization, or a small governmental jurisdiction. Section 601(5) defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

<sup>25</sup> FEMA used the U.S. Census Bureau’s PEP estimates file entitled, “sub-est2019\_all.csv” because it provided 2019 estimated populations for all States and all subgovernmental jurisdictions, including counties, parishes, etc., towns, cities, villages, etc. Accessed and downloaded Feb 24, 2021. <https://www2.census.gov/programs-surveys/popest/datasets/2010-2019/cities/totals/>.

<sup>26</sup> FEMA used the population of the county, parish, or borough in which the grant project was located as a proxy to determine the populations for governmental organizations. For example, FEMA used the New Castle County, DE 2019 population of 558,753 to determine if the New Castle Conservation District was a small entity. In this example, the population of 558,753 is greater than the 50,000 small entity threshold; thus, the new Castle Conservation District is not a small entity.

	2009	18	41
	2010	11	76
	2011	4	12
	2012	8	75
Post-BW-12	2013	23	64
	2014	27	66
	2015	18	71
	2016	25	56
	2017	26	78
	2018	122	82
	2019	38	25
<b>Total Small Entity Recipients</b>		<b>391</b>	<b>766</b>
<b>Total All Recipients</b>		<b>1,551</b>	<b>4,521</b>
<b>Small Entity Recipients as a Percent of Total Recipients</b>		<b>25.2%</b>	<b>17.0%</b>
Pre-BW-12:	Total	112	324
	Annual Average	16	46
Post-BW-12:	Total	279	442
	Annual Average	40	63

Between 2006 and 2019, FEMA awarded a total of 1,551 FMA grants to mitigate flood risk to 4,521 properties. Of the total 1,551 recipients, 391 recipients, or 25.2 percent, had populations under 50,000 and are considered small entities. These small entities used the FMA grants to mitigate flood risk to 766 vulnerable properties. These 391 small entity recipients are all local governments.

Pre-BW-12, FEMA awarded 112 grants to small entities. Of these, 109 were for standard mitigation with an average Federal cost share of 73 percent, 2 were RL with an average Federal cost share of 82 percent, and 1 was SRL with a cost share of 90 percent.

Table 10: Pre-BW-12 Projects and Value by Grant Category (2019\$) Awarded to Small Entities

Year	Standard (≤75% Federal Cost Share)			Repetitive Loss (RL) (75% Federal Cost Share)			Severe Repetitive Loss (SRL) (90%-100% Federal Cost Share)		
	Grants	Value of Grants	Federal Share Obligated	Grants	Value of Grants	Federal Share Obligated	Grants	Value of Grants	Federal Share Obligated
2006	30	\$6,014,828	\$4,467,682	-	\$-	\$-	-	\$-	\$-
2007	25	\$11,015,869	\$7,786,046	-	\$-	\$-	-	\$-	\$-
2008	16	\$2,189,233	\$1,603,820	-	\$-	\$-	-	\$-	\$-
2009	15	\$8,068,507	\$5,868,226	2	\$2,393,363	\$1,952,676	1	\$59,465	\$53,518
2010	11	\$15,403,139	\$11,551,457	-	\$-	\$-	-	\$-	\$-
2011	4	\$2,950,334	\$2,079,950	-	\$-	\$-	-	\$-	\$-

2012	8	\$6,509,829	\$4,876,130	-	\$-	\$-	-	\$-	\$-
Total:	109	\$52,151,739	\$38,233,311	2	\$2,393,363	\$1,952,676	1	\$59,465	\$53,518

Post-BW-12, FEMA awarded 279 grants to small entities. Of these, 40 were standard mitigation with an average Federal cost share of 69 percent, 3 were RL with an average Federal cost share of 88 percent, and 76 were SRL with an average Federal cost share of 90 percent. While the cost shares did not change significantly, more applicants received SRL grants when compared to the pre-BW-12 period. This shows the prioritization of more vulnerable properties.

Table 11: Post-BW-12 Projects and Value by Grant Category (2019\$) Awarded to Small Entities

Year	Standard (≤75% Federal Cost Share)			Repetitive Loss (RL) (75%-90% Federal Cost Share)			Severe Repetitive Loss (SRL) (100% Federal Cost Share)		
	Grants	Value of Grants	Federal Share Obligated	Grants	Value of Grants	Federal Share Obligated	Grants	Value of Grants	Federal Share Obligated
2013	8	\$972,391	\$435,490	1	\$7,274,609	\$6,452,685	14	\$5,720,524	\$3,778,669
2014	11	\$2,575,473	\$1,623,207	-	\$-	\$-	16	\$12,558,967	\$12,235,583
2015	3	\$2,478,165	\$1,858,623	-	\$-	\$-	15	\$10,676,146	\$10,007,363
2016	6	\$290,884	\$197,705	2	\$1,798,791	\$1,556,119	17	\$10,678,636	\$9,299,774
2017	12	\$5,191,261	\$3,881,929	-	\$-	\$-	14	\$9,198,557	\$8,627,638
2018	41	\$1,703,802	\$1,109,366	3	\$2,014,308	\$1,764,641	78	\$16,081,572	\$14,090,559
2019	13	\$648,276	\$422,100	1	\$415,348	\$363,867	24	\$3,749,428	\$3,285,222
Total:	94	\$13,860,253	\$9,528,420	7	\$11,503,056	\$10,137,312	178	\$68,663,830	\$61,324,808

This rule codifies legislative requirements included in the Biggert-Waters Flood Insurance Reform Act of 2012, Pub. L.112-141, 126 Stat. 916 (BW-12), which amended the National Flood Insurance Act of 1968 (NFIA) and required changes to all major components of the National Flood Insurance Program (NFIP), including mitigation grants authorized under the NFIA. FEMA implemented the legislative requirements in BW-12 through policy/guidance in 2013 and is now codifying these changes in regulation, to reflect current agency practice, and to clarify existing regulations. Pursuant to 5 U.S.C. 605(b), FEMA certifies that this regulation will not have a significant economic impact on a substantial number of small entities.

### **C. Unfunded Mandates Reform Act of 1995**

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on state, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and Tribal governments and the private sector. This rule does not result in such an expenditure, and thus preparation of such a statement is not required.

### **D. National Environmental Policy Act of 1969 (NEPA)**

Section 102 of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*) requires Federal agencies to consider the impacts of their proposed actions on the quality of the human environment. Each agency can develop categorical exclusions (catexes) to cover actions that have been demonstrated to not typically trigger significant impacts to the human environment individually or cumulatively. If an action does not qualify for a catex and has the potential to significantly affect the environment, agencies develop environmental assessments (EAs) to evaluate those actions. The Council on Environmental Quality's (CEQ) procedures for implementing NEPA, 40 CFR parts 1500 through 1508, require Federal agencies to prepare Environmental Impact Statements (EISs) for major Federal actions significantly affecting the quality of the human environment. At the end of the



EA process, the agency will determine whether to make a Finding of No Significant Impact (FONSI) or whether to initiate the EIS process.

Under the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.* an agency must prepare an Environmental Assessment (EA) and Environmental Impact Statement (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.

Catex A3 included in the list of exclusion categories at Department of Homeland Security Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act, Appendix A, issued November 6, 2014, covers the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, and advisory circulars if they meet certain criteria provided in A3(a-f). This rule meets the criteria in A3(a), (b), (c), and (d). The rule makes a number of regulatory revisions that are strictly administrative. In addition, the rule amends an existing regulation without changing its environmental effect, and also implements, without substantive change, statutory requirements and guidance documents. Because no extraordinary circumstances have been identified, this rule does not require the preparation of either an EA or an EIS as defined by NEPA. *See* Department of Homeland Security Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act, section (V)(B)(2).

#### **E. Endangered Species Act**

The Endangered Species Act (ESA) mandates that Federal agencies determine whether their proposed actions may affect listed species and/or their designated critical habitat (critical habitat has been designated for some, but not all listed species). Without

authorization or exemption from Federal resource agencies, it is unlawful for any person, whether government employee or private citizen, to take listed animal species.

To comply with Section 7(a)(2) of the ESA, for every action that FEMA proposes to carry out, fund, or authorize, FEMA must first determine if species and habitat are present in the action area. If species are present in the action area, then FEMA must make one of the following determinations with respect to the effect of the proposed action on listed species and critical habitat: (1) no effect (NE); 2) may affect, but is not likely to adversely affect (NLAA); or 3) may affect and is likely to adversely affect (LAA).

This rule has been evaluated by FEMA and due to the administrative nature, FEMA has determined the rule does not have the potential to affect federally-listed species or designated critical habitat. As such, a “No Effect” determination has been made for these activities. Per the ESA regulations, notification to, and consultation with, the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service are not required for activities with a “No Effect” determination.

#### **F. National Historic Preservation Act of 1966**

The National Historic Preservation Act (NHPA) (54 U.S.C. 300101, formerly 16 U.S.C. 470) was enacted in 1966, with various amendments throughout the years. Section 106 of the NHPA (54 U.S.C. 306108) requires Federal agencies to take into account the effect of their actions on any historic property. It mandates a consultation process in the early stages of project planning and must be completed prior to the approval of expenditure of any Federal funds for the undertaking. Subpart B of 36 CFR part 800 lays out a four-step Section 106 process to fulfill this obligation: (1) initiate the process (800.3); (2) identify historic properties (800.4); (3) assess adverse effects (800.5); and (4) resolve adverse effects (800.6).

Pursuant to section 106 of the NHPA and its implementing regulations at 36 CFR part 800, FEMA has determined that this rule does not have the potential to cause effects to historic properties and in accordance with 36 CFR Part 800.3(a)(1), FEMA has no further obligations under section 106.

