

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 208

RIN 1660-AA07 (formerly RIN 3067-AC93)

#### National Urban Search and Rescue Response System

**AGENCY:** Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate (EP&R), Department of Homeland Security (DHS).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule standardizes the financing, administration and operation of the National Urban Search and Rescue Response System, a cooperative effort of the Department of Homeland Security, participating State emergency management agencies and local public safety agencies across the country. This rule addresses the relationship between Sponsoring Agencies<sup>1</sup> of Urban Search & Rescue (US&R) Task Forces and DHS and also funding for preparedness and response activities, including the acquisition of equipment and supplies and training.

Concurrently we<sup>2</sup> are publishing as a Notice in this issue of the **Federal Register** a Maximum Pay Rate Table on which we also request comments.

**DATES:** This interim rule is effective February 24, 2005. We invite comments on this interim rule and the Maximum Pay Rate Table published separately today as a Notice in this issue of the **Federal Register**. We will accept comments on both until April 11, 2005.

**ADDRESSES:** *Mail:* When submitting comments by mail, please send the comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street, SW., room 840, Washington, DC 20472. To ensure proper handling, please reference RIN 1660-AA07 and Docket No. DHS-2004-0010 on your correspondence. This mailing address may also be used for submitting comments on paper, disk, or CD-ROM.

*Hand Delivery/Courier:* The address for submitting comments by hand delivery or courier is the same as that for submitting comments by mail.

<sup>1</sup> Sponsoring Agencies are State or local government agencies that have signed Memoranda of Agreement with DHS to organize and manage US&R Task Forces.

<sup>2</sup> Throughout the preamble to this rule the terms "we" and "our" refer to and mean the Department of Homeland Security. "You" refers to the reader.

*Viewing Comments:* You may view comments and background material at: <http://www.epa.gov/feddocket> or <http://www.regulations.gov>. You may also inspect comments in person at the Office of the General Counsel, Federal Emergency Management Agency, 500 C Street, SW., room 840, Washington, DC 20472.

**FOR FURTHER INFORMATION CONTACT:** Michael Tamillow, Federal Emergency Management Agency, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., room 326, Washington, DC 20472, (202) 646-2549, or (e-mail) [mike.tamillow@dhs.gov](mailto:mike.tamillow@dhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

The Federal Emergency Management Agency (FEMA) published a proposed rule, National Urban Search and Rescue Response System, on December 18, 2002, 67 FR 77627-77640 (Proposed Rule). On March 1, 2003, FEMA became a part of the Emergency Preparedness and Response Directorate (EP&R), Department of Homeland Security (DHS). The National Urban Search and Rescue Response System is now a program in FEMA under the EP&R Directorate.

This preamble and Interim Rule reflect certain decisions made regarding comments that FEMA received on the Proposed Rule, and changes resulting from FEMA's integration into the Department of Homeland Security. The process for creating and updating the Maximum Pay Rate Table (Table), which establishes the maximum rates that DHS will pay for certain medical, engineering, canine handling and backfill services, is described in § 208.12. The Maximum Pay Rate Table, which was mentioned but not published in the Proposed Rule, is incorporated in the Interim Rule, and published concurrently with this Interim Rule as a Notice. Because the Maximum Pay Rate Table was not published previously and will become a part of the National Urban Search and Rescue Response System final rule, we are asking for public comment both on the Table and the Interim Rule.

Section 303 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5144, authorizes the President of the United States to form emergency support teams of Federal personnel to be deployed in an area affected by a major disaster or emergency. The President delegated this function to the Director of the FEMA under Executive Order (E.O.) 12148. Under E.O. 13286 of

February 28, 2003, the President amended E.O. 12148 to transfer the FEMA Director's delegated authority to the Secretary of Homeland Security, and under Homeland Security Delegation No. 9100, delegated the Secretary's authority under Title V of the Homeland Security Act of 2002, which includes the Stafford Act, to the Under Secretary for Emergency Preparedness and Response (EP&R).

Section 306(a) of the Stafford Act authorizes the President (as delegated to the Under Secretary for EP&R) to accept and use the services or facilities of any State or local government, or of any agency, officer or employee thereof, with the consent of such government, in the performance of his responsibilities under the Stafford Act. Section 306(b) of the Stafford Act authorizes the President to appoint and fix the compensation of temporary personnel without regard to U.S. Code provisions governing appointments in the competitive service. Section 403(a)(3)(B) of the Stafford Act provides further that the President may authorize Federal agencies to perform work on public or private lands essential to save lives and protect property, including search and rescue and emergency medical care, and other essential needs. Under section 621(c) of the Stafford Act, the Secretary may accept and use the services of State or local governments, and use voluntary services by individuals or organizations as needed.

FEMA established the National Urban Search & Rescue Response System (System or US&R) under the authorities cited. The System provides specialized lifesaving assistance during major disasters or emergencies that the President declares under the Stafford Act. US&R operational activities include locating, extricating and providing on-site medical treatment to victims trapped in collapsed structures, victims of weapons of mass destruction events, and when assigned, performing incident command or other operational activities.

Created in consultation with State emergency management agencies and local public safety agencies, the System is built around a core of Sponsoring Agencies prepared to deploy US&R Task Forces<sup>3</sup> immediately and initiate US&R operations at DHS's direction. Members of the Task Forces, also referred to as "System Members," may respond as

<sup>3</sup> The US&R System comprises 28 Task Forces in 19 States. A full Task Force consists of 70 System Members, three deep (designed for 210 members) specially trained and equipped to find, extricate, and provide initial medical care to victims of collapsed buildings, weapons of mass destruction, as well as to perform other assigned duties.

part of Joint Management Teams (JMT)<sup>4</sup> or other overhead or technical teams, or as individual resources.

The Task Forces are staffed primarily by local fire department and emergency services personnel specially trained and experienced in collapsed structure search and rescue operations, incident management, and other emergency operational activities. On activation by DHS, members of the US&R Task Forces, US&R System Members of Joint Management Teams, and other overhead or technical teams, operate as Temporary Excepted Federal Volunteers.<sup>5</sup>

The National Urban Search and Rescue Response System presently comprises 28 US&R Task Forces in 19 States. Typically, a State agency or local public safety agency (Sponsoring Agency) sponsors each of the Task Forces. While the Sponsoring Agencies are solely responsible for the administrative management of their respective Task Forces, many Sponsoring Agencies invite other public safety agencies and other entities in their vicinity to contribute personnel and other resources to the Task Force. These public safety agencies and other entities that enter into agreements with the Sponsoring Agency to contribute personnel and other resources are Participating Agencies. In certain cases, individuals who are not employed by a Sponsoring Agency or Participating Agency<sup>6</sup> become members of a Task Force as Affiliated Personnel.<sup>7</sup>

DHS provides financial support in the form of grants or Cooperative Agreements<sup>8</sup> (Grants) to each of the

Sponsoring Agencies under the disaster preparedness and training authorities of the Stafford Act. The Sponsoring Agencies use these Grants to train Task Force personnel, maintain a state of readiness and to acquire necessary equipment and supplies. DHS awards and administers Grants under 44 CFR 13. In return for this financial support, each Task Force must be available for deployment as a Federal resource when DHS activates it.<sup>9</sup> Task Forces also must maintain minimum training requirements that DHS prescribes.<sup>10</sup>

Separate non-standardized memoranda of agreement (MOA), which were individually negotiated at different stages in the System's development, currently govern the relationship between DHS and each of the Sponsoring Agencies. In addition, we require the Sponsoring Agencies to enter into separate Cooperative Agreements on forms that our Office of Financial Management prescribes. As the System has matured, the participants have concluded that it is desirable to standardize these relationships through a set of comprehensive regulations. We developed the Interim Rule with the assistance of the National Urban Search and Rescue Advisory Committee and its Legal Issues Working Group.

Adoption of the Interim Rule enables DHS to standardize our agreements with the Sponsoring Agencies. Following adoption of the final rule, we will ask each of the Sponsoring Agencies to enter into a new, streamlined MOA as well as a Preparedness Cooperative Agreement,<sup>11</sup> as described in subpart B

of the rule, and a Response Cooperative Agreement,<sup>12</sup> as described in subpart C of this rule. These new, standardized agreements will document our relationship with the Sponsoring Agencies.<sup>13</sup> Upon the effective date of the Interim Rule, if a conflict exists between a provision of the rule and an existing MOA, the provision of the rule will control.

#### References in the Preamble to Parts, Subparts or Sections

Throughout the preamble and rule, references to part, subpart, or sections (as "section" or "§") are to parts, subparts or sections of this rule unless specifically cited as a section of an Act, e.g., section 306 of the Stafford Act, or document other than this rule.

#### Organization of the Interim Rule

The Interim Rule is divided into four subparts. Subpart A addresses the organization of the National US&R Response System, explains the relationship among the various components of the system, incorporates certain provisions of other regulations and provides for sanctions if US&R regulations and directives are violated.

Subpart B describes the process through which we provide grant funds to the Sponsoring Agencies to maintain Task Force readiness. Sponsoring Agencies use these grant funds to administer the Task Forces, provide initial and recurrent training,<sup>14</sup> and acquire and maintain a uniform cache of equipment and supplies.

Following adoption of the final rule, we will ask each Sponsoring Agency to enter into a Preparedness Cooperative Agreement with us. In addition, from time to time, DHS will purchase and distribute equipment and supplies directly to each Task Force.

capabilities and readiness for operations, including training.

<sup>12</sup> When DHS activates a Task Force it provides Federal funding for the Task Force's response under the terms of the Response Cooperative Agreement.

<sup>13</sup> Following adoption of the final rule, DHS expects to develop a National US&R Response System Directive Manual, which will contain system policies and explain other Federal regulations, and will govern the operation of the National US&R Response System. The Directive Manual will be updated periodically as needed.

<sup>14</sup> Sections 306(a) and 621(c) of the Stafford Act, 42 U.S.C. 5149(a), 5197(c), authorize DHS to federalize members of US&R Task Forces to participate in preparedness activities. We periodically federalize US&R teams to participate in DHS-sanctioned training exercises, also known as mobilization exercises. During these periods, they are not "Activated" within the meaning of § 208.2 of the rule and, therefore, the provisions of subpart C do not apply to DHS-sanctioned training exercises. Funding for participation in DHS-sanctioned training exercises may be available under § 208.24(b) of the rule.

<sup>4</sup> A Joint Management Team is a multi-disciplinary group of National Disaster Medical System (NDMS), Urban Search and Rescue (US&R) and other specialists combined to provide operational, planning, logistics, finance and administrative support for US&R and NDMS resources, and to provide technical advice and assistance to State and local governments.

<sup>5</sup> The term "Temporary Excepted Federal Volunteer" means that a System member's status is temporary for the period of Federal activation, excepted from Civil Service rules regarding Federal employment, Federal for purposes of tort claim protection and Federal "workers' compensation", and a volunteer in that DHS does not pay the individual directly, but reimburses the Sponsoring Agency for the System Member's services.

<sup>6</sup> A Participating Agency is a State or Local Government, non-profit organization, or private organization that has executed an agreement with a Sponsoring Agency to participate in the National US&R Response System.

<sup>7</sup> Affiliated Personnel are individuals not normally employed by a Sponsoring Agency or Participating Agency and individuals normally affiliated with a Sponsoring Agency or Participating Agency as volunteers.

<sup>8</sup> Cooperative Agreements are similar to grants, but differ from grants in the amount of government cooperation and involvement in the implementation of the agreement.

<sup>9</sup> The Task Forces also respond to disasters and emergencies in their home states as State resources. DHS does not normally and directly reimburse Sponsoring Agencies of the Task Forces for the costs that Task Forces incur when deploying in their home states, although in a State deployment, Task Forces may use equipment that they have purchased with DHS grant funds and Federal property that is in their custody. Subpart C of this rule does not cover in-state deployment of US&R resources. However, Federal reimbursement for the cost of an in-state deployment may be available through DHS's Public Assistance Program under regulations published at 44 CFR part 206. In addition, the Office of Foreign Disaster Assistance of the U.S. Agency for International Development (USAID) often uses the services of certain Task Forces to deliver humanitarian assistance abroad under agreements to which DHS is not a party. The rule does not affect the relationships between USAID and the Sponsoring Agencies of the Task Forces.

<sup>10</sup> In addition to participation on Task Forces, participants in the System (referred to as System Members) may also be called upon to serve as members of Joint Management Teams or other overhead or technical teams.

<sup>11</sup> DHS enters into a Preparedness Cooperative Agreement with each Sponsoring Agency to provide Federal funding to develop and maintain System resource (personnel, equipment and supplies)

Subpart C addresses the deployment of System Members, either as part of a Task Force, a Joint Management Team, or another overhead or technical team, as a Federal resource, and the reimbursement of the Sponsoring Agencies for the costs that they incur as a result of these deployments. This subpart also explains the Response Cooperative Agreement that we will ask each Sponsoring Agency to sign following adoption of the final rule.

Subpart D establishes the procedures by which Sponsoring Agencies may present claims to DHS for reimbursement of costs incurred when we use System Members as Federal resources, including the timeframes in which the Sponsoring Agencies must present such claims, and procedures for appeals, in writing and submitted within 60 days after receipt of written notice of DHS's determination of the initial appeal. The timeframes and procedures for appeals are set out in § 208.62, Appeals.

A glossary of defined terms that we use throughout the Interim Rule and in subpart A appears in § 208.2. A sub-glossary of defined terms used 208.32 (subpart C) appears in that subpart.

### Sectional Analysis

Section 208.33 sets forth the principles under which we will reimburse Sponsoring Agencies for participating in Alerts<sup>15</sup> and Activations.<sup>16</sup> Subsection (a) expresses our policy that participation in Alerts and Activations be as cost neutral as possible to Sponsoring Agencies and Participating Agencies. This commitment is critical to avoid putting local fire departments, which are the predominant sponsors of the Task Forces, at risk for the cost of providing emergency services outside of their respective jurisdictions. Payments are subject to 44 CFR part 13, particularly §§ 13.21 (payment) and 13.22 (allowable cost). 44 CFR 13.22 incorporates various Office of Management and Budget (OMB) circulars that address allowable cost. However, if there is a conflict between this rule and 44 CFR part 13 or the OMB Circulars, this rule controls.

Section 208.39 explains how we will compensate Sponsoring Agencies for personnel costs during Activations. When we deploy System Members,

<sup>15</sup> Alert means the status of a System resource's readiness when triggered by an Alert Order indicating that DHS may Activate the System resource.

<sup>16</sup> Activation means the status of a System resource placed at the direction, control and funding of DHS in response to, or in anticipation of, a presidential declaration of a major disaster or emergency under the Stafford Act.

either as part of a Task Force, or as part of a Joint Management Team or other overhead or technical team, we appoint them into Federal service as Excepted Temporary Federal Volunteers and they work under our direction and control for the duration of the deployment. However, System Members who are regularly employed by a Sponsoring Agency or Participating Agency retain their concurrent employment relationship with their usual employers.<sup>17</sup> The maintenance of this concurrent employment relationship is a fundamental principle of the National US&R Response System, and dates from the inception of the System. We adopted the principle after consultations with the States, local governments and public safety employee organizations and we intend it to prevent System Members from suffering a break in their service to the usual employer while away on the Federal deployment. While on a Federal deployment, these System Members receive pay and benefits from their usual employers during the Federal deployment just as they would if they were not Activated.