### **G. 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 the Office of Management and Budget (OMB) for the collection and the collection displays a valid OMB control number. *See* 44 U.S.C. 3506, 3507. This rule contains collections of information that are subject to review by OMB. The information collections included in this rule are approved by OMB under control numbers 1660-0072 (Flood Mitigation Assistance (eGrants) and Grant Supplement Information), 1660-0062 (State/Local/Tribal Hazard Mitigation Plans), 1660-0026 (State Administrative Plan for the Hazard Mitigation Grant Program), and 1660-0076 (Hazard Mitigation Grant Program Application and Reporting). Currently, FEMA is working to reinstate 1660-0103 (Property Acquisition and Relocation for Open Space).

This rulemaking calls for no new collections of information under the PRA. This rule includes information currently collected by FEMA and approved in OMB information collections 1660-0072, 1660-0062, 1660-0026, and 1660-0076. Currently, FEMA is working to reinstate 1660-0103. The actions of this rulemaking do not impose any additional burden to this collection of information. The changes in this rulemaking do not change the forms, the substance of the forms, or the number of recipients who would submit the forms to FEMA.

### **H. Privacy Act/E-Government Act**

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A record is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. *See* 5 U.S.C. 552a(a)(4). A system of records is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

The E-Government Act of 2002, 44 U.S.C. 3501 note, also requires specific procedures when an agency takes action to develop or procure information technology that collects, maintains, or disseminates information that is in an identifiable form. This Act also applies when an agency initiates a new collection of information that will be collected, maintained, or disseminated using information technology if it includes any information in an identifiable form permitting the physical or online contacting of a specific individual. A Privacy Threshold Analysis was completed.

### **I. 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.

Although Indian Tribal governments are potentially eligible applicants under HMA programs, FEMA has determined that this rule does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. There is no substantial direct compliance cost associated with this rule. The HMA programs are voluntary programs that provide funding to applicants, including Tribal governments, for eligible mitigation planning and projects that reduce disaster losses and protect life and property from future disaster damages. An Indian Tribal government may participate as either an applicant/recipient or a subapplicant/subrecipient. FEMA does not expect the regulatory changes in this rule to disproportionately affect Indian Tribal governments acting as recipients.

#### **J. 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. FEMA has determined that this rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion. This rulemaking amends regulations governing voluntary grant programs that may be used by State, local and Tribal governments to fund eligible mitigation activities that reduce disaster losses and protect life and property from future disaster damages. States are not required to seek grant funding, and this rulemaking does not limit their policymaking discretion.

#### **K. Executive Order 11988, Floodplain Management**

Pursuant to Executive Order 11988, each Federal 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 regulation 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 located in the floodplain. The purpose of the rule is to update FEMA's HMA program regulations to reflect statutory changes that have already been implemented. While the rule revises the regulations for FMA administered by the NFIP, it would not impact other NFIA regulations that pertain to land use, floodplain management, or flood insurance. The majority of the revisions in this rulemaking apply to the regulations for the FMA program, which is a voluntary grant program that provides funding for activities designed to reduce the risk of flood damage to structures insured under the NFIP. 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. These procedures include a specific, 8-step process for conducting floodplain management and wetland reviews. The rule does not change this process.

#### **L. Executive Order 11990, Protection of Wetlands**

Pursuant to Executive Order 11990, each Federal 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 requirements of Executive Order 11990 apply in the context of the provision of Federal financial assistance relating to, among other things, construction and property improvement activities. However, this rule would not have an effect on land use or wetlands. The purpose of the rule is to update FEMA's HMA program regulations to reflect statutory changes that have already been implemented. While the rule revises the regulations for FMA administered by the NFIP, it does not impact other NFIP regulations that pertain to land use, floodplain management, or flood insurance. The majority of the revisions in this rulemaking apply to the regulations for the FMA program, which is a voluntary grant program that provides funding for activities designed to reduce the risk of flood damage to structures insured under the NFIP. When FEMA undertakes specific



actions that may have effects on wetlands, FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with this Executive Order. These procedures include a specific, 8-step process for conducting floodplain management and wetland reviews. The rule would not change this process.

#### **M. Executive Order 12898, Environmental Justice**

Pursuant to Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994, as amended by Executive Order 12948, 60 FR 6381, February 1, 1995, FEMA incorporates environmental justice into its policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin. This rulemaking will not have a disproportionately high or adverse effect on human health or the environment.

#### **N. 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 77**

Flood insurance, Grant programs.

#### **44 CFR Parts 78 and 79**

Flood insurance, Grant programs.

#### **44 CFR Part 80**

Disaster assistance, Grant programs.

#### **44 CFR Part 201**

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

#### **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, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, FEMA amends 44 CFR parts 77, 78, 79, 80, 201, and 206 as follows:

#### **PART 78 – [REMOVED AND RESERVED]**

2. Under the authority of 6 U.S.C. 101 *et seq.*; 42 U.S.C. 4001 *et seq.*; 42 U.S.C. 4104c, 4104d, remove and reserve part 78.

## **PART 79 – [REDESIGNATED]**

2. Redesignate part 79 as part 77:
3. Revise newly redesignated part 77 to read as follows:

## **PART 77 – FLOOD MITIGATION GRANTS**

Sec.

77.1 Purpose and applicability.

77.2 Definitions.

77.3 Responsibilities.

77.4 Availability of funding.

77.5 Application process.

77.6 Eligibility.

77.7 Allowable costs.

77.8 Grant administration.

AUTHORITY: 6 U.S.C. 101 *et seq.*; 42 U.S.C. 4001 *et seq.*; 42 U.S.C. 4104c, 4104d.

### **§ 77.1 Purpose and applicability.**

(a) The purpose of this part is to prescribe actions, procedures, and requirements for administration of the Flood Mitigation Assistance (FMA) grant program made available under the National Flood Insurance Act of 1968, as amended, and the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4001 *et seq.* The purpose of the FMA program is to assist States, Indian Tribal governments, and communities for planning and carrying out mitigation activities designed to reduce the risk of flood damage to structures insured under the National Flood Insurance Program (NFIP).

(b) This part applies to the administration of funds under the FMA program for which the application period opens on or after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

### **§ 77.2 Definitions.**

(a) Except as otherwise provided in this part, the definitions set forth in § 59.1 of this subchapter are applicable to this part.

(b) *Applicant* means the entity, such as a State or Indian Tribal government, applying to FEMA for a Federal award under the FMA program. Once funds have been awarded, the applicant becomes the recipient and may also be a pass-through entity.

(c) *Closeout* means the process by which FEMA or the pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in 2 CFR 200.344, "Closeout."

(d) *Community* means:

(1) A political subdivision, including any Indian Tribe, authorized Tribal organization, Alaska Native village or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and is participating in the NFIP; or

(2) A political subdivision of a State or other authority that is designated by political subdivisions, all of which meet the requirements of paragraph (d)(1) of this section, to administer grants for mitigation activities for such political subdivisions.

(e) *Federal award* means the Federal financial assistance a recipient or subrecipient receives directly from FEMA or indirectly from a pass-through entity. The terms "award" and "grant" may also be used to describe a Federal award under this part.

(f) *Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5131. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

(g) *Pass-through entity* means a recipient that provides a subaward to a subrecipient to carry out part of the FMA program.

(h) *Recipient* means the State or Indian Tribal government that receives a Federal award directly from FEMA. A recipient may also be a pass-through entity. The term recipient does not include subrecipients.

(i) *Repetitive loss structure* means a structure covered under an NFIP flood insurance policy that:

(1) Has incurred flood-related damage on 2 occasions, in which the cost of repair, on average, equaled or exceeded 25% of the value of the structure at the time of each such flood event; and

(2) At the time of the second incidence of flood related damage, the contract for flood insurance contains increased cost of compliance coverage.

(j) *Severe repetitive loss structure* means a structure that is covered under an NFIP flood insurance policy and has incurred flood-related damage:

(1) For which 4 or more separate claims payments have been made under flood insurance coverage under subchapter B of this chapter, with the amount of each claim (including building and contents payments) exceeding \$5,000, and with the cumulative amount of such claims payments exceeding \$20,000; or

(2) For which at least 2 separate flood insurance claims payments (building payments only) have been made, with cumulative amount of such claims exceeding the value of the insured structure.

(k) *State* means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(l) *Subaward* means an award provided by a pass-through entity to a subrecipient, for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a

beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

(m) *Subapplicant* means a State agency, community, or Indian Tribal government submitting a subapplication to the applicant for assistance under the FMA program.

Upon grant award, the subapplicant is referred to as the subrecipient.

(n) *Subrecipient* means the State agency, community, or Indian Tribal government that receives a subaward from a pass-through entity for the subrecipient to carry out an activity under the FMA program.

(o) *Administrator* means the head of the Federal Emergency Management Agency, or his/her designated representative.

(p) *Regional Administrator* means the head of a Federal Emergency Management Agency regional office, or his/her designated representative.

### **§ 77.3 Responsibilities.**

(a) *Federal Emergency Management Agency (FEMA)*. Administer and provide oversight to all FEMA-related hazard mitigation programs and grants, including:

(1) Issue program implementation procedures, as necessary, which will include information on availability of funding;

(2) Award all grants to the recipient after evaluating subaward applications for eligibility and ensuring compliance with applicable Federal laws, giving priority to such properties, or to the subset of such properties, as the Administrator may determine are in the best interest of the NFIF;

(3) Provide technical assistance and training to State, local and Indian Tribal governments regarding the mitigation and grants management process;

(4) Review and approve State, Indian Tribal, and local mitigation plans in accordance with part 201 of this chapter;

(5) 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 subrecipient in accordance with applicable laws, regulations, and agency policy;

(6) Monitor implementation of awards through quarterly reports; and

(7) Review all closeout documentation for compliance and sending the recipient a request for additional supporting documentation, if needed.

(b) *Recipient.* The recipient must have working knowledge of NFIP goals, requirements, and processes and ensure that the program is coordinated with other mitigation activities. Recipients will:

(1) Have a FEMA approved Mitigation Plan in accordance with part 201 of this chapter;

(2) Provide technical assistance and training to communities on mitigation planning, mitigation project activities, developing subaward applications, and implementing approved subawards;

(3) Prioritize and recommend subaward applications to be approved by FEMA, based on the applicable mitigation plan(s), other evaluation criteria, and the eligibility criteria described in § 77.6;

(4) Award FEMA-approved subawards;

(5) Monitor and evaluate the progress of the mitigation activity in accordance with the approved original scope of work and budget through quarterly reports;

(6) Closeout the subaward in accordance with 2 CFR 200.344 and 200.345, and applicable FEMA guidance; and

(7) Comply with program requirements under this part, grant management requirements identified under 2 CFR parts 200 and 3002, the grant agreement articles, and other applicable Federal, State, Tribal and local laws and regulations.

(c) *Subrecipient.* The subrecipient (or subapplicant, as applicable) will:

(1) Complete and submit subaward applications to the recipient for FMA planning and project subawards;

(2) Implement all approved subawards;

(3) Monitor and evaluate the progress of the mitigation activity in accordance with the approved original scope of work and budget through quarterly reports;

(4) Comply with program requirements under this part, grant management requirements identified under 2 CFR parts 200 and 3002, the grant agreement articles, and other applicable Federal, State, Tribal and local laws and regulations; and

(5) Closeout the subaward in accordance with 2 CFR 200.344 and 200.345, and applicable FEMA guidance.

#### **§ 77.4 Availability of funding.**

(a) *Allocation.* (1) For the amount made available for the FMA program, the Administrator will allocate the available funds based upon criteria established for each application period. The criteria may include the number of NFIP policies, severe repetitive loss structures, repetitive loss structures, and any other factors the Administrator determines are in the best interests of the NFIF.

(2) The amount of FMA funds used may not exceed \$50,000 for any mitigation plan of a State or \$25,000 for any mitigation plan of a community.

(b) *Cost share.* All mitigation activities approved under the grant will be subject to the following cost share provisions:

(1) For each severe repetitive loss structure, FEMA may contribute either:



(i) Up to 100 percent of all eligible costs if the activities are technically feasible and cost effective; or

(ii) Up to the amount of the expected savings to the NFIP for acquisition or relocation activities;

(2) For repetitive loss structures, FEMA may contribute up to 90 percent of the eligible costs;

(3) For all other mitigation activities, FEMA may contribute up to 75 percent of all eligible costs.

(4) For projects that contain a combination of severe repetitive loss, repetitive loss, and/or other insured structures, the cost share will be calculated as appropriate for each type of structure submitted in the project subapplication.

(c) *Failure to make award within 5 years.* Any FMA application or subapplication that does not receive a Federal award within 5 years of the application/subapplication submission date is considered to be denied, and any funding amounts allocated for such applications/subapplications will be made available for other FMA awards and subawards.

#### **§ 77.5 Application process.**

(a) *Applicant.* (1) Applicants will be notified of the availability of funding for the FMA program pursuant to 2 CFR 200.203 and 200.204.

(2) The applicant is responsible for soliciting applications from eligible communities, or subapplicants, and for reviewing and prioritizing applications prior to forwarding them to FEMA for review and award.

(b) *Subapplicant.* Communities or other subapplicants who choose to apply must develop subapplications within the timeframes and requirements established by FEMA and must submit subapplications to the applicant.

#### **§ 77.6 Eligibility.**

(a) *NFIP requirements.* (1) States, Indian Tribal governments, and communities must be participating in the NFIP and may not be suspended or withdrawn under the program.

(2) For projects that impact individual structures, for example, acquisitions and elevations, an NFIP policy for the structure must be in effect prior to the opening of the application period and be maintained for the life of the structure.

(b) *Plan requirement--(1) Applicants.* States must have a FEMA-approved mitigation plan meeting the requirements of § 201.4 of this chapter that provides for reduction of flood losses to structures for which NFIP coverage is available. Indian Tribal governments must have a FEMA-approved mitigation plan meeting the requirements of § 201.7 of this chapter that provides for reduction of flood losses to structures for which NFIP coverage is available. The FEMA-approved mitigation plan is required at the time of application and award.

(2) *Subapplicants.* To be eligible for FMA project grants, subapplicants must have an approved mitigation plan in accordance with part 201 of this chapter that provides for reduction of flood losses to structures for which NFIP coverage is available. The FEMA-approved mitigation plan is required at the time of application and award.

(c) *Eligible activities—*

(1) *Planning.* FMA planning grants may be used to develop or update State, Indian Tribal and/or local mitigation plans that meet the planning criteria outlined in part 201 of this chapter and provide for reduction of flood losses to structures for which NFIP coverage is available.

(2) *Projects.* Projects funded under the FMA program are limited to activities that reduce flood damages to properties insured under the NFIP. Applications involving any activities for which implementation has already been initiated or completed are not eligible for funding, and will not be considered. Eligible activities are:

(i) Acquisition of real property from property owners, and demolition or relocation of buildings and/or structures to areas outside of the floodplain to convert the property to open space use in perpetuity, in accordance with part 80 of this subchapter;

(ii) Elevation of existing structures to at least base flood levels or higher, if required by FEMA or if required by any State or local ordinance, and in accordance with criteria established by the Administrator;

(iii) Floodproofing of existing non-residential structures in accordance with the requirements of the NFIP or higher standards if required by FEMA or if required by any State or local ordinance, and in accordance with criteria established by the Administrator;

(iv) Floodproofing of historic structures as defined in §59.1 of this subchapter;

(v) Demolition and rebuilding of properties to at least base flood levels or higher, if required by FEMA or if required by any State or local ordinance, and in accordance with criteria established by the Administrator;

(vi) Localized flood risk reduction projects that lessen the frequency or severity of flooding and decrease predicted flood damages, and that do not duplicate the flood prevention activities of other Federal agencies. Non-localized flood risk reduction projects such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible unless the Administrator specifically determines in approving a mitigation plan that such activities are the most cost-effective mitigation activities for the National Flood Mitigation Fund;

(vii) Elevation, relocation, or floodproofing of utilities; and

(viii) Other mitigation activities not described or identified in (c)(2)(i) through (vii) of this section that are described in the State, Tribal or local mitigation plan.

(3) *Technical assistance.* If a recipient applied for and was awarded at least \$1 million in the prior fiscal year, that recipient may be eligible to receive a technical assistance grant for up to \$50,000.

(4) *Project Scoping.* Activities that enable subapplicants to develop complete subapplications for eligible mitigation activities including but not limited to data development.

(d) *Minimum project criteria.* In addition to being an eligible project type, mitigation grant projects must also:

(1) Be in conformance with State, Tribal and/or local mitigation plans approved under part 201 of this chapter for the jurisdiction where the project is located;

(2) Be in conformance with applicable environmental and historic preservation laws, regulations, and agency policy, including parts 9 and 60 of this chapter, and other applicable Federal, State, Tribal, and local laws and regulations;

(3) Be technically feasible and cost-effective; or, eliminate future payments from the NFIF for severe repetitive loss structures through an acquisition or relocation activity;

(4) Solve a problem independently, or constitute a functional portion of a long-term solution where there is assurance that the project as a whole will be completed. This assurance will include documentation identifying the remaining funds necessary to complete the project, and the timeframe for completing the project;

(5) Consider long-term changes to the areas and entities it protects, and have manageable future maintenance and modification requirements. The subrecipient is responsible for the continued maintenance needed to preserve the hazard mitigation benefits of these measures; and

(6) Not duplicate benefits available from another source for the same purpose or assistance that another Federal agency or program has more primary authority to provide.

#### **§ 77.7 Allowable costs.**

(a) *General.* General policies for allowable costs for implementing awards and subawards are addressed in 2 CFR 200.101, 200.102, 200.400-200.476.

(1) *Eligible management costs—(i) Recipient.* Recipients are eligible to receive management costs (direct and indirect administrative costs pursuant to 2 CFR part 200 Subpart E) consisting of a maximum of 10 percent of the planning and project activities awarded to the recipient, each fiscal year under FMA. These costs must be included in the application to FEMA.

(ii) *Subrecipient.* Subapplicants may include a maximum of 5 percent of the total funds requested for their subapplication for management costs to support the implementation of their planning or project activity. These costs must be included in the subapplication to the recipient.

(2) *Indirect costs.* Indirect costs of administering the FMA program are eligible as part of the 10 percent management costs for the recipient or the 5 percent management costs of the subrecipient, but in no case do they make the recipient eligible for additional management costs that exceed the caps identified in paragraph (a)(1) of this section. In addition, all costs must be in accordance with the provisions of 2 CFR parts 200 and 3002.

(b) *Pre-award costs.* FEMA may fund eligible pre-award costs related to developing the application or subapplication at its discretion and as funds are available. Recipients and subrecipients may be reimbursed for eligible pre-award costs for activities directly related to the development of the project or planning proposal. Costs associated with implementation of the activity but incurred prior to award are not eligible. Therefore, activities where implementation is initiated or completed prior to award are not eligible and will not be reimbursed.

(c) *Duplication of benefits.* Grant funds may not duplicate benefits received by or available to applicants, subapplicants and project participants from insurance, other assistance programs, legal awards, or any other source to address the same purpose. Such individual or entity must notify the recipient and FEMA of all benefits that it receives or

anticipates from other sources for the same purpose. FEMA will reduce the subaward by the amounts available for the same purpose from another source.