Section 208.39(a) of this part provides that we will reimburse the Sponsoring Agency for personnel costs that result from the Activation and are consistent with this rule. The Sponsoring Agency is responsible for reimbursing the personnel costs of its Participating Agencies under the provisions of § 208.39.

Section 208.39(b) of this part speaks to how we compensate Sponsoring Agencies for overtime costs that might not have been incurred but for the Federal deployment. Section 7(k) of the Fair Labor Standards Act (section 7(k)) exempts public safety organizations from paying their employees overtime under certain circumstances. As interpreted by Department of Labor regulations and court decisions, the section 7(k) exemption does not apply unless the employee in question is trained in fire protection, has the legal authority and responsibility to engage in fire suppression, is employed by a public safety agency engaged in fire suppression and actually engages in fire suppression at least 80 percent of the time.

After reviewing Department of Labor regulations relating to section 7(k) and relevant court decisions, we are uncertain whether the rescue activities

<sup>17</sup> In some cases, the relationship between the individual and the Sponsoring Agency or Participating Agency is a contractual relationship or a volunteer relationship. These regulations do not create a common law employment relationship between an individual and a Sponsoring Agency or Participating Agency where none otherwise exists.

undertaken by Sponsoring Agencies of the US&R Task Forces are analogous to fire suppression. We also note that some System Members will not fall within the section 7(k) exemption because they are not regularly employed in fire suppression. It would be unfair to compensate these individuals at one overtime rate, when fellow System Members, who may be volunteers or part-time fire service employees, are compensated at another overtime rate. For these reasons, DHS instructs the Sponsoring Agencies to disregard the section 7(k) exemption when calculating its reimbursement for personnel costs, and reimburses Sponsoring Agencies for regular wages and overtime wages as described in § 208.39(d), (e) and (f).<sup>18</sup> This instruction will not create a windfall for Sponsoring Agencies and Participating Agencies because they cannot charge DHS for personnel costs in excess of those that they actually and normally incur.

Section 208.39(c) of this part establishes a uniform 24-hour tour of duty during the Federal deployment. DHS will reimburse the Sponsoring Agencies for 24 hours of pay for each day that a System Member is deployed, from his or her arrival at the Point of Assembly<sup>19</sup> until his or her release from duty, which may be the airport or Air Force Base to which the Task Force returns, or at the Task Force's original Point of Assembly,<sup>20</sup> or some other point. This reimbursement procedure is known as "portal to portal" pay.

We are not establishing a different rate of reimbursement for meal periods or scheduled sleep periods. Once deployed, all System Members must be available for immediate response twenty-four hours a day during the entire deployment period. Meal periods and sleep periods will be interrupted if System Members are needed to engage in vital lifesaving activities, just as they are in the firehouse.

Search and rescue professionals whom we expect to respond on a moment's notice at any time during a 24-hour period should be compensated for 24 hours of work. Activated System Members often work the first 24 to 48 hours of the Activation continuously, as

<sup>18</sup> Section 208.40(b) addresses reimbursement for various differentials paid by Sponsoring Agencies.

<sup>19</sup> Certain activated System Members will not report to a Point of Assembly, but rather will be instructed to travel to the incident location directly from their home or regular place of work. These individuals are Activated when they leave their home or regular place of business and we will adjust the "portal to portal" pay of these individuals accordingly.

<sup>20</sup> The Point of Assembly is the location where a Task Force assembles before departure in response to an activation order.

this initial period involves packaging the Task Force for transport, loading and unloading equipment, attending briefings, receiving and adjusting to changes in operational objectives, establishing the base of operations and initiating the search for live victims. Once the search begins, we control Task Force activities during the entire 24-hour period and Task Forces must be available for immediate response at any time.

Section 208.39(g) provides for the reimbursement of Backfill<sup>21</sup> expenses. The National US&R Response System depends upon the voluntary participation of public safety agencies. We recognize that these public safety agencies may be short-handed when some of their personnel are away on a Federal deployment. If a public safety agency ordinarily Backfills a position in situations where a regular employee is unavailable for a period of time similar to that spent on a US&R deployment (e.g., Family and Medical Leave, participation in an extended mutual aid assignment, injury or disability), then the public safety agency may bill DHS for the cost of Backfilling the position for the period that the regular employee is away on a Federal deployment. However, we will only reimburse for the incremental overtime salary and benefit expenses associated with the replacement employee. We will not reimburse the Backfilling agency for the regular salary and overtime cost of the replacement employee because the public safety agency would have to pay this cost if the Federal deployment had not occurred.

#### Public Comments on the Proposed Rule

During the comment period on the Proposed Rule, which closed on February 3, 2003, we received a number of comments. We summarize the comments and our response to them in the materials that follow.

Usage of Terms in the **SUPPLEMENTARY INFORMATION**. We received comments concerning the use of the terms "Task Force Member" and "System Member" in the **SUPPLEMENTARY INFORMATION** to the Proposed Rule. In the **SUPPLEMENTARY INFORMATION** to the Proposed Rule, we used the term "Task Force Member" to denote individuals who respond as part of the National US&R Response System. However, while most participants in the System respond as part of a US&R Task Force, participants in the System may also be called upon to serve on Joint

Management Teams and other overhead or technical teams. As a result, the term "System Member" is a more accurate and comprehensive term to describe individuals who participate in System activities, and the term "Task Force Member" is best used to describe a System Member who is Activated as part of a Task Force. We have corrected the usage of these terms in the **SUPPLEMENTARY INFORMATION** to the Interim Rule.

In certain parts of the **SUPPLEMENTARY INFORMATION** to the Proposed Rule, we also used the term "US&R Task Force," rather than "Sponsoring Agency," to denote the agency or entity with which DHS has entered into legal and financial agreements with respect to the US&R Task Forces. We have corrected the usage of these terms in the **SUPPLEMENTARY INFORMATION** to the Interim Rule.

Finally, in the **SUPPLEMENTARY INFORMATION** to the Proposed Rule, we described the reimbursable period during an Activation as ending when a System Member returns to the pre-deployment staging area. This description conflicts both with standard terminology and the reality of System deployments. A more accurate description of the duration of the reimbursable period during an Activation is set forth in the Interim Rule.

*Eligibility for Reimbursement and Coverage Under Federal Statutes While Traveling to and from the Point of Assembly.* One Task Force commented on the time period that we propose to pay System Members, namely from arrival at the Point of Assembly until his or her release from duty, which may be the airport or Air Force Base to which the Task Force returns, or at the Task Force's original Point of Assembly, or some other point. Noting that some of its members live 2 or more hours away from the Point of Assembly, the Sponsoring Agency reimburses members from the time that they are alerted to the time that they return home (including travel mileage).

*Response:* This question has two aspects: (1) Reimbursement for time spent traveling to and from the Point of Assembly, and reimbursement for travel mileage while traveling to and from the Point of Assembly; and (2) consideration of time spent traveling to and from the Point of Assembly as "in the course of employment" for the purposes of workers' compensation (for injuries sustained) and tort liability (for civil wrongs or harms caused) during that travel.

*Reimbursement:* This issue is related to the Fair Labor Standards Act (FLSA),

which establishes a minimum hourly wage for employees and requires employers to pay overtime wages for hours worked above the statutory maximum. It is also related to the Portal-to-Portal Act of 1947, which requires that time spent "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" is not compensable time under the FLSA unless it is compensable by contract, custom, or practice. The general Federal rule regarding travel mileage is: commuting to and from work, that is, between permanent residence and permanent duty station, is a personal expense. The employee is expected to be at work; how the employee chooses to get there is entirely his or her own business. 27 Comp. Gen. 1 (1947).

There are exceptions to the general rule if the travel is not ordinary and is spent outside the workday to and from job assignments. Examples include substantial travel to an emergency job assignment at a location outside the normal workplace, or the employer requires the employee to be "on call" to respond to emergency job assignments. A corollary of the "substantial travel" exception is that the travel is noncompensable if the amount of time spent traveling is minimal.

On reconsideration of our position, we will reimburse certain travel costs and time spent traveling to the Point of Assembly when a System Member responds to an Activation and must travel a considerable distance or time, as determined by DHS on a case by case basis, to reach the Point of Assembly. Otherwise, we will follow the general rule regarding noncompensable travel, including minimal travel. When we activate a Task Force or other System resource, timely assembly of the System Members is critical, and under those circumstances warrants our exception to the general rule. This exception will apply only to Activations, and will not apply, for instance, to Alerts, to travel home after return to the Point of Assembly, or to travel required for training, which we consider to be ordinary noncompensable travel.

*In the Course of Employment:* Ordinary travel to and from a fixed workplace is generally not within the scope of employment for workers' compensation purposes, under the "going and coming" rule. Under the rule, employees with a fixed workplace are covered by workers' compensation only when they are on their employer's premises, or performing an assignment required by the employer. One of the

<sup>21</sup> Backfill means the personnel practice of temporarily replacing a person in his or her usual position with another person.

exceptions to the general rule of going and coming is travel to and from job assignments, where the employer compensates the employee for the time or expense of the travel. Consistent with that exception and our intent to reimburse travel costs and time spent traveling to the Point of Assembly in response to an Activation, on a case-by-case basis we will meet our obligations regarding workers' compensation claims that arise out of injuries that System Members incur while traveling to a Point of Assembly in response to an Activation, but for no other purpose.

*Definitions.* We received several comments on the definitions in § 208.2, and made the following changes:

We changed the term "Memorandum of Understanding" to "Memorandum of Agreement."

The definition for "Equipment Cache List" now reads: "The DHS-issued list that defines:

"(1) The equipment and supplies that US&R will furnish to Sponsoring Agencies; and

"(2) the maximum quantities and types of equipment and supplies that a Sponsoring Agency may purchase and maintain with FEMA funds."

The definition for "Participating Agency" reads: "A State or Local Government, non-profit organization, or private organization that has executed an agreement with the Sponsoring Agency to participate in the National US&R Response System."

One Task Force expressed concern regarding the definitions of "Program Manager," "Program Office," and "Project Manager." We have decided to retain the definitions of "Program Manager" and "Program Office" as they are. Currently, the Program Manager is the Chief of the US&R Section, which is part of the Response Division of FEMA, under the Emergency Preparedness and Response Directorate of DHS, and the Program Office is the US&R Section. However, these entities may change as the organizational structure of DHS evolves. We will notify the Sponsoring Agencies if we designate a different Program Manager or Program Office. We have deleted the definition of "Project Manager" from the definitions set forth in § 208.22, since that term appears nowhere else in the Interim Rule.

We have added the following definition: "*Program Directive* means guidance and direction for action to ensure consistency and standardization across the National US&R Response System." This replaces the term "System Order" in the proposed rule with "Program Directive" in the interim rule.

One commenter recommended that DHS include a definition of "Affiliated Member." The equivalent term is defined at § 208.32 as "Affiliated Personnel."

*Section 208.6, System Resource Reports.* One commenter noted that Sponsoring Agency, Participating Agencies and System Members are to cooperate fully in audits, investigations, studies and evaluation, and asked, "who pays for salary cost associated with gathering and processing the information?"

DHS provides funding for program management in the Preparedness Cooperative Agreement to support administrative activities, including the salary costs for gathering and processing System resource reports.

*Workers' Compensation and Other Benefit Costs.* Several Sponsoring Agencies commented that workers' compensation and other benefit costs incurred by Sponsoring Agencies as the result of an injury or death to a System Member are not reimbursable costs. As set forth in § 208.11 and explained in the Supplementary Information, DHS will appoint System Members into Federal service, concurrent with those individuals' local employment, to secure protection for such employees under the Federal Employees' Compensation Act and the Federal Tort Claims Act. If a System Member sustains an injury, that System Member may file a claim for compensation under the Federal Employees' Compensation Act. Because the System Member's Federal appointment is concurrent with his or her local employment, the System Member may also be eligible for compensation under his or her local workers' compensation system. In that case, the System Member may collect either the incremental difference between Federal benefits and local benefits, or may collect local benefits in full, depending on whether the local benefits may be offset by the Federal payment to the System Member.

As explained in § 208.40, DHS will reimburse the Sponsoring Agency for the workers' compensation insurance premium costs associated with the time during Activation. However, any local benefit payment is not a reimbursable expense, because DHS (through the U.S. Department of Labor) provides coverage under the Federal Employees Compensation Act, and because we are prohibited under our current statutory authority from reimbursing Sponsoring Agencies for the costs of benefit payments.

*Death or Disability in Line of Duty.* One Participating Agency asked whether a System Member killed or

disabled while Activated would be entitled to benefits through the agency's municipal pension program, and whether the death or injury would be considered in the line of duty. We intend that System Members remain fully eligible for local benefits during Federal Activation, and that, as a result, any death or injury during Activation should be considered to have occurred while the System Member was acting in the scope of employment.

*Federal Death Benefits.* One Sponsoring Agency asked how a "Federal death benefit," if incurred, would be calculated. The "Federal death benefit" for System Members comprises two separate components: (1) A benefit payment under the Federal Employees Compensation Act; and (2) a payment under the Public Safety Officers' Benefit Act. The death and injury benefits available under each of those statutes are determined using formulas set forth in those statutes.

*Voluntary Contribution to Municipal Pension Plans.* One Sponsoring Agency asked whether contributions to a municipal pension plan made voluntarily by System Members during an Activation, rather than contributions made by the System Member's employer under the terms of a collective bargaining agreement or other arrangement, are reimbursable by DHS. Voluntary employee contributions, as opposed to mandatory employer contributions, are not reimbursable expenses.

*Contributions to the Pension Plan Based on Overtime.* One Sponsoring Agency commented that under its benefits plan, salary is defined as the total actual fixed cash compensation, including overtime, and contributions to its pension plan are based on this total salary, including overtime. The Sponsoring Agency asked whether contributions to the pension plan based on overtime pay received during Activation reimbursable under this rule. Under § 208.40(a)(2), these contributions are reimbursable.

*Cost Sharing.* One Task Force commented that § 208.23(f) refers to "Cost Sharing" but makes no distinction between "hard share," *i.e.*, cash contributions, and "soft share," *i.e.*, other value-added benefits provided by the Sponsoring Agency. We do not presently require Sponsoring Agencies to provide a cost share, either hard or soft, for preparedness or response funding. Please note that section 208.22(f) provides for cost sharing if it were required in the future. If we were to institute a cost-sharing requirement in the future, we would clearly indicate in the Cooperative Agreement whether

such cost share would be “hard” or “soft.”

*Equipment Ownership.* Several Sponsoring Agencies commented that the Proposed Rule does not address ownership or disposition of equipment purchased under this program.