(d) *Negligence or other tortious conduct.* FEMA grant funds are not available where an applicant, subapplicant, other project participant, or third party's negligence or intentional actions contributed to the conditions to be mitigated. If the applicant, subapplicant, or project participant suspects negligence or other tortious conduct by a third party for causing such condition, they are responsible for taking all reasonable steps to recover all costs attributable to the tortious conduct of the third party. FEMA generally considers such amounts to be duplicated benefits available for the same purpose, and will treat them consistent with paragraph (c) of this section.

(e) *Legal obligations.* FEMA grant funds are not available to satisfy or reimburse for legal obligations, such as those imposed by a legal settlement, court order, or State law.

#### **§ 77.8 Grant administration.**

(a) *General.* Recipients must comply with the requirements contained in 2 CFR parts 200 and 3002 and FEMA award requirements, including submission of performance and financial status reports. Recipients must also ensure that subrecipients are aware of and comply with 2 CFR parts 200 and 3002.

(b) *Cost overruns.* (1) During the implementation of an approved grant, the recipient may find that actual costs are exceeding the approved award amount. While there is no guarantee of additional funding, FEMA will only consider requests made by the recipient to pay for such overruns if:

(i) Funds are available to meet the requested increase in funding; and

(ii) The amended grant award meets the eligibility requirements, including cost share requirements, identified in this section.

(2) Recipients may use cost underruns from ongoing subawards to offset overruns incurred by another subaward(s) awarded under the same award. All costs for which funding is requested must have been included in the original subapplication's cost estimate. In cases where an underrun is not available to cover an overrun, the Administrator may, with justification from the recipient and subrecipient, use other available FMA funds to cover the cost overrun.

(3) For all cost overruns that exceed the amount approved under the award, and which require additional Federal funds, the recipient must submit a written request with a recommendation, including a justification for the additional funding to the Regional Administrator for a determination. If approved, the Regional Administrator will increase the award through an amendment to the original award document.

(c) *Recapture.* At the time of closeout, FEMA will recapture any funds provided to a State or a community under this part if the applicant has not provided the appropriate matching funds, the approved project has not been completed within the timeframes specified in the grant agreement, or the completed project does not meet the criteria specified in this part.

(d) *Remedies for noncompliance.* FEMA may terminate an award or take other remedies for noncompliance in accordance with 2 CFR 200.339 through 200.343.

(e) *Reconsideration.* FEMA will reconsider determinations of noncompliance, additional award conditions, or its decision to terminate a Federal award. Requests for reconsideration must be made in writing to FEMA within 60 calendar days after receipt of a notice of the action, and in accordance with submission procedures set out in guidance. FEMA will notify the requester of the disposition of the request for reconsideration. If the decision is to grant the request for reconsideration, FEMA will take appropriate implementing action.

**PART 79 [RESERVED]**

4. Add and reserve part 79.

## **PART 80 – PROPERTY ACQUISITION AND RELOCATION FOR OPEN SPACE**

5. Revise the authority citation for part 80 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.; Homeland Security Act of 2002, 6 U.S.C. 101.

6. Revise § 80.3 to read as follows:

### **§ 80.3 Definitions.**

(a) Except as noted in this part, the definitions applicable to the funding program apply to implementation of this part. In addition, for purposes of this part:

(b) *Applicant* means a State or Indian Tribal government applying to FEMA for a Federal award that will be accountable for the use of funds. Once funds have been awarded, the applicant becomes the recipient and may also be a pass-through entity.

(c) *Federal award* means the Federal financial assistance that a recipient or subrecipient receives directly from FEMA or indirectly from a pass-through entity. The terms “award” and “grant” may also be used to describe a “Federal award” under this part.

(d) *Market Value* means the price that the seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s length transaction.

(e) *National of the United States* means a person within the meaning of the term as defined in the Immigration and Nationality Act, 8 U.S.C. 1101(a)(22).

(f) *Pass-through entity* means a recipient that provides a subaward to a subrecipient.

(g) *Purchase offer* is the initial value assigned to the property, which is later adjusted by applicable additions and deductions, resulting in a final offer amount to a property owner.



(h) *Qualified alien* means a person within the meaning of the term as defined at 8 U.S.C. 1641.

(i) *Qualified conservation organization* means a qualified organization with a conservation purpose pursuant to 26 CFR 1.170A-14 and applicable implementing regulations, that is such an organization at the time it acquires the property interest and that was such an organization at the time of the major disaster declaration, or for at least 2 years prior to the opening of the grant application period.

(j) *Recipient* means the State or Tribal government that receives a Federal award directly from FEMA. A recipient may also be a pass-through entity. The term recipient does not include subrecipients.

(k) *Subapplicant* means the entity that submits an application for FEMA mitigation assistance to the State or Indian Tribal applicant/recipient. With respect to open space acquisition projects under the Hazard Mitigation Grant Program (HMGP), this term has the same meaning as given to the term “applicant” in part 206, subpart N of this chapter. Upon grant award, the subapplicant is referred to as the subrecipient.

(l) *Subaward* means an award provided by a pass-through entity to a subrecipient, for the subrecipient to carry out part of a Federal award received by the pass-through entity.

(m) *Subrecipient* means the State agency, community or Indian Tribal government or other legal entity to which a subaward is awarded and which is accountable to the recipient for the use of the funds provided.

(n) *Administrator* means the head of the Federal Emergency Management Agency, or his/her designated representative.

(o) *Regional Administrator* means the head of a Federal Emergency Management Agency regional office, or his/her designated representative.

**§ 80.5 [Amended]**

7. Amend § 80.5 by:

a. Removing the word “grantee” wherever it appears and adding in its place the word “recipient”; and

b. Removing the word “subgrantee” wherever it appears and adding in its place the word “subrecipient”.

8. Amend § 80.9 by revising paragraphs (b) and (c) to read as follows:

**§ 80.9 Eligible and ineligible costs.**

\* \* \* \* \*

(b) *Pre-award costs.* FEMA may fund eligible pre-award project costs at its discretion and as funds are available. Recipients and subrecipients may be reimbursed for eligible pre-award costs for activities directly related to the development of the project proposal. These costs can only be incurred during the open application period of the respective grant program. Costs associated with implementation of the project but incurred prior to grant award are not eligible. Therefore, activities where implementation is initiated or completed prior to award are not eligible and will not be reimbursed.

(c) *Duplication of benefits.* Grant funds may not duplicate benefits received by or available to applicants, subapplicants and other project participants from insurance, other assistance programs, legal awards, or any other source to address the same purpose. Such individual or entity must notify the subapplicant and FEMA of all benefits that it receives, anticipates, or has available from other sources for the same purpose. FEMA will reduce the subaward by the amounts available for the same purpose from another source.

\* \* \* \* \*

9. Amend § 80.11 by revising paragraph (a) to read as follows:

**§ 80.11 Project eligibility.**

(a) *Voluntary participation.* Eligible acquisition projects are those where the property owner participates voluntarily, and the recipient/subrecipient will not use its eminent domain authority to acquire the property for the open space purposes should negotiations fail.

\* \* \* \* \*

10. Amend § 80.13 by revising paragraph (a)(3) to read as follows:

**§ 80.13 Application information.**

(a) \* \* \*

(3) The deed restriction language, which must be consistent with the FEMA model deed restriction that the local government will record with the property deeds. Any variation from the model deed restriction language can only be made with prior approval from FEMA's Office of Chief Counsel;

\* \* \* \* \*

11. Revise § 80.17 to read as follows:

**§ 80.17 Project implementation.**

(a) *Hazardous materials.* The subrecipient must take steps to ensure it does not acquire or include in the project properties contaminated with hazardous materials by seeking information from property owners and from other sources on the use and presence of contaminants affecting the property from owners of properties that are or were industrial or commercial, or adjacent to such. A contaminated property must be certified clean prior to participation. This excludes permitted disposal of incidental demolition and household hazardous wastes. FEMA mitigation grant funds may not be used for clean up or remediation of contaminated properties.

(b) *Clear title.* The subrecipient will obtain a title insurance policy demonstrating that fee title conveys to the subrecipient for each property to ensure that it acquires only a property with clear title. The property interest generally must transfer by a general

warranty deed. Any incompatible easements or other encumbrances to the property must be extinguished before acquisition.

(c) *Purchase offer and supplemental payments.* (1) The amount of purchase offer is the current market value of the property or the market value of the property immediately before the relevant event affecting the property (“pre-event”).

(i) The relevant event for Robert T. Stafford Disaster Relief and Emergency Assistance Act assistance under HMGP is the major disaster under which funds are available; for assistance under the Pre-disaster Mitigation program (PDM) (42 U.S.C. 5133), it is the most recent major disaster. Where multiple disasters have affected the same property, the recipient and subrecipient will determine which is the relevant event.

(ii) The relevant event for assistance under the National Flood Insurance Act is the most recent event resulting in a National Flood Insurance Program (NFIP) claim of at least \$5000.

(2) The recipient should coordinate with the subrecipient in their determination of whether the valuation should be based on pre-event or current market value. Generally, the same method to determine market value should be used for all participants in the project.

(3) A property owner who did not own the property at the time of the relevant event, or who is not a National of the United States or qualified alien, is not eligible for a purchase offer based on pre-event market value of the property. Subrecipients who offer pre-event market value to the property owner must have already obtained certification during the application process that the property owner is either a National of the United States or a qualified alien.

(4) Certain tenants who must relocate as a result of the project are entitled to relocation benefits under the Uniform Relocation Assistance and Real Property

Acquisition Act (such as moving expenses, replacement housing rental payments, and relocation assistance advisory services) in accordance with 49 CFR part 24.

(5) If a purchase offer for a residential property is less than the cost of the homeowner-occupant to purchase a comparable replacement dwelling outside the hazard-prone area in the same community, subrecipients for mitigation grant programs may make such a payment available in accordance with criteria determined by the Administrator.

(6) The subrecipient must inform each property owner, in writing, of what it considers to be the market value of the property, the method of valuation and basis for the purchase offer, and the final offer amount. The offer will also clearly state that the property owner's participation in the project is voluntary.

(d) *Removal of existing buildings.* Existing incompatible facilities must be removed by demolition or by relocation outside of the hazard area within 90 days of settlement of the property transaction. The FEMA Regional Administrator may grant an exception to this deadline only for a particular property based upon written justification if extenuating circumstances exist, but will specify a final date for removal.

(e) *Deed Restriction.* The subrecipient, upon settlement of the property transaction, must record with the deed of the subject property notice of applicable land use restrictions and related procedures described in this part, consistent with FEMA model deed restriction language.

12. Amend § 80.19 by revising paragraphs (a) introductory text, (a)(3), and (b) through (e) to read as follows:

**§ 80.19 Land use and oversight.**

\* \* \* \* \*

(a) *Open space requirements.* The property must be dedicated and maintained in perpetuity as open space for the conservation of natural floodplain functions.

\* \* \* \* \*

(3) Any improvements on the property must be in accordance with proper floodplain management policies and practices. Structures built on the property according to paragraph (a)(2) of this section must be floodproofed or elevated to at least the base flood level plus 1 foot of freeboard, or greater, if required by FEMA, or if required by any State or local ordinance, and in accordance with criteria established by the Administrator.

\* \* \* \* \*

(b) *Subsequent transfer.* After acquiring the property interest, the subrecipient, including successors in interest, will convey any interest in the property only if the Regional Administrator, through the State, gives prior written approval of the transferee in accordance with this paragraph.

(1) The request by the subrecipient, through the State, to the Regional Administrator must include a signed statement from the proposed transferee that it acknowledges and agrees to be bound by the terms of this section, and documentation of its status as a qualified conservation organization if applicable.

(2) The subrecipient may convey a property interest only to a public entity or to a qualified conservation organization. However, the subrecipient may convey an easement or lease to a private individual or entity for purposes compatible with the uses described in paragraph (a) of this section, with the prior approval of the Regional Administrator, and so long as the conveyance does not include authority to control and enforce the terms and conditions of this section.

(3) If title to the property is transferred to a public entity other than one with a conservation mission, it must be conveyed subject to a conservation easement that must be recorded with the deed and must incorporate all terms and conditions set forth in this

section, including the easement holder's responsibility to enforce the easement. This must be accomplished by one of the following means:

(i) The subrecipient will convey, in accordance with this paragraph (b), a conservation easement to an entity other than the title holder, which must be recorded with the deed, or

(ii) At the time of title transfer, the subrecipient will retain such conservation easement, and record it with the deed.

(4) Conveyance of any property interest must reference and incorporate the original deed restrictions providing notice of the conditions in this section and must incorporate a provision for the property interest to revert to the subrecipient or recipient in the event that the transferee ceases to exist or loses its eligible status under this section.

(c) *Inspection.* FEMA, its representatives and assigns, including the recipient will have the right to enter upon the property, at reasonable times and with reasonable notice, for the purpose of inspecting the property to ensure compliance with the terms of this part, the property conveyance and of the grant award.

(d) *Monitoring and reporting.* Every 3 years the subrecipient (in coordination with any current successor in interest) through the recipient, must submit to the FEMA Regional Administrator a report certifying that the subrecipient has inspected the property within the month preceding the report, and that the property continues to be maintained consistent with the provisions of this part, the property conveyance and the grant award.

(e) *Enforcement.* The subrecipient, recipient, FEMA, and their respective representatives, successors and assigns, are responsible for taking measures to bring the property back into compliance if the property is not maintained according to the terms of this part, the conveyance, and the grant award. The relative rights and responsibilities of

FEMA, the recipient, the subrecipient, and subsequent holders of the property interest at the time of enforcement, include the following:

(1) The recipient will notify the subrecipient and any current holder of the property interest in writing and advise them that they have 60 days to correct the violation. If the subrecipient or any current holder of the property interest fails to demonstrate a good faith effort to come into compliance with the terms of the grant within the 60-day period, the recipient will enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to bringing an action at law or in equity in a court of competent jurisdiction.

(2) FEMA, its representatives, and assignees may enforce the terms of the grant by taking any measures it deems appropriate, including but not limited to 1 or more of the following:

(i) Withholding FEMA mitigation awards or assistance from the State and subrecipient; and current holder of the property interest.

(ii) Requiring transfer of title. The subrecipient or the current holder of the property interest will bear the costs of bringing the property back into compliance with the terms of the grant; or

(iii) Bringing an action at law or in equity in a court of competent jurisdiction against any or all of the following parties: the recipient, the subrecipient, and their respective successors.

13. Amend § 80.21 by revising the introductory text and paragraph (d) to read as follows:

**§ 80.21 Closeout requirements.**

Upon closeout of the grant, the subrecipient, through the recipient, must provide FEMA, with the following:

\* \* \* \* \*



(d) Identification of each property as a repetitive loss structure, if applicable; and

\* \* \* \* \*

## **PART 201 – MITIGATION PLANNING**

14. Revise the authority citation for part 201 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; National Flood Insurance Act of 1968, 42 U.S.C. 4104c.

15. Amend § 201.1 by revising paragraph (a) to read as follows:

### **§ 201.1 Purpose.**

(a) The purpose of this part is to provide information on the policies and procedures for mitigation planning as required by the provisions of section 322 of the Stafford Act, 42 U.S.C. 5165, and section 1366 of the National Flood Insurance Act of 1968, 42 U.S.C. 4104c.

\* \* \* \* \*

16. Revise § 201.2 to read as follows:

### **§ 201.2 Definitions.**

*Administrator* means the head of the Federal Emergency Management Agency, or his/her designated representative.

*Applicant* means the entity applying to FEMA for a Federal award that will be accountable for the use of funds.

*Federal award* means the Federal financial assistance that a recipient or subrecipient receives directly from FEMA or indirectly from a pass-through entity. The term “grant” or “award” may also be used to describe a Federal award under this part.

*Flood Mitigation Assistance (FMA)* means the program authorized by section 1366 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4104c, and implemented at part 77.

*Hazard mitigation* means any sustained action taken to reduce or eliminate the long-term risk to human life and property from hazards.

*Hazard Mitigation Grant Program (HMGP)* means the program authorized under section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5170c, and implemented at part 206, subpart N of this chapter.

*Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5131. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

*Local government* is any county, municipality, city, town, township, public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government; any Indian Tribe or authorized Tribal organization, or Alaska Native village or organization; and any rural community, unincorporated town or village, or other public entity.

*Managing State* means a State to which FEMA has delegated the authority to administer and manage the HMGP under the criteria established by FEMA pursuant to 42 U.S.C. 5170c(c). FEMA may also delegate authority to Tribal governments to administer and manage the HMGP as a Managing State.

*Pass-through entity* means a recipient that provides a subaward to a subrecipient to carry out part of a Federal program.

*Pre-Disaster Mitigation Program (PDM)* means the program authorized under section 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5133.

*Regional Administrator* means the head of a Federal Emergency Management Agency regional office, or his/her designated representative.

*Recipient* means the government that receives a Federal award directly from FEMA. A recipient may also be a pass-through entity. The term recipient does not include subrecipients. The recipient is the entire legal entity even if only a particular component of the entity is designated in the grant award document. Generally, the State is the recipient. However, an Indian Tribal government may choose to be a recipient, or may act as a subrecipient under the State. An Indian Tribal government acting as recipient will assume the responsibilities of a “State”, as described in this part, for the purposes of administering the grant.

*Repetitive loss structure* means a structure as defined at § 77.2 of this chapter.

*Severe repetitive loss structure* is a structure as defined at § 77.2 of this chapter.

*Small and impoverished communities* means a community of 3,000 or fewer individuals that is identified by the State as a rural community, and is not a remote area within the corporate boundaries of a larger city; is economically disadvantaged, by having an average per capita annual income of residents not exceeding 80 percent of national, per capita income, based on best available data; the local unemployment rate exceeds by one percentage point or more, the most recently reported, average yearly national unemployment rate; and any other factors identified in the State Plan in which the community is located.

*The Stafford Act* refers to the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Public Law 93-288, as amended (42 U.S.C. 5121-5207).

*State* is any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

*State Hazard Mitigation Officer* is the official representative of State government who is the primary point of contact with FEMA, other Federal agencies, and local governments in mitigation planning and implementation of mitigation programs and activities required under the Stafford Act.

*Subapplicant* means an entity submitting a subapplication to the applicant for a subaward to carry out part of a Federal award.

*Subaward* means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award.

*Subrecipient* means the entity that receives a subaward from a pass-through entity. Depending on the program, subrecipients of hazard mitigation assistance subawards can be a State agency, local government, private nonprofit organization, or Indian Tribal government. Subrecipients of FMA subawards can be a State agency, community, or Indian Tribal government, as described in 44 CFR part 77. Indian Tribal governments acting as a subrecipient are accountable to the State recipient.

17. Amend § 201.3 by revising paragraphs (a), (b)(2), (c)(1), and (e)(1) to read as follows:

**§ 201.3 Responsibilities.**

(a) *General.* This section identifies the key responsibilities of FEMA, States, and local/Tribal governments in carrying out section 322 of the Stafford Act, 42 U.S.C. 5165.