OMB Circulars A-87 and A-110 specify that equipment purchased with Federal Grant funds is the property of the grantee. However, title, use, management and disposition of equipment purchased under a grant or Cooperative Agreement is set out in 44 CFR 13.32, a government-wide rule to which DHS adheres. While the Sponsoring Agency has title to any equipment purchased with Federal preparedness and response Cooperative Agreement funds, DHS reserves the right to transfer title to the Federal Government or a third party that we may name, under 44 CFR 13.32(g). DHS would generally expect to limit its exercise of this right to instances when a Sponsoring Agency indicates or demonstrates that the Sponsoring Agency cannot fulfill its obligations under the Memorandum of Agreement.

*Maximum Pay Rate Table.* We received the most number of comments concerning the Maximum Pay Rate Table (Table) identified in the Proposed Rule. For clarity, we set forth here the applicability of the Table and the process we will follow for creating and updating the Table.

Section 208.32 defines the “Maximum Pay Rate Table” as “the DHS-issued table that identifies the maximum pay rates for selected System positions that may be used for reimbursement of Affiliated Personnel compensation and Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency.” In that same section, “Affiliated Personnel” are defined as “individuals not normally employed by a Sponsoring Agency or Participating Agency and individuals normally affiliated with a Sponsoring Agency or Participating Agency as volunteers.”

One Sponsoring Agency commented that the Table seemed to contradict the principle of cost neutrality set forth prominently in the Proposed Rule. However, as defined, the Table applies only to those individuals who are not normally employed by a Sponsoring Agency or Participating Agency, or whose affiliation with a Sponsoring Agency or Participating Agency is as a volunteer; that is, an individual whom the Sponsoring Agency or Participating Agency does not normally compensate in any way, at any rate.

The Table sets forth maximum rates for which we will reimburse the

Sponsoring Agency for compensation paid to those individuals while Activated. The Sponsoring Agency may choose to compensate these individuals at a higher rate, but we will not reimburse the increment above the maximum rate specified in the Table. Likewise, the Sponsoring Agency may choose to enter into a Participating Agency agreement with the individual’s employer, rather than use the individual as an Affiliated Personnel, in which case the Table would not apply. Consequently, only a Sponsoring Agency’s choice to exceed the maximum rates set forth in the Maximum Pay Rate Table would result in an uncompensated expenditure, and the Table would not violate the principle of cost neutrality.

A number of parties expressed concern that the Table was not provided concurrently with the publishing of the Proposed Rule. We chose not to delay the Proposed Rule until the Table could be developed. We have inserted a new section 208.12, Maximum Pay Rate Table, to establish the process for creating, updating and using the Table. We are also publishing the Table as a Notice in the **Federal Register** and are asking for comments on both the Interim Rule and the Table before publishing the final rule.

One Sponsoring Agency expressed concern that the rates set forth in the Table could not be used with respect to individuals employed by the Sponsoring Agency, and not when the individual would serve on the Task Force as Affiliated Personnel (e.g., a Sponsoring Agency fire department dispatcher affiliated with the US&R Task Force in a non-dispatcher role as a canine search specialist). Although the Table would not necessarily apply to reimbursement for salary and benefits for that individual, Sponsoring Agencies may use the rates in the Table as a guide for establishing compensation levels for Affiliated Personnel.

*Affiliated Personnel.* Several commenters noted that the rule can be interpreted to preclude the reimbursement of Backfill expenses for Affiliated Personnel under § 208.39(g). Those commenters expressed concern that, since the highly-trained civilians such as physicians, structural engineers and canine handlers are typically Affiliated Personnel, reimbursement for Backfill expenses is important to securing the participation of these individuals in the System. The restriction on Backfill costs for Affiliated Personnel could limit the ability of Sponsoring Agencies to recruit and retain these highly trained civilians.

However, the only permissible way to reimburse Affiliated Personnel for Backfill costs is through Participating Agencies—neither we nor the Sponsoring Agencies have contractual or employment relationships with the individuals Backfilling the jobs of Affiliated Personnel. If reimbursement for Backfill expenses is a problem for Affiliated Personnel, we encourage them to have their employers or professional association seek Participating Agency status. Participating Agency status is available to private, for-profit organizations under the revised definition of “Participating Agency” set forth in this Interim Rule. (See Definitions, § 208.2, *Participating Agency*, and § 208.12, *Maximum Pay Rate Table*.) Note, however, that compensation costs, for the purposes of reimbursement and Backfill, refer to the System Member’s actual compensation, or the compensation of the individual who Backfills a position (which includes salary and benefits, as described in §§ 208.39 and 208.40), rather than billable or other rates that might be charged for services rendered to commercial clients or patients.

*Creating, Updating and Using the Maximum Pay Rate Table.* We have inserted a new section 208.12 in this rule to establish how we will create, update and use the Table to reimburse Affiliated Personnel (Task Force Physicians, Task Force Engineers, and Canine Handlers) and Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency; the Table applies only to these named categories. Section 208.12 describes the method for determining maximum pay rates using United States Office of Personnel Management’s (OPM) salary rates, and provides links to OPM’s applicable salary rate tables and locality pay tables.

The section provides that DHS will review and update the Table periodically (at least annually). DHS is publishing the initial Table in the **Federal Register** as a Notice with request for comments. DHS will publish subsequent revisions to the Table as Notices in the **Federal Register**.

The section further states that a Sponsoring Agency may choose to pay Affiliated Personnel at a higher rate, but DHS will not reimburse the increment above the maximum rate specified in the Table.

*Resupply and Logistics Costs During a Federal Activation.* One Sponsoring Agency noted that, under § 208.38, we will not reimburse costs incurred for resupply and logistical support during Activation. That section states that resupply and logistical support needed

during Activation are the responsibility of the Joint Management Team (JMT). The Sponsoring Agency asked, "What happens if the Incident Management Team [now the JMT] cannot be established?"

During Activation, we are responsible for resupply and logistics. Currently, we accomplish this responsibility through either the JMT, which operates in the field, or the Emergency Support Function 9 (ESF-9),<sup>22</sup> which operates from the National Emergency Operations Center, an emergency coordinating center located at FEMA headquarters. As DHS develops and evolves, we may change the names or functions of these teams; however, the responsibility for resupply and logistics will remain with us. Task Forces should not engage in resupply or logistical support during Activation unless coordinated through one of these teams. In extraordinary circumstances, *e.g.*, if the Task Force cannot make contact with either the JMT or the EST, the Task Force should follow the instructions in § 208.44, Reimbursement for other costs. Absent such circumstances, we will not reimburse costs incurred for resupply and logistical support during Activation.

*Compensation for Exempt System Members.* Several agencies commented on the proposed reimbursement for compensation paid to Exempt System Members, *i.e.*, System Members who are paid a salary, rather than an hourly wage, and are otherwise exempt from the Fair Labor Standards Act. One agency commented that reimbursement for Exempt System Members should be based on the employees' salary, converted to a 40-hour workweek and then paid at that rate on an hourly basis during Activation. Another agency commented that the different methods of compensation calculation for Exempt and non-exempt System Members will result in non-exempt System Members receiving a greater amount of compensation during Activation than Exempt System Members, who are typically more experienced firefighters holding higher ranks in the Sponsoring Agency or Participating Agency. This agency speculated that the method of compensation calculation used in the Proposed Rule would result in fewer chief officers (who are typically

classified as Exempt System Members) participating as System Members.

There are two guiding principles underlying our compensation calculation rules: (1) Cost neutrality; and (2) customary and usual practice. The compensation calculation system for Exempt System Members complies with both of these principles. If an individual is classified as an Exempt System Member in his or her regular position with the Sponsoring Agency or Participating Agency, then this individual will receive compensation on a daily basis, rather than an hourly basis, regardless of the number of hours the individual works in a day. The rule provides reimbursement to the Sponsoring Agency or Participant Agency on this basis—that is, for the amount that the individual would have customarily and usually received. If the Sponsoring Agency or Participating Agency customarily and usually compensates Exempt System Members by paying a salary and overtime, or customarily and usually awards compensatory time or another overtime substitute for hours worked above a predetermined threshold, then the Sponsoring Agency may request reimbursement for the overtime amount, or the liquidated value of the compensatory time or other overtime substitute, in accordance with §§ 208.39(e)(5)(ii) and (iii). In this way, this rule abides by the principle of cost neutrality.

One Sponsoring Agency asked that we examine the feasibility of giving Sponsoring Agencies the option of having chief officers appointed as Disaster Assistance Employees (DAE) (temporary DHS employees) during Activation. In that case, those officers would be temporary Federal employees, would probably take a reduction in pay, and would take vacation or administrative leave from the Sponsoring Agency or Participating Agency for the period of Activation. In turn, a DAE appointment might affect their pension and seniority rights. We believe that disadvantages of DAE appointments outweigh any benefits that chief officers might derive, and that the current language of this rule concerning Exempt System Members represents the best general practice.

One Sponsoring Agency asked whether, under § 208.39(e)(3), chiefs compensated based on a 56-hour workweek should be converted to a 40-hour workweek for purposes of calculating reimbursable compensation under the rule. This Sponsoring Agency also noted that compensating individuals who customarily and usually work a 56-hour workweek, by

converting their hourly wage rate to a 40-hour workweek, results in approximately 40 percent higher costs during Activation. Sponsoring Agencies and Participating Agencies that compensate employees based on a 56-hour workweek take advantage of the partial overtime exemption set forth in section 7(k) of the Fair Labor Standards Act. As explained herein, we require that Sponsoring Agencies and Participating Agencies disregard the section 7(k) partial exemption in calculating personnel costs, and we will reimburse personnel costs based on a 40-hour work week, as described in § 208.39 of this rule.

One Sponsoring Agency notes that the calculation of reimbursable personnel costs will place an extra burden on payroll staff, and there will most likely be personnel who will be eligible for overtime compensation immediately upon Activation since they have already exceeded the overtime threshold for that week. We have included an administrative allowance in the reimbursement for response costs, found at § 208.41, to compensate the Sponsoring Agency for this increased burden on payroll staff. We also provide for reimbursement of any additional salary and overtime costs in § 208.39(f), *e.g.*, those incurred because a System Member is eligible for overtime compensation immediately upon Activation.

*Reimbursement for Personnel Costs for Equipment Cache Rehabilitation.* Under § 208.43, we will reimburse Sponsoring Agencies for personnel costs associated with equipment cache rehabilitation up to the number of hours specified in the Demobilization Order.<sup>23</sup> One Sponsoring Agency stated that the number of hours specified in the Demobilization Order should be an estimate only, rather than a fixed limit, and asked whether there is an appeal process for the number of hours specified in the Demobilization Order, or another mechanism for requesting additional hours based on unforeseen circumstances. There is no appeal process for the number of hours specified in the Demobilization Order. However, if the Sponsoring Agency feels that unforeseen circumstances will prevent it from completing its equipment cache rehabilitation within the specified number of hours, the Sponsoring Agency should follow the

<sup>22</sup> ESF-9, or Emergency Support Function 9, Urban Search and Rescue, is responsible to plan and coordinate the use of Urban Search and Rescue assets following an event that requires locating, extricating and providing immediate medical treatment of victims trapped in collapsed structures. ESF-9 also provides planning and coordination of US&R assets when they engage in other disaster-related assignments.

<sup>23</sup> A Demobilization Order is a DHS communication that terminates an Alert or Activation and identifies cost and time allowances for rehabilitation.

procedures in § 208.44 for reimbursement of other costs.

*Reimbursement for Other Costs.*

Section 208.44 sets a procedure for Sponsoring Agencies to follow if the Sponsoring Agency or the Task Force believes that it must incur an expense not included in subpart C for which it expects to request reimbursement. Section 208.44 requires that the Sponsoring Agency request in writing permission from DHS to make the expenditure or, if advance permission in writing is not possible to obtain, to meet three criteria before making the expenditure, including requesting and receiving advance verbal approval.

One agency commented that during an extreme emergency, in particular during the initial 24- to 48-hours of an Activation, it can be difficult to obtain written or verbal approvals, and that personnel authorized to approve expenditures are not available 24 hours a day during this period. Moreover, this agency commented that Joint Management Teams, in the past, have left requests for resupply unanswered for extended periods of time. The agency recommended that we empower Task Force Leaders to make procurement decisions.

We feel that this comment addresses operational problems rather than regulatory issues. Many of these problems will be alleviated by the construction of the new DHS operations center that will be staffed 24 hours a day during an Activation, and by assuring that there is at least one person on duty in the operations center who holds delegated authority to authorize procurements. Moreover, the revised Equipment Cache List<sup>24</sup> provides for the purchase of multiple, back-up methods of communication to assure that Task Forces can communicate with the operations center under any circumstances. We believe that the rule controls the costs associated with Activation and limits duplicative procurement without compromising responder safety.

*Advance of Funds.* Section 208.45 states that we will provide the Sponsoring Agency with an advance of funds up to 75 percent of the estimated personnel costs of the Activation. Several agencies commented that we should increase this amount to 90 percent of the estimated personnel costs. These agencies commented that since personnel costs of an Activation

can exceed \$1 million, an advance up to 75 percent of that amount still leaves the Sponsoring Agency with approximately \$250,000 in outlays for personnel costs for which it must wait for up to 120 days or more for reimbursement. The financial burden of these outlays would be compounded in the event of multiple Activations within a relatively short time period.

We believe that up to 75 percent is the optimal amount for an advance of funds because it balances the need for funds against the possibility of overestimated funds. As one commenter pointed out, for many years we did not provide any advance of funds, and for more recent Activations we provided an advance equal to 25 percent of estimated personnel costs. The amount “up to 75 percent” is a result of our examination of personnel cost data from a number of previous Activations. It also recognizes the financial burden borne by the Sponsoring Agencies in carrying, even temporarily, these additional salary costs. However, Activations often last for a shorter period of time than we use to calculate the estimated personnel costs for the Activation, as was the case recently with Hurricane Isabel when teams were activated for fewer than 7 days. As one commenter pointed out, some percentage of personnel costs may be questioned and ultimately disallowed as a result of the reimbursement review process. For these reasons, at this time, we believe that up to 75 percent of estimated personnel costs is the best amount for an advance of funds. We expect to review Sponsoring Agencies’ experience periodically under this provision, and will make revisions as warranted.

*Deadline for Submission of Claims.*

One agency commented that the deadline for submission of claims comes too soon after an Activation has ended. Currently, § 208.52 specifies that Sponsoring Agencies must submit claims for reimbursement within 90 days of the conclusion of the Activation. Section 208.52 also states that DHS may extend and specify the time limitation upon a written request and justification from the Sponsoring Agency. The commenting agency noted that it could take many weeks to obtain certain items, often because of manufacturers’ inventory status. The agency stated that setting a deadline of 120 days would obviate the need for a Sponsoring Agency to apply for repeated extensions.