(b) \* \* \*

(2) Provide technical assistance and training to State, local, and Indian Tribal governments regarding the mitigation planning process;

\*\*\*\*\*

(c) \* \* \*

(1) Prepare and submit to FEMA a Standard State Mitigation Plan following the criteria established in § 201.4 as a condition of receiving non-emergency Stafford Act

assistance and FEMA mitigation grants. In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

\* \* \* \* \*

(e) \* \* \*

(1) Prepare and submit to FEMA a Tribal Mitigation Plan following the criteria established in § 201.7 as a condition of receiving non-emergency Stafford Act assistance and FEMA mitigation grants as a recipient. This plan will also allow Indian Tribal governments to apply through the State, as a subrecipient, for any FEMA mitigation project grant. In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

\* \* \* \* \*

18. Amend § 201.4 by revising paragraphs (c)(2) through (4) to read as follows:

**§ 201.4 Standard State Mitigation Plans.**

\* \* \* \* \*

(c) \* \* \*

(2) Statewide *risk assessments* that provide the factual basis for activities proposed in the strategy portion of the mitigation plan. Statewide risk assessments must characterize and analyze natural hazards and risks to provide a statewide overview. This overview will allow the State to compare potential losses throughout the State and to determine their priorities for implementing mitigation measures under the strategy, and to prioritize jurisdictions for receiving technical and financial support in developing more

detailed local risk and vulnerability assessments. The risk assessment must include the following:

(i) An overview of the type and location of all natural hazards that can affect the State, including information on previous occurrences of hazard events, as well as the probability of future hazard events, using maps where appropriate;

(ii) An overview and analysis of the State's vulnerability to the hazards described in this paragraph (c)(2), based on estimates provided in local risk assessments as well as the State risk assessment. The State must describe vulnerability in terms of the jurisdictions most threatened by the identified hazards, and most vulnerable to damage and loss associated with hazard events. State owned or operated critical facilities located in the identified hazard areas must also be addressed;

(iii) An overview and analysis of potential losses to the identified vulnerable structures, based on estimates provided in local risk assessments as well as the State risk assessment. The State must estimate the potential dollar losses to State owned or operated buildings, infrastructure, and critical facilities located in the identified hazard areas.

(3) A *Mitigation Strategy* that provides the State's blueprint for reducing the losses identified in the risk assessment. This section must include:

(i) A description of State goals to guide the selection of activities to mitigate and reduce potential losses.

(ii) A discussion of the State's pre- and post-disaster hazard management policies, programs, and capabilities to mitigate the hazards in the area, including: an evaluation of State laws, regulations, policies, and programs related to hazard mitigation as well as to development in hazard-prone areas; a discussion of State funding capabilities for hazard mitigation projects; and a general description and analysis of the effectiveness of local mitigation policies, programs, and capabilities.

(iii) An identification, evaluation, and prioritization of cost-effective, environmentally sound, and technically feasible mitigation actions and activities the State is considering and an explanation of how each activity contributes to the overall mitigation strategy. This section should be linked to local plans, where specific local actions and projects are identified.

(iv) Identification of current and potential sources of Federal, State, local, or private funding to implement mitigation activities.

(v) In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

(4) A section on the *Coordination of Local Mitigation Planning* that includes the following:

(i) A description of the State process to support, through funding and technical assistance, the development of local mitigation plans.

(ii) A description of the State process and timeframe by which the local plans will be reviewed, coordinated, and linked to the State Mitigation Plan.

(iii) Criteria for prioritizing communities and local jurisdictions that would receive planning and project grants under available funding programs, which should include consideration for communities with the highest risks, repetitive loss structures, and most intense development pressures. Further, that for non-planning grants, a principal criterion for prioritizing grants will be the extent to which benefits are maximized according to a cost benefit review of proposed projects and their associated costs.

\* \* \* \* \*

19. Amend § 201.6 by revising paragraphs (a) through (c) to read as follows:

## § 201.6 Local Mitigation Plans.

\* \* \* \* \*

(a) *Plan requirements.* (1) A local government must have a mitigation plan approved pursuant to this section in order to receive HMGP project grants. A local government must have a mitigation plan approved pursuant to this section in order to apply for and receive mitigation project grants under all other mitigation grant programs.

(2) Plans prepared for the FMA program, described at part 77 of this chapter, need only address these requirements as they relate to flood hazards in order to be eligible for FMA project grants. However, these plans must be clearly identified as being flood mitigation plans, and they will not meet the eligibility criteria for other mitigation grant programs, unless flooding is the only natural hazard the jurisdiction faces.

(3) Regional Administrators may grant an exception to the plan requirement in extraordinary circumstances, such as in a small and impoverished community, when justification is provided. In these cases, a plan will be completed within 12 months of the award of the project grant. If a plan is not provided within this timeframe, the project grant will be terminated, and any costs incurred after notice of grant's termination will not be reimbursed by FEMA.

(4) Multi-jurisdictional plans (*e.g.* watershed plans) may be accepted, as appropriate, as long as each jurisdiction has participated in the process and has officially adopted the plan. State-wide plans will not be accepted as multi-jurisdictional plans.

(b) *Planning process.* An open public involvement process is essential to the development of an effective plan. In order to develop a more comprehensive approach to reducing the effects of natural disasters, the planning process must include:

(1) An opportunity for the public to comment on the plan during the drafting stage and prior to plan approval;



(2) An opportunity for neighboring communities, local and regional agencies involved in hazard mitigation activities, and agencies that have the authority to regulate development, as well as businesses, academia and other private and nonprofit interests to be involved in the planning process; and

(3) Review and incorporation, if appropriate, of existing plans, studies, reports, and technical information.

(c) *Plan content.* The plan must include the following:

(1) Documentation of the *planning process* used to develop the plan, including how it was prepared, who was involved in the process, and how the public was involved.

(2) A *risk assessment* that provides the factual basis for activities proposed in the strategy to reduce losses from identified hazards. Local risk assessments must provide sufficient information to enable the jurisdiction to identify and prioritize appropriate mitigation actions to reduce losses from identified hazards. The risk assessment must include:

(i) A description of the type, location, and extent of all natural hazards that can affect the jurisdiction. The plan must include information on previous occurrences of hazard events and on the probability of future hazard events.

(ii) A description of the jurisdiction's vulnerability to the hazards described in paragraph (c)(2)(i) of this section. This description must include an overall summary of each hazard and its impact on the community. All plans approved after October 1, 2008 must also address NFIP insured structures that have been repetitively damaged by floods. The plan should describe vulnerability in terms of:

(A) The types and numbers of existing and future buildings, infrastructure, and critical facilities located in the identified hazard areas;

(B) An estimate of the potential dollar losses to vulnerable structures identified in paragraph (c)(2)(ii)(A) of this section and a description of the methodology used to prepare the estimate;

(C) Providing a general description of land uses and development trends within the community so that mitigation options can be considered in future land use decisions.

(iii) For multi-jurisdictional plans, the risk assessment section must assess each jurisdiction's risks where they vary from the risks facing the entire planning area.

(3) A *mitigation strategy* that provides the jurisdiction's blueprint for reducing the potential losses identified in the risk assessment, based on existing authorities, policies, programs and resources, and its ability to expand on and improve these existing tools.

This section must include:

(i) A description of mitigation goals to reduce or avoid long-term vulnerabilities to the identified hazards.

(ii) A section that identifies and analyzes a comprehensive range of specific mitigation actions and projects being considered to reduce the effects of each hazard, with particular emphasis on new and existing buildings and infrastructure. All plans approved by FEMA after October 1, 2008, must also address the jurisdiction's participation in the NFIP, and continued compliance with NFIP requirements, as appropriate.

(iii) An action plan describing how the actions identified in paragraph (c)(3)(ii) of this section will be prioritized, implemented, and administered by the local jurisdiction. Prioritization will include a special emphasis on the extent to which benefits are maximized according to a cost benefit review of the proposed projects and their associated costs.

(iv) For multi-jurisdictional plans, there must be identifiable action items specific to the jurisdiction requesting FEMA approval or credit of the plan.

(4) *A plan maintenance process* that includes:

(i) A section describing the method and schedule of monitoring, evaluating, and updating the mitigation plan within a five-year cycle.

(ii) A process by which local governments incorporate the requirements of the mitigation plan into other planning mechanisms such as comprehensive or capital improvement plans, when appropriate.

(iii) Discussion on how the community will continue public participation in the plan maintenance process.

(5) *Documentation* that the plan has been formally adopted by the governing body of the jurisdiction requesting approval of the plan (e.g., City Council, County Commissioner, Tribal Council). For multi-jurisdictional plans, each jurisdiction requesting approval of the plan must document that it has been formally adopted.

\* \* \* \* \*

20. Amend § 201.7 by revising paragraphs (a), (c), and (d) to read as follows:

**§ 201.7 Tribal Mitigation Plans.**

\* \* \* \* \*

(a) *Plan requirement.* (1) Indian Tribal governments applying to FEMA as a recipient must have an approved Tribal Mitigation Plan meeting the requirements of this section as a condition of receiving non-emergency Stafford Act assistance and FEMA mitigation grants. Emergency assistance provided under 42 U.S.C. 5170a, 5170b, 5173, 5174, 5177, 5179, 5180, 5182, 5183, 5184, 5192 will not be affected. Mitigation planning grants provided through the PDM program, authorized under section 203 of the Stafford Act, 42 U.S.C. 5133, will also continue to be available.

(2) Indian Tribal governments applying through the State as a subrecipient must have an approved Tribal Mitigation Plan meeting the requirements of this section in order to receive HMGP project grants. A Tribe must have an approved Tribal Mitigation Plan

in order to apply for and receive FEMA mitigation project grants, under all other mitigation grant programs. The provisions in § 201.6(a)(3) are available to Tribes applying as subrecipients.

(3) Multi-jurisdictional plans (*e.g.* county-wide or watershed plans) may be accepted, as appropriate, as long as the Indian Tribal government has participated in the process and has officially adopted the plan. Indian Tribal governments must address all the elements identified in this section to ensure eligibility as a recipient or as a subrecipient.