We believe that the 90-day timeframe for submission, with the opportunity for Sponsoring Agencies to apply for 30-day extensions, is the better policy. In the past, we found that Sponsoring

Agencies often do not submit claims for reimbursement in a timely manner. This tendency interferes with our ability administratively to “close out” the accounts we set up for each major disaster or emergency, and also results in Sponsoring Agencies carrying unreimbursed costs for longer periods of time. We believe that it is better to require submission of claims for reimbursement within 90 days of the conclusion of the Activation, while permitting Sponsoring Agencies to apply for 30-day extensions at their option.

*Reevaluation and Potential Revision of the Rule.* One agency commented that we should provide a date certain for reevaluation and potential revision of this rule. The agency believed that providing this date certain was important because some provisions of the rule will require additional discussion and development, and other issues may arise after the rule is implemented. We do not believe that there is a need to provide a date certain by which we will reevaluate and, if necessary, revise the rule. However, we will work with our State and Local Government partners through the National Urban Search and Rescue System Advisory Committee and its Legal Issues Working Group to evaluate this rule, measure its efficacy, and develop revisions as necessary.

*Task Force Leader.* One Sponsoring Agency commented that this rule should include a definition of the role and responsibilities of the Task Force Leader, the highest leadership position on a US&R Task Force. The commenting agency stated that “[t]he Task Force Leader is the individual during a deployment who is in control and responsible for the entire Task Force, in addition to reporting to FEMA (whether the FEMA Emergency Support Team (EST) or the IST [now JMT]) the Task Force Leader is the individual that the Sponsoring Agency designates to represent the Sponsoring Agency both financially and legally while the Task Force is deployed.”

We feel that the roles and responsibilities of the Task Force Leader should not be included in the rule. We have developed and published a Position Description for the Task Force Leader, and have described the roles and responsibilities of the Task Force Leader in several operational documents. These descriptions may change over time, and we want to retain flexibility by including these descriptions in operational documents rather than in the rule. Moreover, different Sponsoring Agencies have vested their Task Force Leaders with

<sup>24</sup> The *Equipment Cache List* is the DHS-issued list that defines: (a) The equipment and supplies that US&R will furnish to Sponsoring Agencies; and (b) the maximum quantities and types of equipment and supplies that a Sponsoring Agency may purchase and maintain with DHS funds.



different levels of authority. For these reasons, we have not defined the roles and responsibilities of the Task Force Leader in the rule.

*Use of Federally Purchased Equipment for Local Use in Daily Operations.* One commenter noted that, in the Federalism Summary Impact Statement included with the Proposed Rule, we stated that "Equipment and supplies purchased with Federal funds may be used to respond to state disasters or emergencies." The commenter asked whether the intent of the rule was to prevent the use of federally purchased equipment for daily operations.

We intend the System to provide a Federal capability to respond to major disasters or emergencies involving structural collapse, weapons of mass destruction, or other incidents that the President declares. A Sponsoring Agency may use equipment and supplies purchased with Federal funds to respond to disasters or emergencies requiring urban search and rescue response at the state and local level, and if necessary, to repair or replace equipment so used at the Sponsoring Agency's expense. However, we do not intend that Sponsoring Agencies use federally purchased equipment in routine, day-to-day operations.

*Indirect Costs.* One Sponsoring Agency commented on our prohibition of reimbursement for indirect costs related to response, and our 7.5 percent limitation on indirect costs related to preparedness. The commenting agency noted that this limitation on indirect costs is inconsistent with other FEMA programs and diverges from standard Federal indirect cost percentages. The commenting agency stated that this limitation could threaten the ability of that Sponsoring Agency to remain in the System, stating that the "work burden formulas presuppose economies of scale for a larger, pre-existing agency."

We brought this issue to the National US&R Advisory Committee, which recommended retention of the indirect costs policy as in the proposed rule. We agree. This limitation is not inconsistent with other limitations applicable to FEMA programs. Accordingly, we have not changed this section. Note that this limitation applies only to Preparedness Cooperative Agreements, which apply over the course of at least one year and to which indirect cost principles can be applied readily. Except as provided in § 208.41, we allow no indirect costs under Response Cooperative Agreements. US&R deployments are most often short-term, on the order of 10–14 days. Consistent with section 407 of the Stafford Act, we will allow the

administrative allowance listed in § 208.41 of this part in lieu of attempting to establish indirect cost rates for short-term deployments.

#### **Administrative Procedure Act Determination**

We are publishing this Interim Rule under the Administrative Procedure Act, 5 U.S.C. 553, with our request for public comments. Concurrently with publication of the Interim Rule, we are publishing the Maximum Pay Rate Table (Table) in the **Federal Register** as a Notice. We published a Proposed Rule, National Urban Search and Rescue Response System, on December 18, 2002, 67 FR 77627–77640, and received over 30 comments from various Task Forces in the National US&R Response System. We discuss the comments in the preamble of the Interim Rule, indicating where we agree with the comments and have made changes, and also where we do not agree with the comments.

We did not have the Table prepared at the time we published the Proposed Rule but received a large number of comments and questions about the Table. To provide an opportunity for comment before publishing the final rule, and because of the delay between the date of the Proposed Rule and the Interim Rule, we request that interested parties comment within 45 days of today's publication.

The National US&R Response System provides a number of public services that are unique within the Federal Government. Members are experienced and trained professionals highly skilled in the often dangerous roles of searching for, extricating and providing initial medical care for victims from collapsed buildings, whether collapsed by natural or manmade causes. The searching is important to the public to ensure that every effort has been made to rescue people still alive within a collapsed structure. Members also have an important role in finding the bodies of those killed in the collapse, so that victims might be identified and returned to grieving families. The tasks performed and the dangers inherent in the work benefit other firefighters and disaster responders who do not have the specialized training and experience of the National US&R Response System Members and who are not put at risk by entering the collapsed structures when US&R teams are present.

The Interim Rule is effective today, the date of publication. There is an urgent need within the National US&R Response System to standardize financial, administrative and operational functions among the 28

Task Forces located in 19 States. These needs include codifying the relationship between the Department of Homeland Security (DHS) and the Sponsoring Agencies of the 28 Task Forces, and standardizing the relationships of Sponsoring Agencies with their Participating Agencies and Affiliated Personnel. Efforts to standardize the Memoranda of Agreement between DHS and the Sponsoring Agencies, and in turn, the agreements between the Sponsoring Agencies and Participating Agencies and Affiliated Personnel, are essential to the effective functioning of the System and must be completed soon to inform, guide and govern all System participants uniformly in their respective roles, responsibilities and activities.

In the years since September 11, 2001, Congress has appropriated increased funds to US&R for equipment, training, and other measures to ensure that each Task Force is fully staffed, trained and available for whatever disaster they may be called upon for help. It is imperative and urgent that there be full accountability for the funds granted to the Sponsoring Agencies, and that there be uniform standards that the Sponsoring Agencies can apply in the performance of their US&R responsibilities. This rule provides those standards; it is urgent that they be in effect as soon as possible.

The direct effect of this rule is on the 28 Sponsoring Agencies, their Participating Agencies, and Affiliated Personnel—a relatively small, well-defined universe. The Sponsoring Agencies, the Advisory Committee of the National US&R Response System (Advisory Committee),<sup>25</sup> the Working Groups<sup>26</sup> under the Advisory Committee, and others associated with the National US&R Response System have frequently and repeatedly requested publication and implementation of this rule, which they urgently need to fulfill their obligations to the System, themselves and their organizations. As matters of sound policy, planning and management for the entire System, it is important to make the rule effective upon publication.

Good cause exists and it is in the public interest to make this Interim Rule

<sup>25</sup> The Advisory Committee of the National US&R Response System provides advice, recommendations, and counsel on the continuing development and maintenance of a National US&R Response System to the Under Secretary for Emergency Preparedness and Response.

<sup>26</sup> The System has several specialized Working Groups, e.g., command and general staff, medical, legal issues, training, etc., that provide professional and technical advice on US&R issues to DHS through the National Advisory Committee.

effective upon publication (and to request comments on the Interim Rule and on the Table as published separately today as a Notice). DHS will review and evaluate any comments that it receives and will publish the final rule at a later date.

#### National Environmental Policy Act

44 CFR 10.8(d)(2)(ii) categorically excludes from actions such as the preparation, revision, and adoption of regulations, and specifically 44 CFR 10.8(d)(2)(xviii)(C), which relates to planning and administrative activities in support of emergency and disaster response and recovery, including deployment of urban search and rescue teams. Accordingly, we have not prepared an environmental assessment or environmental impact statement for this rule.

#### Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866, 58 FR 51735, October 4, 1993, a “significant regulatory action” is subject to OMB review and the requirements of Executive Order 12866. Section 3(f) of the Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more, or may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

In determining whether to proceed with the formulation and publication of this rule, we considered three alternatives: maintain the status quo ante; manage the program through administrative directives; and cancel the program.

*Maintain the Status Quo Ante.* The National US&R Response System has operated since the early 1990s without formal regulations. The first ten years or so were formative years with a great deal of flux. Federal appropriations were minimal until the events following September 11, 2001, which led to major changes in planning, operations, management, training and funding.

Twenty US&R teams responded to the World Trade Center and five responded to the Pentagon. After-action evaluations showed the need for greater interoperability of equipment, consistency in training and operating across the 28 teams, and many other factors to permit 28 disparate units in 19 States to perform as a cohesive whole. Congress appropriated larger sums to support the program, mandating that the program not add new task forces until existing task forces were fully equipped and trained. Spurred by the response of Congress and the Administration, we redoubled efforts to standardize the financing, administration and operation of the National US&R Response System.

Under the *status quo ante* and the low level of Federal funding, we had little leverage to standardize the program. With increased appropriations and expanding mission that followed September 11, 2001 (*e.g.*, response to acts of terrorism and weapons of mass destruction events, response to hurricanes), operating without formal regulations was no longer tenable. Sound management and responsible stewardship of the program demand formal regulations. For these reasons, we rejected the *status quo ante*.

*Management by Administrative Directives.* We rejected this alternative on grounds that administrative directives do not have the force of law, tend to be piecemeal, and do not adequately support our need for standardized practices within the US&R program. In contrast, the rule will have the force of law and will concisely support our need to standardize the financing, administration and operation of the US&R program.

*Cancel the Program.* The US&R program grew out of the evident need to have highly skilled, specially trained and equipped personnel swiftly available to search for and extricate victims from collapsed buildings, whether from earthquakes and other natural causes, acts of terrorism, accidents or other human causes. The need is greater today than perceived in the late 1980s and early 1990s. The program has garnered a well- and hard-earned recognition of its effectiveness, with strong support from Congress, the Administration, and its Sponsoring and Participating Agencies. With that continuing support, cancellation of the program is not a feasible alternative.

*Interim Rule.* We (FEMA) published a Proposed Rule, National Urban Search and Rescue Response System, on December 18, 2002, 67 FR 77627–77640. During the 45-day comment period, we received about 30 comments from Sponsoring Agencies, one from a

Participating Agency, one from a Member of Congress, and none from the public at large. We reviewed the comments, accepting some, rejecting some. This preamble and Interim Rule reflect the decisions made regarding the comments that we received.

When we published the Proposed Rule, we mentioned, but had not yet prepared, the Maximum Pay Rate Table (Table). In order to have that part of the rule on which we had received comments go into effect, and to obtain public comments on the Table, we elected to publish the rule as an Interim Rule, and, concurrently to publish the Table as a Notice, with request for comments.

*Economic Significance of the Rule.* This rule will not have an annual effect on the economy of \$100 million or more and is not an economically significant rule under Executive Order 12866. The rule establishes the relationship between the Sponsoring Agencies of the Urban Search & Rescue (US&R) Task Forces and DHS, funding for preparedness and response activities, including the acquisition of equipment and supplies and training, and the eligibility of Task Forces to receive and maintain Federal excess property.

This interim rule impacts 28 Sponsoring Agencies, 26 of which are from local communities, 2 are associated with state universities. All of the communities have populations greater than 50,000. Most of the Sponsoring Agencies have agreements with Participating Agencies for additional support to meet the staffing, equipment and training requirements of the National US&R Response System. US&R-related costs of Participating Agencies are paid by DHS through the Sponsoring Agencies. Similarly, expenses of Affiliated Personnel are reimbursed through the Sponsoring Agencies.

DHS has designed the National US&R Response System to be as cost neutral to Sponsoring Agencies as Federal law authorizes. DHS acquires equipment and supplies, pays for training, meetings and related travel, lodging, and per diem expenses, and attempts to cover Sponsoring Agencies’ preparedness costs through preparedness Cooperative Agreements. When DHS activates a US&R Task Force we reimburse the Sponsoring Agency for 100 per cent of its direct eligible costs incurred, including overtime and Backfill costs, and indirect costs capped at 7.5 percent of direct costs, under the terms of the response Cooperative Agreements. Sponsoring Agencies will incur certain paperwork burdens and expenses, which are described and quantified

below in the materials on the Paperwork Reduction Act. We expect that our Cooperative Agreements and their associated indirect cost rates will cover the eligible costs that the Sponsoring Agencies incur to participate in the National US&R Response System.

Costs to DHS to administer the National US&R Response System include the salaries and expenses of an 8-person staff, and the indirect staff costs for financial, acquisition, logistics and other administrative services provided by DHS and FEMA. Current appropriations limit administrative costs to 3 percent of the total amount appropriated for US&R.

FEMA's planning and program guidance for fiscal years 2005 through 2009 set funding levels of \$6.438 million for the National US&R Response System, representing the baseline nondisaster-specific budget for operating expenses. In the past two years, congressional annual appropriations for US&R were \$60 million, most of which US&R passed to the Sponsoring Agencies pursuant to Cooperative Agreements. FEMA passes the amounts appropriated to the Sponsoring Agencies in preparedness Cooperative Agreements funded 100 percent by the Federal Government to cover planning, training, equipment or other essentials to fulfill the US&R mission, which do not impose conditions on the Sponsoring Agencies making them economically significant. Nor would Cooperative Agreement funding adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities.

This rule is a significant regulatory action, but not an economically significant regulatory action within the definition of section 3(f) of Executive Order 12866, and it adheres to the principles of regulation of the Executive Order. The Office of Management and Budget has reviewed this rule under the provisions of the Executive Order.

#### **Regulatory Flexibility Act, 5 U.S.C. 601**

Under the Regulatory Flexibility Act, agencies must consider the impact of their rulemakings on "small entities" (small businesses, small organizations and local governments). The Act also provides that, if a regulatory flexibility analysis is not required, the agency must certify in the rulemaking document that the rulemaking will not "have a significant economic impact on a substantial number of small entities."

This rule standardizes the financing, administration and operation of the

National Urban Search and Rescue Response System (System or US&R), which FEMA established under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. The System currently comprises 28 US&R Task Forces in 19 States. A State agency or local public safety agency (Sponsoring Agency) typically sponsors a Task Force,<sup>27</sup> staffed primarily by local fire department and emergency services personnel, and include Joint Management Teams (JMT) and other overhead or technical teams. None of the Sponsoring Agencies are in communities with populations fewer than 50,000. The governments of the Sponsoring Agencies are urban or State instrumentalities and none qualify as a "small governmental jurisdiction" within the meaning of 5 U.S.C. 601(5).

Some of the Participating Agencies are small businesses, such as engineering firms and HMOs. DHS reimburses Sponsoring Agencies for the eligible costs that the Sponsoring Agencies incur in reimbursing their Participating Agencies. DHS expects Participating Agencies to receive full reimbursement for the salaries and expenses of their personnel who are participating System Members, indirect costs up to 7.5 percent, per diem, travel and related costs when Task Forces activated, and backfill expenses.

DHS has designed the US&R program to be as cost neutral to Sponsoring Agencies as Federal law authorizes. When DHS activates a US&R Task Force it reimburses the Sponsoring Agency for its direct costs incurred, including overtime and Backfill costs, and indirect costs capped at 7.5 percent of direct costs. Upon activation, System Members become Temporary Excepted Federal Volunteers entitled to the benefits of the Federal Employees Compensation Act (FECA) and the Federal Tort Claims Act (FTCA). In some instances, State workers' compensation benefits exceed those available under FECA, and the

<sup>27</sup> The Task Forces also respond to disasters and emergencies in their home states as State resources. DHS does not directly reimburse Sponsoring Agencies of the Task Forces for the costs that they incur when deploying in their home state, although in a State deployment Task Forces may use equipment that they have purchased with DHS grant funds and Federal property that is in their custody. Subpart C of this rule does not cover in-state deployment of US&R resources. However, Federal reimbursement for the cost of an in-state deployment may be available through DHS's Public Assistance Program under regulations published at 44 CFR part 206. In addition, the Office of Foreign Disaster Assistance of the U.S. Agency for International Development (USAID) often uses the services of certain US&R Task Forces to deliver humanitarian assistance abroad under agreements to which DHS is not a party. The rule does not affect the relationships between USAID and the Sponsoring Agencies of the Task Forces.

difference between the State benefits and the Federal benefits may have to be borne by the Sponsoring Agency.

US&R Task Forces also must maintain minimum training requirements that DHS prescribes. Under current interpretations by the Department of Justice, the FTCA covers System Members during Task Force activations, but does not apply to training activities. This lack of FTCA coverage during training is a potential liability that a Sponsoring Agency might incur, but such a circumstance has not occurred in 15 years of experience. DHS is working with the Department of Justice to determine what measures DHS could take to provide liability coverage for System Members during US&R training events.

DHS assumes that the professional skills necessary for preparation of the reports and records are within the capabilities of the Sponsoring and Participating Agencies. DHA further assumes that Sponsoring and Participating Agencies incur no extra, unreimbursed costs for sound administration and accountability that Federal Cooperative Agreements require of any recipient of such awards. We have no basis for estimating the expected cost or range of costs per impacted Sponsoring or Participating Agency.

DHS is not aware of any rules that may duplicate, overlap or conflict with this rule. In our discussion of E.O. 12866 above, we considered several alternatives to this rule, including *status quo ante*, cancellation of the program, management by program directives, and this interim rule. None of the alternatives to this rule met DHS needs to standardize the financing, administration and operation of the US&R System; none provided differing compliance or reporting requirements, or clarified, consolidated, or simplified compliance and reporting, or exempted any of the Sponsoring Agencies from coverage of the rule.

For the reasons stated, we certify under 5 U.S.C. 605(b) that this Interim Rule will not have a significant economic impact on a substantial number of small entities and does not apply to this interim rule.

#### **Paperwork Reduction Act of 1995**

DHS has determined that the implementation of this rule is subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520. As the Paperwork Reduction Act of 1995 requires and, concurrently with this rule, we have submitted a request for Office of Management and Budget (OMB) review and approval of a new collection of

information, which is contained in this rule. The collection of information complies with provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3506(c)(2)(A). We invite the general public to comment on the collection of information.

**Collection of Information**

*Title:* Urban Search and Rescue Program.

US&R grant application forms approved by OMB under Control Number 1660-0025, which expires July 31, 2007, are:

*Form Numbers:* SF 424, Application for Federal Assistance; DHS Form 20-10, Financial Status Report; DHS Form 20-16, Summary Sheet for Assurances

and Certifications; DHS Form 20-16A, Assurances—Non-Construction Programs; DHS Form 20-16C, Certifications Regarding Lobbying; Debarment, Suspension and Other Responsibility Matters; and Drug-Free Workplace Requirements; DHS Form 20-20, Budget Information—Non-Construction Programs; and SF LLL, Disclosure of Lobbying Activities.

*Abstract:* This information collection is to implement the National Urban Search and Rescue System (US&R), by which DHS provides specialized lifesaving assistance during major disaster or emergency. US&R operational activities include locating, extricating and providing on-site medical treatment to victims trapped in

collapsed structures, weapons of mass destruction events, and when assigned, incident command or coordination of other operational activities. In order to implement the US&R program DHS must collect certain types of information, including grant applications, budget and budget narrative, financial status reports, assurances and certifications, performance information, and requests for advances or reimbursement on forms approved by OMB under Control Number 1660-0025.

*Affected Public:* State, local and Indian tribal governments.

*Estimated Total Annual Burden Hours:* 803 hours. A breakdown of the burden follows:

DHS forms	No. of responders (A)	Frequency of response (B)	Hours per response and record-keeping (C)	Annual burden hours (A × B × C)
The following forms were approved under 1660-0025:				
SF-424 Application for Federal Assistance .....	28	1	1 hour .....	28 hours.
DHS Form 20-10 Financial Status Report .....	28	1	1 hour .....	28 hours.
DHS Forms 20-16, 20-16A, 20-16C, Summary Sheet for Assurances and Certifications.	28	1	30 minutes .....	14 hours.
SF LLL, Disclosure of Lobbying Activities .....	28	1	10 minutes .....	5 hours.
DHS Form 20-20, Budget Information Non-Construction Programs and Budget Narrative.	28	2	9 hours .....	504 hours.
SF 270, Request for Advance or Reimbursement .....	28	2	4 hours .....	224 hours.
Subtotal .....		224		803 hours.

*OMB Number:* New.

*Abstract:* In order to implement the US&R program, DHS must collect certain types of information not included in OMB Control Number

1660-0025, including memoranda of agreement, program narrative statements, grant awards, progress reports, extension or change requests, closeout information and audits.

*Affected Public:* State, local and Indian tribal governments.

*Estimated Total Annual Burden Hours:* 1181 hours. A breakdown of the burden follows:

DHS forms	No. of responders (A)	Frequency of response (B)	Hours per response and recordkeeping (C)	Annual burden hours (A × B × C)
The following are new collections:				
Narrative Statement .....	28	2	4 hours .....	224 hours.
Progress Reports .....	28	2	2 hours .....	112 hours.
Extension or Change Requests .....	5	1	1 hour .....	5 hours.
Audits of States, Local Governments, and Non-Profit Organizations.	28	1	30 hours .....	840 hours.
Memoranda of Agreement .....	28	1	( <sup>1</sup> ) .....	8
Subtotal .....		145		1181 hours.
Total hours .....		369		1984 hours.

<sup>1</sup> After we publish the final rule, we will prepare a standardized, streamlined memorandum of agreement in consultation with the National US&R Response System Advisory Committee and its Legal Issues Working Group. When completed, we will make a second Paperwork Reduction Act submission to OMB.

*Estimated Times and Costs:* The approximate annual salary of State and local staff who will complete the forms is \$35,000. The approximate hourly rate of pay is \$18.90 (\$35,000 divided by 1850 hours). The total cost to grantees is estimated to be \$37,498.

The cost to DHS is largely personnel salary costs to review and analyze the information collected on these forms—for all DHS grant programs, not just US&R grants, which is a significant portion of grants management annual work. We estimate that for the US&R program, DHS Headquarters would

expend approximately 672 hours on analysis, or an average of 24 hours per program. We estimate the cost to DHS to be \$14,112 (672 hours times \$21 per hour of staff work). Printing costs are minimal because the forms are available in electronic format.

The total annual estimated time and costs are 1984 hours and \$37,498 cost to applicants and \$14,112 cost to DHS. This calculation is based on the number of burden hours for each type of information collection/form, as indicated above, and the estimated wage rates for those individuals responsible for collecting the information or completing the forms. The new collection is required for sound grants management and compliance with OMB Circulars and DHS regulations.

**FOR FURTHER INFORMATION CONTACT:**

Contact Michael Tamillow, Emergency Preparedness and Response Directorate, Department of Homeland Security, 500 C Street, SW., Washington, DC 20472, telephone (202) 646-2549, facsimile (202) 646-4684, or e-mail [mike.tamillow@dhs.gov](mailto:mike.tamillow@dhs.gov) for additional information. You may contact Muriel B. Anderson for copies of the proposed collection of information at (202) 646-2625 or (facsimile) (202) 646-3347, or e-mail [informationcollections@dhs.gov](mailto:informationcollections@dhs.gov).

**Executive Order 13132 Federalism—Federalism Summary Impact Statement**

Executive Order 13132 requires DHS to develop a process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” Such policies are defined in the Executive Order to include rules 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.”

We have analyzed this interim rule in accordance with the principles and criteria in the Executive Order and has determined that this interim rule would not have a substantial direct effect 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. The rule imposes no mandates on State or local governments; participation in the National US&R Response System is strictly voluntary. Moreover, one of the most significant objectives of this program is to build State and local US&R capability. The US&R program recognizes the primary role of State and local governments in responding to disasters and emergencies. Equipment and supplies purchased with Federal funds may be used to respond to in-state disasters and emergencies. The teams may only be deployed across State lines when released by their home State. The assistance these teams provide, like

other assistance under the Stafford Act, is only furnished when disaster or emergency needs exceed the combined State and local capabilities and the Governor requests the assistance. Therefore, we certify that this interim rule does not have federalism implications as defined in Executive Order 13132.

While this interim rule does not have federalism implications, this rule has been developed through a collaborative process with representatives of State and local governments. As noted above, the Legal Issues Working Group, a subgroup of the National US&R Response System Advisory Committee, developed the original draft of these regulations. The National US&R Response System presented a draft to DHS. The Legal Issues Working Group and the National US&R Response System Advisory Committee both comprised Federal, State and Local Government officials, as well as representatives of labor organizations, some of whose members serve on the US&R Task Forces.

**Congressional Review of Agency Rulemaking**

We have sent this final rule to the Congress and to the General Accounting Office under the Congressional Review of Agency Rulemaking Act, Pub. L. 104-121. The rule is not a “major rule” within the meaning of that Act. It standardizes the financing, administration and operation of the National Urban Search and Rescue Response System, a cooperative effort of the Department of Homeland Security, participating State emergency management agencies and local public safety agencies across the country.

The rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. 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. This rule is subject to the information collection requirements of the Paperwork Reduction Act and OMB has assigned Control No. 1660-0025. The rule is not an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, and any enforceable duties that we impose are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

**List of Subjects in 44 CFR Part 208**

Disaster assistance, Grant programs.  
 ■ Accordingly, we add part 208 to title 44, chapter I of the Code of Federal Regulations, as follows:

**PART 208—NATIONAL URBAN SEARCH AND RESCUE RESPONSE SYSTEM**

**Subpart A—General**

Sec.

- 208.1 Purpose and scope of this part.
- 208.2 Definitions of terms used in this part.
- 208.3 Authority for the National US&R Response System.
- 208.4 Purpose for System.
- 208.5 Authority of the Director of the Response Division (Director).
- 208.6 System resource reports.
- 208.7 Enforcement.
- 208.8 Code of conduct.
- 208.9 Agreements between Sponsoring Agencies and Participating Agencies.
- 208.10 Other regulations.
- 208.11 Federal status of System Members.
- 208.12 Maximum Pay Rate Table.
- 208.13–208.20 [Reserved]

**Subpart B—Preparedness Cooperative Agreements**

- 208.21 Purpose.
- 208.22 Preparedness Cooperative Agreement process.
- 208.23 Allowable costs under Preparedness Cooperative Agreements.
- 208.24 Purchase and maintenance of items not listed on Equipment Cache List.
- 208.25 Obsolete equipment.
- 208.26 Accountability for use of funds.
- 208.27 Title to equipment.
- 208.28–208.30 [Reserved].

**Subpart C—Response Cooperative Agreements**

- 208.31 Purpose.
- 208.32 Definitions of terms used in this subpart.
- 208.33 Allowable costs.
- 208.34 Agreements between Sponsoring Agencies and others.
- 208.35 Reimbursement for Advisory.
- 208.36 Reimbursement for Alert.
- 208.37 Reimbursement for equipment and supply costs incurred during Activation.
- 208.38 Reimbursement for re-supply and logistics costs incurred during Activation.
- 208.39 Reimbursement for personnel costs incurred during Activation.
- 208.40 Reimbursement of fringe benefit costs during Activation.
- 208.41 Administrative allowance.
- 208.42 Reimbursement for other administrative costs.
- 208.43 Rehabilitation.
- 208.44 Reimbursement for other costs.
- 208.45 Advance of funds.
- 208.46 Title to equipment.
- 208.47–208.50 [Reserved]

**Subpart D—Reimbursement Claims and Appeals**

- 208.51 General.
- 208.52 Reimbursement procedures.

- 208.53–208.59 [Reserved]  
 208.60 Determination of claims.  
 208.61 Payment of claims.  
 208.62 Appeals.  
 208.63 Request by DHS for supplemental information.  
 208.64 Administrative and audit requirements.  
 208.65 Mode of transmission.  
 208.66 Reopening of claims for retrospective or retroactive adjustment of costs.  
 208.67–208.70 [Reserved]

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

## Subpart A—General

### § 208.1 Purpose and scope of this part.

(a) *Purpose.* The purpose of this part is to prescribe policies and procedures pertaining to the Department of Homeland Security's (DHS) National Urban Search and Rescue Response System.

(b) *Scope.* This part applies to Sponsoring Agencies and other participants in the National Urban Search and Rescue Response System that have executed agreements governed by this part. Part 206 of this chapter does not apply to activities undertaken under this part, except as provided in §§ 208.5 and 208.10 of this part. This part does not apply to reimbursement under part 206, subpart H, of this chapter.

### § 208.2 Definitions of terms used in this part.

(a) *General.* Any capitalized word in this part is a defined term unless such capitalization results from the application of standard capitalization or style rules for Federal regulations. The following definitions have general applicability throughout this part:

*Activated* or *Activation* means the status of a System resource placed at the direction, control and funding of DHS in response to, or in anticipation of, a presidential declaration of a major disaster or emergency under the Stafford Act.

*Activation Order* means the DHS communication placing a System resource under the direction, control, and funding of DHS.

*Advisory* means a DHS communication to System resources indicating that an event has occurred or DHS anticipates will occur that may require Alert or Activation of System resources.

*Alert* means the status of a System resource's readiness when triggered by an Alert Order indicating that DHS may Activate the System resource.

*Alert Order* means the DHS communication that places a System resource on Alert status.

*Assistance Officer* means the DHS employee who has legal authority to bind DHS by awarding and amending Cooperative Agreements.

*Backfill* means the personnel practice of temporarily replacing a person in his or her usual position with another person.