\* \* \* \* \*

(c) *Plan content.* The plan must include the following:

(1) Documentation of the *planning process* used to develop the plan, including how it was prepared, who was involved in the process, and how the public was involved.

This must include:

(i) An opportunity for the public to comment on the plan during the drafting stage and prior to plan approval, including a description of how the Indian Tribal government defined “public;”

(ii) As appropriate, an opportunity for neighboring communities, Tribal and regional agencies involved in hazard mitigation activities, and agencies that have the authority to regulate development, as well as businesses, academia, and other private and nonprofit interests to be involved in the planning process;

(iii) Review and incorporation, if appropriate, of existing plans, studies, and reports; and

(iv) Be integrated to the extent possible with other ongoing Tribal planning efforts as well as other FEMA programs and initiatives.

(2) A *risk assessment* that provides the factual basis for activities proposed in the strategy to reduce losses from identified hazards. Tribal risk assessments must provide

sufficient information to enable the Indian Tribal government to identify and prioritize appropriate mitigation actions to reduce losses from identified hazards. The risk assessment must include:

(i) A description of the type, location, and extent of all natural hazards that can affect the Tribal planning area. The plan must include information on previous occurrences of hazard events and on the probability of future hazard events.

(ii) A description of the Indian Tribal government's vulnerability to the hazards described in paragraph (c)(2)(i) of this section. This description must include an overall summary of each hazard and its impact on the Tribe. The plan should describe vulnerability in terms of:

(A) The types and numbers of existing and future buildings, infrastructure, and critical facilities located in the identified hazard areas;

(B) An estimate of the potential dollar losses to vulnerable structures identified in paragraph (c)(2)(ii)(A) of this section and a description of the methodology used to prepare the estimate;

(C) A general description of land uses and development trends within the Tribal planning area so that mitigation options can be considered in future land use decisions; and

(D) Cultural and sacred sites that are significant, even if they cannot be valued in monetary terms.

(3) A *mitigation strategy* that provides the Indian Tribal government's blueprint for reducing the potential losses identified in the risk assessment, based on existing authorities, policies, programs and resources, and its ability to expand on and improve these existing tools. This section must include:

(i) A description of mitigation goals to reduce or avoid long-term vulnerabilities to the identified hazards.

(ii) A section that identifies and analyzes a comprehensive range of specific mitigation actions and projects being considered to reduce the effects of each hazard, with particular emphasis on new and existing buildings and infrastructure.

(iii) An action plan describing how the actions identified in paragraph (c)(3)(ii) of this section will be prioritized, implemented, and administered by the Indian Tribal government.

(iv) A discussion of the Indian Tribal government's pre- and post-disaster hazard management policies, programs, and capabilities to mitigate the hazards in the area, including: An evaluation of Tribal laws, regulations, policies, and programs related to hazard mitigation as well as to development in hazard-prone areas; and a discussion of Tribal funding capabilities for hazard mitigation projects.

(v) Identification of current and potential sources of Federal, Tribal, or private funding to implement mitigation activities.

(vi) In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

(4) A *plan maintenance process* that includes:

(i) A section describing the method and schedule of monitoring, evaluating, and updating the mitigation plan.

(ii) A system for monitoring implementation of mitigation measures and project closeouts.

(iii) A process by which the Indian Tribal government incorporates the requirements of the mitigation plan into other planning mechanisms such as reservation master plans or capital improvement plans, when appropriate.

(iv) Discussion on how the Indian Tribal government will continue public participation in the plan maintenance process.

(v) A system for reviewing progress on achieving goals as well as activities and projects identified in the mitigation strategy.

(5) The plan must be formally adopted by the governing body of the Indian Tribal government prior to submittal to FEMA for final review and approval.

(6) The plan must include assurances that the Indian Tribal government will comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding, including 2 CFR parts 200 and 3002. The Indian Tribal government will amend its plan whenever necessary to reflect changes in Tribal or Federal laws and statutes.

*(d) Plan review and updates.* (1) Plans must be submitted to the appropriate FEMA Regional Office for formal review and approval. Indian Tribal governments who would like the option of being a subrecipient under the State must also submit their plan to the State Hazard Mitigation Officer for review and coordination.

(2) The Regional review will be completed within 45 days after receipt from the Indian Tribal government, whenever possible.

(3) Indian Tribal governments must review and revise their plan to reflect changes in development, progress in local mitigation efforts, and changes in priorities, and resubmit it for approval within 5 years in order to continue to be eligible for non-emergency Stafford Act assistance and FEMA mitigation grant funding.

## **PART 206 – FEDERAL DISASTER ASSISTANCE**

21. The authority citation for part 206 is revised 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).

22. Revise § 206.431 to read as follows:

**§ 206.431 Definitions.**

*Activity* means any mitigation measure, project, or action proposed to reduce risk of future damage, hardship, loss or suffering from disasters.

*Applicant* means the non-Federal entity consisting of a State or Indian Tribal government, applying to FEMA for a Federal award under the Hazard Mitigation Grant Program. Upon award, the applicant becomes the recipient and may also be a pass-through entity.

*Enhanced State Mitigation Plan* is the hazard mitigation plan approved under 44 CFR part 201 as a condition of receiving increased funding under the HMGP.

*Grant application* means the request to FEMA for HMGP funding, as outlined in § 206.436, by a State or Tribal government that will act as recipient.

*Grant award* means total of Federal and non-Federal contributions to complete the approved scope of work.

*Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 5131. This does not include Alaska Native corporations, the ownership of which is vested in private individuals. Indian Tribal governments have the option to apply as an applicant or subapplicant.

*Local Mitigation Plan* is the hazard mitigation plan required of a local government acting as a subrecipient as a condition of receiving a project subaward under the HMGP as outlined in 44 CFR 201.6.

*Pass-through entity* means a recipient that provides a subaward to a subrecipient.

*Recipient* means the State or Indian Tribal government that receives a Federal award directly from FEMA. A recipient may also be a pass-through entity. The term



recipient does not include subrecipients. The recipient is the entire legal entity even if only a particular component of the entity is designated in the grant award document. Generally, the State is the recipient. However, an Indian Tribal government may choose to be a recipient, or may act as a subrecipient under the State. An Indian Tribal government acting as recipient will assume the responsibilities of a “State”, as described in this part, for the purposes of administering the grant.

*Standard State Mitigation Plan* is the hazard mitigation plan approved under 44 CFR part 201, as a condition of receiving Stafford Act assistance as outlined in § 201.4 of this chapter.

*State Administrative Plan for the Hazard Mitigation Grant Program* means the plan developed by the State to describe the procedures for administration of the HMGP.

*Subapplicant* means the State agency, local government, eligible private nonprofit organization, or Indian Tribal government submitting a subapplication to the applicant for financial assistance under HMGP. Upon award, the subapplicant becomes the subrecipient.

*Subaward* means an award provided by a pass-through entity to a subrecipient for the subrecipient to carry out part of a Federal award.

*Subaward application* means the request to the recipient for HMGP funding by the eligible subrecipient, as outlined in § 206.436.

*Subrecipient* means the government or other legal entity to which a subaward is awarded and which is accountable to the recipient for the use of the funds provided. Subrecipients can be a State agency, local government, private nonprofit organization, or Indian Tribal government as outlined in § 206.433. Indian Tribal governments acting as a subrecipient are accountable to the State recipient.

*Tribal Mitigation Plan* is the hazard mitigation plan required of an Indian Tribal government acting as a recipient or subrecipient as a condition of receiving a project award or subaward under the HMGP as outlined in 44 CFR 201.7.

23. Amend § 206.432 by revising paragraphs (b) introductory text, (b)(2) and (3), and (c) to read as follows:

**§ 206.432 Federal grant assistance.**

\* \* \* \* \*

(b) *Amounts of assistance.* The total Federal contribution of funds is based on the estimated aggregate grant amount to be made under the Stafford Act for the major disaster (less associated administrative costs), and must be as follows:

\* \* \* \* \*

(2) *Twenty (20) percent.* A State with an approved Enhanced State Mitigation Plan, in effect before the disaster declaration, which meets the requirements outlined in § 201.5 of this subchapter will be eligible for assistance under the HMGP not to exceed 20 percent of such amounts, for amounts not more than \$35.333 billion.

(3) The estimates of Federal assistance under this paragraph (b) will be based on the Regional Administrator's estimate of all eligible costs, actual grants, and appropriate mission assignments.

(c) *Cost sharing.* All mitigation measures approved under the State's grant will be subject to the cost sharing provisions established in the FEMA-State Agreement. FEMA may contribute up to 75 percent of the cost of measures approved for funding under the Hazard Mitigation Grant Program for major disasters declared on or after June 10, 1993. The non-Federal share may exceed the Federal share. FEMA will not contribute to costs above the Federally approved estimate.

24. Amend § 206.433 by revising paragraph (a) to read as follows:

**§ 206.433 State responsibilities.**

(a) *Recipient.* The State will be the recipient to which funds are awarded and will be accountable for the use of those funds. There may be subrecipients within the State government.

\* \* \* \* \*

25. Amend § 206.434 by revising paragraphs (a), (b), (c)(1) and (5), (d)(1), and (e) to read as follows:

**§ 206.434 Eligibility.**

(a) *Eligible entities.* The following are eligible to apply for the Hazard Mitigation Program Grant:

(1) Applicants – States and Indian Tribal governments;

(2) Subapplicants – (i) State agencies and local governments;

(ii) Private nonprofit organizations that own or operate a private nonprofit facility as defined in § 206.221(e). A qualified conservation organization as defined at § 80.3(h) of this chapter is the only private nonprofit organization eligible to apply for acquisition or relocation for open space projects;

(iii) Indian Tribal governments.