*Cooperating Agency* means a State or Local Government that has executed a Cooperative Agreement to provide Technical Specialists.

*Cooperative Agreement* means a legal instrument between DHS and a Sponsoring Agency or Cooperating Agency that provides funds to accomplish a public purpose and anticipates substantial Federal involvement during the performance of the contemplated activity.

*Daily Cost Estimate* means a Sponsoring Agency's estimate of Task Force personnel compensation, itemized fringe benefit rates and amounts including calculations, and Backfill expenditures for a 24-hour period of Activation.

*Deputy Director* means the Deputy Director of the Response Division, Emergency Preparedness and Response Directorate, Department of Homeland Security, or other person that the Director designates.

*DHS* means the Department of Homeland Security.

*Director* means the Director of the Response Division, Emergency Preparedness and Response Directorate, DHS.

*Disaster Search Canine Team* means a disaster search canine and handler who have successfully completed the written examination and demonstrated the performance skills required by the Disaster Search Canine Readiness Evaluation Process. A disaster search canine is a dog that has successfully completed the DHS Disaster Search Canine Readiness Evaluation criteria for Type II or both Type II and Type I.

*Emergency* means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

*Equipment Cache List* means the DHS-issued list that defines:

(1) The equipment and supplies that US&R will furnish to Sponsoring Agencies; and

(2) The maximum quantities and types of equipment and supplies that a Sponsoring Agency may purchase and maintain with DHS funds.

*Federal Excess Property* means any Federal personal property under the control of a Federal agency that the agency head or a designee determines is not required for its needs or for the discharge of its responsibilities.

*Federal Response Plan* means the signed agreement among various Federal departments and agencies that provides a mechanism for coordinating delivery of Federal assistance and resources to augment efforts of State and Local Governments overwhelmed by a Major Disaster or Emergency, supports implementation of the Stafford Act, as well as individual agency statutory authorities, and supplements other Federal emergency operations plans developed to address specific hazards.

*Joint Management Team* or *JMT* means a multi-disciplinary group of National Disaster Medical System (NDMS), Urban Search and Rescue (US&R), and other specialists combined to provide operations, planning, logistics, finance and administrative support for US&R and NDMS resources, and to provide technical advice and assistance to States and Local Governments.

*Local Government* means any county, city, village, town, district, or other political subdivision of any State; any federally recognized Indian tribe or authorized tribal organization; and any Alaska Native village or organization.

*Major Disaster* means any natural catastrophe (including any hurricane, tornado, storm, high water, wind driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, that in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, Local Governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

*Memorandum of Agreement (MOA)* means the document signed by DHS, a Sponsoring Agency and its State that describes the relationship of the parties with respect to the National Urban Search & Rescue System.

*Participating Agency* means a State or Local Government, non-profit organization, or private organization

that has executed an agreement with a Sponsoring Agency to participate in the National US&R Response System.

*Personnel Rehabilitation Period* means the period allowed by DHS for a person's rehabilitation to normal conditions of living following an Activation.

*Preparedness Cooperative Agreement* means the agreement between DHS and a Sponsoring Agency for reimbursement of allowable expenditures incurred by the Sponsoring Agency to develop and maintain System capabilities and operational readiness.

*Program Directive* means guidance and direction for action to ensure consistency and standardization across the National US&R Response System.

*Program Manager* means the individual, or his or her designee, within DHS who is responsible for day-to-day administration of the National US&R Response System.

*Program Office* means the organizational entity within DHS that is responsible for day-to-day administration of the National US&R Response System.

*Response Cooperative Agreement* means an agreement between DHS and a Sponsoring Agency for reimbursement of allowable expenditures incurred by the Sponsoring Agency as a result of an Alert or Activation.

*Sponsoring Agency* means a State or Local Government that has executed an MOA with DHS to organize and administer a Task Force.

*Stafford Act* means the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5206.

*State* means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia or the Republic of the Marshall Islands.

*Support Specialist* means a person participating in the System who assists the Task Force with administrative or other support during mobilization, ground transportation and demobilization as directed.

*System or National US&R Response System* means the national US&R response capability administered by DHS.

*System Member* means any Task Force Member, JMT Member, Technical Specialist, Support Specialist or Disaster Search Canine Team.

*Task Force* means an integrated US&R organization of multi-disciplinary resources with common communications and a leader, organized

and administered by a Sponsoring Agency and meeting DHS standards.

*Task Force Member* means a person occupying a position on a Task Force.

*Technical Specialist* means a person participating in the System contributing technical knowledge and skill who may be placed on Alert or Activated as a single resource and not as a part of a JMT or a Task Force.

*US&R* means urban search and rescue, the process of searching for, extricating, and providing for the immediate medical stabilization of victims who are entrapped in collapsed structures.

(b) *Additional definitions.* Definitions for certain terms that apply only to individual subparts of this part are located in those subparts.

### § 208.3 Authority for the National US&R Response System.

(a) *Enabling legislation.* The Federal Emergency Management Agency established and operated the System under the authority of §§ 303, 306(a), 306(b), 403(a)(3)(B) and 621(c) of the Stafford Act, 42 U.S.C. 5144, 5149(a), 5149(b), 5170b(a)(3)(B) and 5197(c), respectively. Section 503 of the Homeland Security Act of 2002, 6 U.S.C. 313, transferred the functions of the Director of FEMA to the Secretary of Homeland Security. The President redelegated to the Secretary of Homeland Security in Executive Order 13286 those authorities of the President under the Stafford Act that had been delegated previously to the Director of FEMA under Executive Order 12148.

(b) *Implementing plan.* The National Response Plan identifies DHS as the primary Federal agency with responsibility for Emergency Support Function 9, Urban Search and Rescue.

### § 208.4 Purpose for System.

It is DHS policy to develop and provide a national system of standardized US&R resources to respond to Emergencies and Major Disasters that are beyond the capabilities of affected State and Local Governments.

### § 208.5 Authority of the Director of the Response Division (Director).

(a) *Participation in activities of the System.* The Director is responsible for determining participation in the System and any activity thereof, including but not limited to whether a System resource is operationally ready for Activation.

(b) *Standards for and measurement of System efficiency and effectiveness.* In addition to the authority provided in § 206.13 of this chapter, the Director may establish performance standards

and assess the efficiency and effectiveness of System resources.

### § 208.6 System resource reports.

(a) *Reports to Director.* The Director may request reports from any System resource relating to its activities as part of the System.

(b) *Reports to FEMA Regional Directors.* Any FEMA Regional Director may request through the Director reports from any System resource used within or based within the Regional Director's jurisdiction.

(c) *Audits, investigations, studies and evaluations.* DHS and the General Accounting Office may conduct audits, investigations, studies, and evaluations as necessary. Sponsoring Agencies, Participating Agencies and System Members are expected to cooperate fully in such audits, investigations, studies and evaluations.

### § 208.7 Enforcement.

(a) *Remedies for noncompliance.* In accordance with the provisions of 44 CFR 13.43, if a Sponsoring Agency, Participating Agency, Affiliated Personnel or other System Member materially fails to comply with a term of a Cooperative Agreement, Memorandum of Agreement, System directive or other Program Directive, the Director may take one or more of the actions provided in 44 CFR 13.43(a)(1) through (5). Any such enforcement action taken by the Director will be subject to the hearings, appeals, and effects of suspension and termination provisions of 44 CFR 13.43(b) and (c).

(b) The enforcement remedies identified in this section, including suspension and termination, do not preclude a Sponsoring Agency, Participating Agency, Affiliated Personnel or other System Member from being subject to "Debarment and Suspension" under E.O. 12549, as amended, in accordance with 44 CFR 13.43(d).

(c) *Other authority for sanctions.* Nothing in this section limits or precludes the application of other authority to impose civil or criminal sanctions, including 42 U.S.C. 5156.

### § 208.8 Code of conduct.

The Director will develop and implement a code of conduct for System Members acting under DHS's direction and control. Nothing in this section or the DHS code of conduct will limit the authority of a Sponsoring Agency, Participating Agency or Cooperating Agency to apply its own code of conduct to its System Members or employees. If the DHS code is more restrictive, it controls.

### § 208.9 Agreements between Sponsoring Agencies and Participating Agencies.

Every agreement between a Sponsoring Agency and a Participating Agency regarding the System must include a provision making this part applicable to the Participating Agency and its employees who engage in System activities.

### § 208.10 Other regulations.

The following provisions of title 44 CFR, Chapter I also apply to the program in this part:

(a) Section 206.9, which deals with the non-liability of DHS in certain circumstances.

(b) Section 206.11, which prescribes nondiscrimination in the provision of disaster assistance.

(c) Section 206.14, which deals with criminal and civil penalties.

(d) Section 206.15, which permits recovery of assistance by DHS.

### § 208.11 Federal status of System Members.

The Director will appoint all Activated System Members as temporary excepted Federal volunteers. The Director may appoint a System Member who participates in Alert activities as such a Federal volunteer. The Director may also appoint each System Member who participates in DHS-sanctioned preparedness activities as a temporary excepted Federal volunteer. DHS intends these appointments to secure protection for such volunteers under the Federal Employees Compensation Act and the Federal Tort Claims Act and do not intend to interfere with any preexisting employment relationship between a System Member and a Sponsoring Agency, Cooperating Agency or Participating Agency. System Members whom DHS appoints as temporary excepted Federal volunteers will not receive any compensation or employee benefit directly from the United States of America for their service, but will be compensated through their Sponsoring Agency.

### § 208.12 Maximum Pay Rate Table.

(a) *Purpose.* This section establishes the process for creating and updating the Maximum Pay Rate Table (Table), and the Table's use to reimburse Affiliated Personnel (Task Force Physicians, Task Force Engineers, and Canine Handlers) and Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency. Section 208.32 defines the "Maximum Pay Rate Table" as "the DHS-issued table that identifies the maximum pay rates for

selected System positions that may be used for reimbursement of Affiliated Personnel compensation and Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency." In that same section, the term "Affiliated Personnel" is defined as "individuals not normally employed by a Sponsoring Agency or Participating Agency and individuals normally affiliated with a Sponsoring Agency or Participating Agency as volunteers."

(b) *Scope of this section.* (1) The Maximum Pay Rate Table applies to those individuals who are not normally employed by a Sponsoring Agency or Participating Agency, or whose affiliation with a Sponsoring Agency or Participating Agency is as a volunteer; that is, an individual whom the Sponsoring Agency or Participating Agency does not normally compensate in any way, at any rate.

(2) The Table also applies to Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency.

(c) *Method for determining maximum pay rates.* (1) DHS uses the United States Office of Personnel Management's salary rates, computed under 5 U.S.C. 5504, as the basis for the maximum pay rate schedule. DHS considers System members' experience and sets maximum pay rates at the maximum grade, middle step for each position, which demonstrates an experience level of five years.

(2) The Office of Personnel Management (OPM) publishes salary and locality pay schedules each calendar year.

(i) *Physicians.* DHS uses the latest Special Salary Rate Table Number 0290 for Medical Officers (Clinical) Worldwide for physicians. The rates used in the initial Table can be found at <http://www.opm.gov/oca/03tables/SSR/HTML/0290.asp>.

(ii) *Engineers and Canine Handlers.* DHS uses the latest General Schedule pay scale for both positions. Both specialties are compared to the General Schedule pay scale to ensure parity with like specialties on a task force (canine handlers are equated with rescue specialists). The rates used in the initial Table can be found at <http://www.opm.gov/oca/03tables/html/gs.asp>.

(iii) *Locality Pay.* To determine adjustments for locality pay DHS uses the latest locality pay areas (including the "Rest of U.S." area) established by OPM. The rates used in the initial Table can be found at <http://www.opm.gov/oca/03tables/locdef.asp>.

(3) *Review and update.* DHS will review and update the Table periodically, at least annually. The comments of Sponsoring and Participating Agencies and their experience with the Table will be considered and evaluated in the course of the reviews.

(4) *Initial rates and subsequent revisions.* DHS will publish the initial maximum pay rate table in the **Federal Register** as a notice with request for comments. Subsequent revisions will be made to the pay rate table as OPM changes salary rates as described in this section. When subsequent revisions are made to the maximum pay rate table DHS will publish the new maximum pay rate table in the **Federal Register**. The rates will be effective for the latest year indicated by OPM.<sup>1</sup>

(d) *Application of the maximum pay rate table—(1) Applicability.* The Maximum Pay Rate Table sets forth maximum rates for which DHS will reimburse the Sponsoring Agency for compensation paid to Activated Affiliated Personnel and as Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency.

(2) *Higher rates.* The Sponsoring Agency may choose to pay Affiliated Personnel at a higher rate, but DHS will not reimburse the increment above the maximum rate specified in the Maximum Pay Rate Table. Likewise, the Sponsoring Agency may choose to enter into a Participating Agency agreement with the individual's employer, rather than use the individual as an Affiliated Personnel, in which case the Maximum Pay Rate Table would not apply.

(3) *Compensation for Sponsoring Agency employees serving as Affiliated Personnel.* An employee of a Sponsoring Agency serving on a Task Force in a capacity other than his or her normal job, e.g., a fire department dispatcher affiliated with the Task Force as a canine search specialist, as an Affiliated Personnel, would not necessarily be subject to the Maximum Pay Rate Table for reimbursement for salary and benefits for that individual. However, Sponsoring Agencies may use the rates in the Maximum Pay Rate Table as a guide for establishing compensation levels for such individuals.

(4) *Backfill expenses for Affiliated Personnel under § 208.39(g).* (i) The only way that DHS can reimburse for Backfill costs incurred for Affiliated Personnel is through Participating

<sup>1</sup> In some years the latest year may not be the current calendar year. For instance, OPM did not change its pay rates for calendar year 2004, and the 2003 schedules apply.



Agencies. If reimbursement for Backfill expenses is needed for Affiliated Personnel, DHS encourages them to urge their employers or professional association to seek Participating Agency status.

(ii) *Private, for-profit organizations.* Participating Agency status is available to private, for-profit organizations, e.g., HMOs or medical or engineering professional associations, under the revised definition of "Participating Agency" set forth in this Interim rule. (See Definitions, § 208.2, *Participating Agency*, and § 208.32, *Maximum Pay Rate Table*). When a for-profit Participating Agency must backfill an Activated System Member's position we will compensate that Participating Agency up to the maximum rate provided in the Table.

(iii) *Compensation costs.* DHS will reimburse for-profit organizations, for purposes of reimbursement and Backfill, for the System Member's actual compensation or the actual compensation of the individual who Backfills a position (which includes salary and benefits, as described in §§ 208.39 and 208.40), but will not reimburse for billable or other rates that might be charged for services rendered to commercial clients or patients.

#### §§ 208.13—208.20 [Reserved]

### Subpart B—Preparedness Cooperative Agreements

#### § 208.21 Purpose.

Subpart B of this part provides guidance on the administration of Preparedness Cooperative Agreements.

#### § 208.22 Preparedness Cooperative Agreement process.

(a) *Application.* To obtain DHS funding for an award or amendment of a Preparedness Cooperative Agreement, the Sponsoring Agency must submit an application. Standard form SF-424 "Application for Federal Assistance" generally will be used. However, the application must be in a form that the Assistance Officer specifies.

(b) *Award.* DHS will award a Preparedness Cooperative Agreement to each Sponsoring Agency to provide Federal funding to develop and maintain System resource capabilities and operational readiness. For the purposes of the Preparedness Cooperative Agreement, the Sponsoring Agency will be considered the "recipient."

(c) *Amendment—(1) Procedure.* Absent special circumstances, DHS will fund and amend Preparedness Cooperative Agreements on an annual basis. Before amendment, the Assistance

Officer will issue a call for Cooperative Agreement amendment applications. The Assistance Officer will specify required application forms and supporting documentation to be submitted with the application.

(2) *Period of performance.* Absent special circumstances, the period of performance for Preparedness Cooperative Agreements will be 1 year from the date of award. The Assistance Officer may allow for an alternate period of performance with the approval of the Director.

(3) *Assistance Officer.* The Assistance Officer is the only individual authorized to award or modify a Preparedness Cooperative Agreement.

(d) *Award amounts.* The Director will determine award amounts on an annual basis. A Task Force is eligible for an annual award only if the Program Manager receives and approves the Task Force's current-year Daily Cost Estimate.

(e) *DHS priorities.* The Director will establish overall priorities for the use of Preparedness Cooperative Agreement funds taking into consideration the results of readiness evaluations and actual Activations, overall priorities of DHS, and other factors, as appropriate.

(f) *Cost sharing.* The Director may subject Preparedness Cooperative Agreement awards to cost sharing provisions. In the call for Preparedness Cooperative Agreement amendment applications, the Assistance Officer must inform Sponsoring Agencies about any cost sharing obligations.

(g) *Sponsoring Agency priorities.* The Sponsoring Agency should indicate its spending priorities in the application. The Program Manager will review these priorities and will make recommendations to the Assistance Officer for negotiating the final agreement.

(h) *Responsibility to maintain integrity of the equipment cache.* The Sponsoring Agency is responsible to maintain the integrity of the equipment cache, including but not limited to, maintenance of the cache, replacement of equipment or supplies expended in training, activations, or local use of the cache, and timely availability of the cache for Task Force Activations.

#### § 208.23 Allowable costs under Preparedness Cooperative Agreements.

System Members may spend Federal funds that DHS provides under any Preparedness Cooperative Agreement and any required matching funds under 44 CFR 13.22 and this section to pay reasonable, allowable, necessary and allocable costs that directly support System activities, including the following:

- (a) Administration, including:
  - (1) Management and administration of day-to-day System activities such as personnel compensation and benefits relating to System maintenance and development, record keeping, inventory of equipment, and correspondence;
  - (2) Travel to and from System activities, meetings, conferences, training, drills and exercises;
  - (3) Tests and examinations, including vaccinations, immunizations and other tests that are not normally required or provided in the course of a System Member's employment, and that DHS requires to meet its standards.
- (b) Training:
  - (1) Development and delivery of, and participation in, System-related training courses, exercises, and drills;
  - (2) Construction, maintenance, lease or purchase of System-related training facilities or materials;
  - (3) Personnel compensation expenses, including overtime and other related expenses associated with System-related training, exercises, or drills;
  - (4) System-required evaluations and certifications other than the certifications that DHS requires System Members to possess at the time of entry into the System. For instance, DHS will not pay for a medical school degree, paramedic certification or recertification, civil engineering license, etc.
- (c) Equipment:
  - (1) Procurement of equipment and supplies specifically identified on the then-current DHS-approved Equipment Cache List;
  - (2) Maintenance and repair of equipment included on the current Equipment Cache List;
  - (3) Maintenance and repair of equipment acquired with DHS approval through the Federal Excess Property program, except as provided in § 208.25 of this part;
  - (4) Purchase, construction, maintenance or lease of storage facilities and associated equipment for System equipment and supplies.
- (d) Disaster search canine expenses limited to:
  - (1) Procurement for use as a System resource;
  - (2) Training and certification expenses;
  - (3) Veterinary care.
- (e) Management and administrative costs, actually incurred but not otherwise specified in this section that directly support the Sponsoring Agency's US&R capability, provided that such costs do not exceed 7.5 percent of the award/amendment amount.

**§ 208.24 Purchase and maintenance of items not listed on Equipment Cache List.**

(a) Requests for purchase or maintenance of equipment and supplies not appearing on the Equipment Cache List, or that exceed the number specified in the Equipment Cache List, must be made in writing to the Program Manager. No Federal funds provided under any Preparedness Cooperative Agreement may be expended to purchase or maintain any equipment or supply item unless:

(1) The equipment and supplies directly support the Sponsoring Agency's US&R capability;

(2) The Program Manager approves the expenditure and gives written notice of his or her approval to the Sponsoring Agency before the Sponsoring Agency purchases the equipment or supply item.

(b) Maintenance of items approved for purchase under this section is eligible for reimbursement, except as provided in § 208.26 of this subpart.

**§ 208.25 Obsolete equipment.**

(a) The Director will periodically identify obsolete items on the Equipment Cache List and provide such information to Sponsoring Agencies.

(b) Neither funds that DHS provides nor matching funds required under a Preparedness Cooperative Agreement may be used to maintain or repair items that DHS has identified as obsolete.

**§ 208.26 Accountability for use of funds.**

The Sponsoring Agency is accountable for the use of funds as provided under the Preparedness Cooperative Agreement, including financial reporting and retention and access requirements according to 44 CFR 13.41 and 13.42.

**§ 208.27 Title to equipment.**

Title to equipment purchased by a Sponsoring Agency with funds provided under a DHS Preparedness Cooperative Agreement vests in the Sponsoring Agency, provided that DHS reserves the right to transfer title to the Federal Government or a third party that DHS may name, under 44 CFR 13.32(g), for example, when a Sponsoring Agency indicates or demonstrates that it cannot fulfill its obligations under the Memorandum of Agreement.

**§§ 208.28–208.30 [Reserved]****Subpart C—Response Cooperative Agreements****§ 208.31 Purpose.**

Subpart C of this part provides guidance on the administration of Response Cooperative Agreements.

**§ 208.32 Definitions of terms used in this subpart.**

*Affiliated Personnel* means individuals not normally employed by a Sponsoring Agency or Participating Agency and individuals normally affiliated with a Sponsoring Agency or Participating Agency as volunteers.

*Demobilization Order* means a DHS communication that terminates an Alert or Activation and identifies cost and time allowances for rehabilitation.

*Exempt* means any System Member who is exempt from the requirements of the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, pertaining to overtime compensation and other labor standards.

*Maximum Pay Rate Table* means the DHS-issued table that identifies the maximum pay rates for selected System positions that may be used for reimbursement of Affiliated Personnel compensation and Backfill for Activated System Members employed by or otherwise associated with a for-profit Participating Agency. The Maximum Pay Rate Table does not apply to a System member whom a Sponsoring Agency or Participating Agency employs.

*Mobilization* means the process of assembling equipment and personnel in response to an Alert or Activation.

*Non-Exempt* means any System Member who is covered by 29 U.S.C. 201 *et seq.*

*Rehabilitation* means the process of returning personnel and equipment to a pre-incident state of readiness after DHS terminates an Activation.

**§ 208.33 Allowable costs.**

(a) *Cost neutrality.* DHS policy is that an Alert or Activation should be as cost neutral as possible to Sponsoring Agencies and Participating Agencies. To make an Alert or Activation cost-neutral, DHS will reimburse under this subpart all reasonable, allowable, necessary and allocable costs that a Sponsoring Agency or Participating Agency incurs during the Alert or Activation.

(b) *Actual costs.* Notwithstanding any other provision of this chapter, DHS will not reimburse a Sponsoring Agency or Participating Agency for any costs greater than those that the Sponsoring Agency or Participating Agency actually incurs during an Alert, Activation.

(c) *Normal or predetermined practices.* Consistent with Office of Management and Budget (OMB) Circulars A–21, A–87, A–102 and A–110 (2 CFR part 215), as applicable, Sponsoring Agencies and Participating Agencies must adhere to their own normal and predetermined practices

and policies of general application when requesting reimbursement from DHS except as it sets out in this subpart.

(d) *Indirect costs.* Indirect costs beyond the administrative and management costs allowance established by § 208.41 of this part are not allowable.

**§ 208.34 Agreements between Sponsoring Agencies and others.**

Sponsoring Agencies are responsible for executing such agreements with Participating Agencies and Affiliated Personnel as may be necessary to implement the Sponsoring Agency's Response Cooperative Agreement with DHS. Those agreements must identify established hourly or daily rates of pay for System Members. The hourly or daily rates of pay for Affiliated Personnel must be in accordance with, and must not exceed, the maximum pay rates contained in the then-current Maximum Pay Rate Table.

**§ 208.35 Reimbursement for Advisory.**

DHS will not reimburse costs incurred during an Advisory.

**§ 208.36 Reimbursement for Alert.**

(a) *Allowable costs.* DHS will reimburse costs incurred during an Alert, up to the dollar limit specified in the Alert Order, for the following activities:

(1) Personnel costs, including Backfill, incurred to prepare for Activation.

(2) Transportation costs relating to hiring, leasing, or renting vehicles and drivers.

(3) The administrative allowance provided in § 208.41 of this part.

(4) Food and beverages for Task Force Members and Support Specialists when DHS does not provide meals during the Alert. DHS will limit food and beverage reimbursement to the amount of the then-current Federal meals daily allowance published in the **Federal Register** for the locality where such food and beverages were provided, multiplied by the number of personnel who received them.

(b) *Calculation of Alert Order dollar limit.* The Alert Order dollar limit will equal:

(1) An allowance of 10 percent of the Task Force's Daily Cost Estimate; and

(2) A supplemental allowance of 1 percent of the Task Force's Daily Cost Estimate for each 24-hour period beyond the first 72 hours of Alert.

(c) *Non-allowable costs.* DHS will not reimburse costs incurred or relating to the leasing, hiring or chartering of aircraft or the purchase of any equipment, aircraft, or vehicles.

**§ 208.37 Reimbursement for equipment and supply costs incurred during Activation.**

(a) *Allowable costs.* DHS will reimburse costs incurred for the emergency procurement of equipment and supplies in the number, type, and up to the cost specified in the current approved Equipment Cache List, and up to the aggregate dollar limit specified in the Activation Order. The Director may determine emergency procurement dollar limits, taking into account previous Activation history, available funding, the extent and nature of the incident, and the current state of Task Force readiness.

(b) *Non-Allowable costs.* DHS will not reimburse costs incurred for items that are not listed on the Equipment Cache List; for items purchased greater than the cost or quantity identified in the Equipment Cache List; or for any purchase of non-expendable items that duplicate a previous purchase under a Preparedness or Response Cooperative Agreement.

**§ 208.38 Reimbursement for re-supply and logistics costs incurred during Activation.**

With the exception of emergency procurement authorized in the Activation Order, and replacement of consumable items provided for in § 208.43(a)(2) of this subpart, DHS will not reimburse costs incurred for re-supply and logistical support during Activation. Re-supply and logistical support of Task Forces needed during

Activation are the responsibility of the Joint Management Team.

**§ 208.39 Reimbursement for personnel costs incurred during Activation.**

(a) *Compensation.* DHS will reimburse the Sponsoring Agency for costs incurred for the compensation of each Activated System Member during Activation. Reimbursement of compensation costs for Activated Support Specialists will be limited to periods of time during which they were actively supporting the Activation or traveling to or from locations at which they were actively supporting the Activation. The provisions of § 208.40 of this part govern costs incurred for providing fringe benefits to System Members.

(b) *Public Safety Exemption not applicable.* DHS will reimburse Sponsoring Agencies for costs incurred by Non-Exempt System Members in accordance with 29 U.S.C. 207(a) of the Fair Labor Standards Act, without regard to the public safety exemption contained in 29 U.S.C. 207(k). In other words, DHS will reimburse Sponsoring Agencies on an overtime basis for any hours worked by Non-Exempt System Members greater than 40 hours during a regular workweek.

(c) *Tour of duty.* The tour of duty for all Activated System Members will be 24 hours. DHS will reimburse the Sponsoring Agency for salary and overtime costs incurred in

compensating System Members for meal periods and regularly scheduled sleep periods during Activation. Activated System Members are considered “on-duty” and must be available for immediate response at all times during Activation.

(d) *Regular rate.* The regular rate for purposes of calculating allowable salary and overtime costs is the amount determined in accordance with § 208.39(e)(1) through (3) of this subpart.

(e) *Procedures for calculating compensation during Activation.* A Sponsoring Agency or Participating Agency must:

(1) Convert the base hourly wage of any Non-Exempt System Member regularly paid under 29 U.S.C. 207(k) to its equivalent for a 40-hour work week;

(2) Convert the annual salary of any salaried Non-Exempt System Member to its hourly equivalent for a 40-hour workweek;

(3) Calculate the daily compensation of Exempt System Members based on their current annual salary, exclusive of fringe benefits;

(4) Calculate the total number of hours worked by each System Member to be included in the Sponsoring Agency’s request for reimbursement; and

(5) Submit a request for reimbursement under § 208.52 of this part according to the following table:

If the Sponsoring Agency or Participating Agency * * *	And the Sponsoring Agency or Participating Agency * * *	Then the following compensation costs are allowable:
(i) Customarily and usually compensates Exempt System Members by paying a salary, but not overtime,	Does not customarily and usually grant compensatory time or other form of overtime substitute to Exempt System members.	The daily compensation equivalent calculated under §208.39(e)(3) of this part for each Activated Exempt System Member for each full or partial day during Activation.
(ii) Customarily and usually compensates Exempt System Members by paying a salary but not overtime	Customarily and usually awards compensatory time or other overtime substitute for Exempt System Members for hours worked above a predetermined hours threshold (for example, the Sponsoring Agency customarily and usually grants compensatory time for all hours worked above 60 in a given week).	The daily compensation equivalent calculated under §208.39(e)(3) of this part for each Activated Exempt System Member for each full or partial day during Activation AND the dollar value at the time of accrual of the compensatory time or other overtime substitute for each Activated Exempt System Member based on the duration of the Activation.
(iii) Customarily and usually compensates Exempt System Members by paying a salary and overtime,	Customarily and usually calculates overtime for Exempt System Members by paying a predetermined overtime payment for each hour worked above a predetermined hours threshold,.	The daily compensation equivalent calculated under §208.39(e)(3) of this part for each Activated Exempt System Member for each full or partial day during Activation AND the predetermined overtime payment for each hour during the Activation above the previously determined hours threshold for each Activated Exempt System Member.
(iv) Customarily and usually compensates Non-Exempt System Members by paying overtime after 40 hours per week,	Does not customarily and usually grant compensatory time or other form of overtime substitute to Non-Exempt System members,.	For each seven-day period during the Activation, the hourly wage of each Activated Non-Exempt System Member for the first 40 hours AND the overtime payment for each Activated Non-Exempt System Member for every hour over 40.