(b) *Plan requirement.* (1) Local and Indian Tribal government applicants for project subawards must have an approved local or Tribal Mitigation Plan in accordance with 44 CFR part 201 before receipt of HMGP subaward funding for projects.

(2) Regional Administrators may grant an exception to this requirement in extraordinary circumstances, such as in a small and impoverished community when justification is provided. In these cases, a plan will be completed within 12 months of the award of the project subaward. If a plan is not provided within this timeframe, the project subaward will be terminated, and any costs incurred after notice of subaward's termination will not be reimbursed by FEMA.

(c) \* \* \*

(1) Be in conformance with the State Mitigation Plan and Local or Tribal Mitigation Plan approved under 44 CFR part 201; or for Indian Tribal governments acting as recipients, be in conformance with the Tribal Mitigation Plan approved under 44 CFR 201.7;

\* \* \*\*

(5) Be cost-effective and substantially reduce the risk of future damage, hardship, loss, or suffering resulting from a major disaster. The recipient must demonstrate this by documenting that the project;

(i) Addresses a problem that has been repetitive, or a problem that poses a significant risk to public health and safety if left unsolved,

(ii) Will not cost more than the anticipated value of the reduction in both direct damages and subsequent negative impacts to the area if future disasters were to occur,

(iii) Has been determined to be the most practical, effective, and environmentally sound alternative after consideration of a range of options,

(iv) Contributes, to the extent practicable, to a long-term solution to the problem it is intended to address,

(v) Considers long-term changes to the areas and entities it protects, and has manageable future maintenance and modification requirements.

(d) \*\*\* (1) *Planning*. Up to 7% of the State's HMGP award may be used to develop State, Tribal and/or local mitigation plans to meet the planning criteria outlined in 44 CFR part 201.

\* \* \*\*

(e) *Property acquisitions and relocation requirements*. Property acquisitions and relocation projects for open space proposed for funding pursuant to a major disaster declared on or after December 3, 2007 must be implemented in accordance with part 80 of this chapter.

\* \* \* \* \*

**§ 206.435 [Amended]**

26. Amend § 206.435 by removing the word “shall” and adding in its place the word “will” in the last sentence of paragraph (a).

27. Amend § 206.436 by revising paragraphs (a), (b), (c) introductory text, (c)(1), (e), and (g) to read as follows:

**§ 206.436 Application procedures.**

(a) *General.* This section describes the procedures to be used by the recipient in submitting an application for HMGP funding. Under the HMGP, the State or Indian Tribal government is the recipient and is responsible for processing subawards to applicants in accordance with 2 CFR parts 200 and 3002. Subrecipients are accountable to the recipient.

(b) *Governor's Authorized Representative.* The Governor's Authorized Representative serves as the grant administrator for all funds provided under the Hazard Mitigation Grant Program. The Governor's Authorized Representative's responsibilities as they pertain to procedures outlined in this section include providing technical advice and assistance to eligible subrecipients, and ensuring that all potential applicants are aware of assistance available and submission of those documents necessary for grant award.

(c) *Hazard mitigation application.* Upon identification of mitigation measures, the State (Governor's Authorized Representative) will submit its Hazard Mitigation Grant Program application to the FEMA Regional Administrator. The application will identify one or more mitigation measures for which funding is requested. The application must include a Standard Form (SF) 424, Application for Federal Assistance, SF 424D, Assurances for Construction Programs, if appropriate, and a narrative statement. The narrative statement will contain any pertinent project management information not

included in the State's administrative plan for Hazard Mitigation. The narrative statement will also serve to identify the specific mitigation measures for which funding is requested. Information required for each mitigation measure must include the following:

(1) Name of the subrecipient, if any;

\* \* \* \* \*

(e) *Extensions.* The State may request the Regional Administrator to extend the application time limit by 30 to 90 day increments, not to exceed a total of 180 days. The recipient must include a justification in its request.

\* \* \* \* \*

(g) *Indian Tribal recipients.* Indian Tribal governments may submit a SF 424 directly to the Regional Administrator.

28. Amend § 206.437 by revising paragraphs (a), (b)(4)(i), (x), and (xiii), and (d) to read as follows:

**§ 206.437 State administrative plan.**

(a) *General.* The State must develop a plan for the administration of the Hazard Mitigation Grant Program.

(b) \* \* \*

(4) \* \* \*

(i) Identify and notify potential applicants (subrecipients) of the availability of the program;

\* \* \* \* \*

(x) Provide technical assistance as required to subrecipient(s);

\* \* \* \* \*

(xiii) Determine the percentage or amount of pass-through funds for management costs provided under 44 CFR part 207 that the recipient will make available to

subrecipients, and the basis, criteria, or formula for determining the subrecipient percentage or amount.

\* \* \* \* \*

(d) *Approval.* The State must submit the administrative plan to the Regional Administrator for approval. Following each major disaster declaration, the State must prepare any updates, amendments, or plan revisions required to meet current policy guidance or changes in the administration of the Hazard Mitigation Grant Program. Funds will not be awarded until the State Administrative Plan is approved by the FEMA Regional Administrator.

29. Revise § 206.438 to read as follows:

**§ 206.438 Project management.**

(a) *General.* The State serving as recipient has primary responsibility for project management and accountability of funds as indicated in 2 CFR parts 200 and 3002 and 44 CFR part 206. The State is responsible for ensuring that subrecipients meet all program and administrative requirements.

(b) *Cost overruns.* During the execution of work on an approved mitigation measure the Governor's Authorized Representative may find that actual project costs are exceeding the approved estimates. Cost overruns which can be met without additional Federal funds, or which can be met by offsetting cost underruns on other projects, need not be submitted to the Regional Administrator for approval, so long as the full scope of work on all affected projects can still be met. For cost overruns which exceed Federal obligated funds and which require additional Federal funds, the Governor's Authorized Representative will evaluate each cost overrun and submit a request with a recommendation to the Regional Administrator for a determination. The applicant's justification for additional costs and other pertinent material must accompany the request. The Regional Administrator will notify the Governor's Authorized Representative in

writing of the determination and process a supplement, if necessary. All requests that are not justified must be denied by the Governor's Authorized Representative. In no case will the total amount obligated to the State exceed the funding limits set forth in § 206.432(b). Any such problems or circumstances affecting project costs must be identified through the quarterly progress reports required in paragraph (c) of this section.

(c) *Progress reports.* The recipient must submit a quarterly progress report to FEMA indicating the status and completion date for each measure funded. Any problems or circumstances affecting completion dates, scope of work, or project costs which are expected to result in noncompliance with the approved grant conditions must be described in the report.

(d) *Payment of claims.* The Governor's Authorized Representative will make a claim to the Regional Administrator for reimbursement of allowable costs for each approved measure. In submitting such claims the Governor's Authorized Representative must certify that reported costs were incurred in the performance of eligible work, that the approved work was completed and that the mitigation measure is in compliance with the provisions of the FEMA-State Agreement. The Regional Administrator will determine the eligible amount of reimbursement for each claim and approve payment. If a mitigation measure is not completed, and there is not adequate justification for noncompletion, no Federal funding will be provided for that measure.

(e) *Audit requirements.* Uniform audit requirements as set forth in 2 CFR parts 200 and 3002 and 44 CFR part 206 apply to all grant assistance provided under this subpart. FEMA may elect to conduct a Federal audit on the disaster assistance award or on any of the subawards.

30. Amend § 206.439 by revising the second sentence of paragraph (c) to read as follows:

**§ 206.439 Allowable costs.**



\* \* \* \* \*

(c) \* \* \* Recipients and subrecipients may be reimbursed for eligible pre-award costs for activities directly related to the development of the project or planning proposal. \* \* \*

31. Amend § 206.440 by revising the introductory text and paragraphs (a), (b) paragraph heading, (c) paragraph heading, (c)(2) and (3), (d), and (e)(3) to read as follows:

**§ 206.440 Appeals.**

An eligible applicant, subrecipient, or recipient may appeal any determination previously made related to an application for or the provision of Federal assistance according to the procedures in this section.

(a) *Format and content.* The applicant or recipient will make the appeal in writing through the recipient to the Regional Administrator. The recipient will review and evaluate all subrecipient appeals before submission to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator. The appeal must contain documented justification supporting the appellant's position, specifying the monetary figure in dispute and the provisions in Federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.

\* \* \* \* \*

(b) *Levels of appeal.* \*\*\*

(c) *Time limits.* \*\*\*

(2) The recipient will review and forward appeals from an applicant or subrecipient, with a written recommendation, to the Regional Administrator within 60 days of receipt.

(3) Within 90 days following receipt of an appeal, the Regional Administrator (for first appeals) or Assistant Administrator for the Mitigation Directorate (for second appeals) will notify the recipient in writing of the disposition of the appeal or of the need

for additional information. A request by the Regional Administrator or Assistant Administrator for the Mitigation Directorate for additional information will include a date by which the information must be provided. Within 90 days following the receipt of the requested additional information or following expiration of the period for providing the information, the Regional Administrator or Assistant Administrator for the Mitigation Directorate will notify the recipient in writing of the disposition of the appeal. If the decision is to grant the appeal, the Regional Administrator will take appropriate implementing action.

(d) *Technical advice.* In appeals involving highly technical issues, the Regional Administrator or Assistant Administrator for the Mitigation Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 days of receipt of the report, the Regional Administrator or Assistant Administrator for the Mitigation Directorate will notify the recipient in writing of the disposition of the appeal.

(e) \* \* \*

(3) The decision of the FEMA official at the next higher appeal level will be the final administrative decision of FEMA.

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**Deanne B. Criswell,**

*Administrator,*

*Federal Emergency Management Agency.*