If the Sponsoring Agency or Participating Agency * * *	And the Sponsoring Agency or Participating Agency * * *	Then the following compensation costs are allowable:
(v) Customarily and usually compensates Non-Exempt System Members according to a compensation plan established under 29 U.S.C. 207(k),	Does not customarily and usually grant compensatory time or other form of overtime substitute to Non-Exempt System Members..	For each seven-day period during the Activation, the hourly wage equivalent of each Activated Non-Exempt System Member calculated under §208.39(e)(1) of this part for the first 40 hours AND the overtime payment equivalent for each Activated Non-Exempt System Member calculated under §208.39(e)(1) of this part for every hour over 40.
(vi) Activates Personnel, who are customarily and usually paid an hourly wage according to the Maximum Pay Rate Table,	.....	For each seven-day period during the Affiliated Activation, the hourly wage for each Activated Affiliated Personnel for the first 40 hours and one and one-half times the hourly wage for each Activated Affiliated Personnel for every hour over 40.
(vii) Activates Affiliated Personnel who are customarily and usually paid a daily compensation rate according to the Maximum Pay Rate Table,	.....	The daily compensation rate for each Activated Affiliated Personnel for each full or partial day during the Activation.

(f) *Reimbursement of additional salary and overtime costs.* DHS will reimburse any identified additional salary and overtime cost incurred by a Sponsoring Agency as a result of the temporary conversion of a Non-Exempt System Member normally compensated under 29 U.S.C. 207(k) to a 40-hour work week under 29 U.S.C. 207(a).

(g) *Reimbursement for Backfill costs upon Activation.* DHS will reimburse the cost to Backfill System Members. Backfill costs consist of the expenses generated by filling the position in

which the Activated System Member should have been working. These costs are calculated by subtracting the non-overtime compensation, including fringe benefits, of Activated System Members from the total costs (non-overtime and overtime compensation, including fringe benefits) paid to Backfill the Activated System Members. Backfill reimbursement is available only for those positions that are normally Backfilled by the Sponsoring Agency or Participating Agency during Activation.

Employees exempt under the Fair Labor Standards Act (FLSA) not normally Backfilled by the Sponsoring Agency or Participating Agency are not eligible for Backfill during Activation.

**§208.40 Reimbursement of fringe benefit costs during Activation.**

(a) Except as specified in §208.40 (c) of this subpart, DHS will reimburse the Sponsoring Agency for fringe benefit costs incurred during Activation according to the following table:

If the Sponsoring Agency or Participating Agency * * *	Then the Sponsoring Agency or Participating Agency must * * *	Example
(1) Incurs a fringe benefit cost based on the number of base hours worked by a System Member,	Bill DHS for a pro-rata share of the premium based on the number of base hours worked during Activation.	The City Fire Department incurs a premium of 3 percent for dental coverage based on the number of base hours worked in a week (53 hours). The City should bill DHS an additional 3 percent of the firefighter's converted compensation for the first 40 hours Activation.
(2) Incurs a fringe benefit cost based on the number of hours a System Member actually worked (base hours and overtime),	Bill DHS for a pro-rata share of the premium based on the number of hours each System Member worked during Activation.	The City Fire Department pays a premium of 12 percent for retirement based on the number of hours worked by a firefighter. The City should bill DHS an additional 12 percent of the firefighter's total compensation during Activation.
(3) Incurs a fringe benefit cost on a yearly basis based on the number of people employed full-time during the year,	Bill DHS for a pro-rata share of those fringe benefit costs based on the number of non-overtime hours worked during Activation by System Members employed full time.	The City Fire Department pays workers compensation premiums into the City risk fund for the following year, based on the number of full-time firefighters employed during the current year. The City should bill DHS for workers compensation premium costs by multiplying the hourly fringe benefit rate or amount by the number of non-overtime hours worked during Activation by full time firefighters who are System Members.

(b) *Differential pay.* DHS will reimburse the Sponsoring Agency for direct costs incurred because of any separate differential compensation paid for work performed during an

Activation including, but not limited to, differentials paid for holidays, night work, hazardous duty, or other paid fringe benefits, provided such differentials are not otherwise

reimbursed under paragraph (a) of this section. A detailed explanation of the differential payment for which the Sponsoring Agency seeks reimbursement must accompany any

request for reimbursement under this section together with identification of every fringe benefit sought under §208.40(a) of this part and the method used to calculate each such payment and the reimbursement sought from DHS.

(c) DHS will not reimburse the Sponsoring Agency for fringe benefit costs for Affiliated Personnel.

#### § 208.41 Administrative allowance.

(a) The administrative allowance is intended to defray costs of the following activities, to the extent provided in paragraph (b) of this section:

- (1) Collecting expenditure information from Sponsoring Agencies and Participating Agencies;
- (2) Compiling and summarizing cost records and reimbursement claims;
- (3) Duplicating cost records and reimbursement claims; and
- (4) Submitting reimbursement claims, including mailing, transmittal, and related costs.

(b) The administrative allowance will be equal to the following:

- (1) If total allowable costs are less than \$100,000, 3 percent of total allowable costs included in the reimbursement claim;
- (2) If total allowable costs are \$100,000 or more but less than \$1,000,000, \$3,000 plus 2 percent of costs included in the reimbursement claim greater than \$100,000;
- (3) If total allowable costs are \$1,000,000 or more, \$21,000 plus 1 percent of costs included in the reimbursement claim greater than \$1,000,000.

#### § 208.42 Reimbursement for other administrative costs.

Costs incurred for conducting after-action meetings and preparing after-action reports must be billed as direct costs in accordance with DHS administrative policy.

#### § 208.43 Rehabilitation.

DHS will reimburse costs incurred to return System equipment and personnel to a state of readiness following Activation as provided in this section.

(a) *Costs for Equipment Cache List items*—(1) *Non-consumable items*. DHS will reimburse costs incurred to repair or replace any non-consumable item on the Equipment Cache List that was lost, damaged, destroyed, or donated at DHS direction to another entity, during Activation. For each such item, the Sponsoring Agency must document, in writing, the circumstances of the loss, damage, destruction, or donation.

(2) *Consumable items*. DHS will reimburse costs incurred to replace any

consumable item on the Equipment Cache List that was consumed during Activation.

(3) *Personnel costs associated with equipment cache rehabilitation*. DHS will reimburse costs incurred for the compensation, including benefits, payable for actual time worked by each person engaged in rehabilitating the equipment cache following Activation, in accordance with the standard pay policy of the Sponsoring Agency or Participating Agency and without regard to the provisions of § 208.39(e)(1) of this part, up to the number of hours specified in the Demobilization Order. Fringe benefits are reimbursed under the provisions of § 208.40 of this part.

(b) *Costs for personnel rehabilitation*. DHS will reimburse costs incurred for the compensation, including benefits and Backfill, of each Activated System Member regularly scheduled to work during the rehabilitation period specified in the Demobilization Order, in accordance with the standard pay policy of the Sponsoring Agency or Participating Agency and without regard to the provisions of § 208.39(e)(1) of this part.

(c) *Other allowable costs*—(1) *Local transportation*. DHS will reimburse costs incurred for transporting Task Force Members from the point of assembly to the point of departure and from the point of return to the location where they are released from duty. DHS will also reimburse transportation costs incurred for assembling and moving the equipment cache from its usual place(s) of storage to the point of departure, and from the point of return to its usual place(s) of storage. Such reimbursement will include costs to return the means of transportation to its point of origin.

(2) *Ground transportation*. When DHS orders a Sponsoring Agency to move its Task Force Members and equipment cache by ground transportation, DHS will reimburse costs incurred for such transportation, including but not limited to charges for contract carriers, rented vehicles, contract vehicle operators, fleet vehicles, fuel and associated transportation expenses. The Director has authority to issue schedules of maximum hourly or per mile reimbursement rates for fleet and contract vehicles.

(3) *Food and beverages*. DHS will reimburse expenditures for food and beverages for Activated Task Force Members and Support Specialists when the Federal government does not provide meals during Activation. Reimbursement of food and beverage costs for Activated Support Specialists will be limited to periods of time during which they were actively supporting the

Activation or traveling to or from locations at which they were actively supporting the Activation. Food and beverage reimbursement will be limited to the amount of the then-current Federal meals and incidental expenses daily allowance published in the **Federal Register** for the locality where such food and beverages were provided, multiplied by the number of personnel who received the same.

#### § 208.44 Reimbursement for other costs.

(a) Except as allowed under paragraph (b) of this section, DHS will not reimburse other costs incurred preceding, during or upon the conclusion of an Activation unless, before making the expenditure, the Sponsoring Agency has requested, in writing, permission for a specific expenditure and has received written permission from the Program Manager or his or her designee to make such expenditure.

(b) At the discretion of the Program Manager or his or her designee, a request for approval of costs presented after the costs were incurred must be in writing and establish that:

- (1) The expenditure was essential to the Activation and was reasonable;
- (2) Advance written approval by the Program Manager was not feasible; and
- (3) Advance verbal approval by the Program Manager had been requested and was given.

#### § 208.45 Advance of funds.

At the time of Activation of a Task Force, the Task Force will develop the documentation necessary to request an advance of funds be paid to such Task Force's Sponsoring Agency. Upon approval, DHS will submit the documentation to the Assistance Officer and will request an advance of funds up to 75 percent of the estimated personnel costs for the Activation. The estimated personnel costs will include the salaries, benefits, and Backfill costs for Task Force Members and an estimate of the salaries, benefits and Backfill costs required for equipment cache rehabilitation. The advance of funds will not include any costs for equipment purchase.

#### § 208.46 Title to equipment.

Title to equipment purchased by a Sponsoring Agency with funds provided under a DHS Response Cooperative Agreement vests in the Sponsoring Agency, provided that DHS reserves the right to transfer title to the Federal Government or a third party that DHS may name, under 44 CFR 13.32(g), when a Sponsoring Agency indicates or demonstrates that it cannot fulfill its

obligations under the Memorandum of Agreement.

**§§ 208.47–208.50 [Reserved]**

**Subpart D—Reimbursement Claims and Appeals**

**§ 208.51 General.**

(a) *Purpose.* This subpart identifies the procedures that Sponsoring Agencies must use to request reimbursement from DHS for costs incurred under Response Cooperative Agreements.

(b) *Policy.* It is DHS policy to reimburse Sponsoring Agencies as expeditiously as possible consistent with Federal laws and regulations.

**§ 208.52 Reimbursement procedures.**

(a) *General.* A Sponsoring Agency must present a claim for reimbursement to DHS in such manner as the Director specifies.

(b) *Time for submission.* (1) Claims for reimbursement must be submitted within 90 days after the end of the Personnel Rehabilitation Period specified in the Demobilization Order.

(2) The Director may extend and specify the time limitation in paragraph (b)(1) of this section when the Sponsoring Agency justifies and requests the extension in writing.

**§§ 208.53–208.59 [Reserved]**

**§ 208.60 Determination of claims.**

When DHS receives a reviewable claim for reimbursement, DHS will review the claim to determine whether and to what extent reimbursement is allowable. Except as provided in § 208.63 of this part, DHS will complete its review and give written notice to the Sponsoring Agency of its determination within 90 days after the date DHS receives the claim. If DHS determines that any item of cost is not eligible for reimbursement, its notice of determination will specify the grounds on which DHS disallowed reimbursement.

**§ 208.61 Payment of claims.**

DHS will reimburse all allowable costs for which a Sponsoring Agency requests reimbursement within 30 days after DHS determines that reimbursement is allowable, in whole or in part, at any stage of the reimbursement and appeal processes identified in this subpart.

**§ 208.62 Appeals.**

(a) *Initial appeal.* The Sponsoring Agency may appeal to the Program

Manager any determination made under § 208.60 of this part to disallow reimbursement of an item of cost:

(1) The appeal must be in writing and submitted within 60 days after receipt of DHS's written notice of disallowance under § 208.60 of this part.

(2) The appeal must contain legal and factual justification for the Sponsoring Agency's contention that the cost is allowable.

(3) Within 90 days after DHS receives an appeal, the Program Manager will review the information submitted, make such additional investigations as necessary, make a determination on the appeal, and submit written notice of the determination of the appeal to the Sponsoring Agency.

(b) *Final appeal.* (1) If the Program Manager denies the initial appeal, in whole or in part, the Sponsoring Agency may submit a final appeal to the Deputy Director. The appeal must be made in writing and must be submitted not later than 60 days after receipt of written notice of DHS's determination of the initial appeal.

(2) Within 90 days following the receipt of a final appeal, the Deputy Director will render a determination and notify the Sponsoring Agency, in writing, of the final disposition of the appeal.

(c) *Failure to file timely appeal.* If the Sponsoring Agency does not file an appeal within the time periods specified in this section, DHS will deem that the Sponsoring Agency has waived its right to appeal any decision that could have been the subject of an appeal.

**§ 208.63 Request by DHS for supplemental information.**

(a) At any stage of the reimbursement and appeal processes identified in this subpart, DHS may request the Sponsoring Agency to provide supplemental information that DHS considers necessary to determine either a claim for reimbursement or an appeal. The Sponsoring Agency must exercise its best efforts to provide the supplemental information and must submit to DHS a written response that includes such supplemental information as the Sponsoring Agency is able to provide within 30 days after receiving DHS's request.

(b) If DHS makes a request for supplemental information at any stage of the reimbursement and appeal processes, the applicable time within which its determination of the claim or appeal is to be made will be extended by 30 days. However, without the

consent of the Sponsoring Agency, no more than one such time extension will be allowed for any stage of the reimbursement and appeal processes.

**§ 208.64 Administrative and audit requirements.**

(a) *Non-Federal audit.* For Sponsoring Agencies and States, requirements for non-Federal audit are contained in 44 CFR 13.26, in accordance with OMB Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations.

(b) *Federal audit.* DHS or the General Accounting Office may elect to conduct a Federal audit of any payment made to a Sponsoring Agency or State.

**§ 208.65 Mode of transmission.**

When sending all submissions, determinations, and requests for supplemental information under this subpart, all parties must use a means of delivery that permits both the sender and addressee to verify the dates of delivery.

**§ 208.66 Reopening of claims for retrospective or retroactive adjustment of costs.**

(a) Upon written request by the Sponsoring Agency DHS will reopen the time period for submission of a request for reimbursement after the Sponsoring Agency has submitted its request for reimbursement, if:

(1) The salary or wage rate applicable to the period of an Activation is retroactively changed due to the execution of a collective bargaining agreement, or due to the adoption of a generally applicable State or local law, ordinance or wage order or a cost-of-living adjustment;

(2) The Sponsoring Agency or any Participating Agency incurs an additional cost because of a legally-binding determination; or

(3) The Deputy Director determines that other extenuating circumstances existed that prevented the Sponsoring Agency from including the adjustment of costs in its original submission.

(c) The Sponsoring Agency must notify DHS as early as practicable that it anticipates such a request.

**§§ 208.67–208.70 [Reserved]**

Dated: February 3, 2005.

**Michael D. Brown,**

*Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.*

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