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DEPARTMENT OF HOMELAND SECURITY**Federal Emergency Management Agency****44 CFR Part 62**

RIN 1660-AA41

National Flood Insurance Program; Appeal of Decisions Relating to Flood Insurance Claims**AGENCY:** Federal Emergency Management Agency, DHS.**ACTION:** Final rule.

SUMMARY: This rule amends and finalizes the Federal Emergency Management Agency's (FEMA's) May 2006 interim rule establishing an appeals process for National Flood Insurance policyholders as required under section 205 of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004.

DATES: This final rule is effective November 13, 2006.

FOR FURTHER INFORMATION CONTACT: James Shortley, Director of Claims, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3418 (Phone), (202) 646-2818 (facsimile), or James.Shortley@dhs.gov (e-mail).

SUPPLEMENTARY INFORMATION:**Background**

In the face of mounting flood losses and escalating costs of disaster relief to the taxpayers, the National Flood Insurance Program (NFIP) was established by Congress as part of the National Flood Insurance Act of 1968 (the Act). Pub. L. 90-448, Title XII (Aug. 1, 1968), as amended, 42 U.S.C. 4001, *et seq.* The intent of the NFIP is to reduce future flood damage through community floodplain management ordinances, and to make risk-based flood insurance generally available for property owners. FEMA was designated by Congress to be the administrator of the NFIP.

In 1983, FEMA partnered with the private insurance industry to expand the NFIP policy base. This partnership between FEMA and the private sector property insurance companies is termed the Write Your Own (WYO) Program.

The WYO Program is a cooperative undertaking between the insurance industry and FEMA. The WYO Program allows participating property and

casualty insurance companies to issue and service the NFIP Standard Flood Insurance policies (SFIPs) in their own names. FEMA also uses the services of contractors to process NFIP policy information from the WYO Companies and the agents and to service SFIPs sold directly by FEMA. Contractors are sometimes employed by the WYO Companies to handle and adjust claims.

Section 205 of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act (FIRA) of 2004 (Pub. L. 108-264 (June 30, 2004), 42 U.S.C. 4011) requires FEMA to establish by regulation a formal process for the appeal of decisions of flood insurance claims issued through the NFIP. On May 26, 2006, FEMA issued an interim rule establishing a formal appeals process and soliciting comments from the public. *See* 71 FR 30294. The process implemented under the interim rule codifies FEMA's existing NFIP appeals practice and enables policyholders to formally appeal the decisions of any insurance agent or adjuster, or insurance company, or any FEMA employee or contractor with respect to their SFIP claims, proofs of loss, and loss estimates.

Under the formal appeals process, FEMA will acknowledge receipt of a policyholder's appeal in writing and advise the policyholder if additional information is required in order to fully consider the appeal. FEMA will review the documentation submitted by the policyholder and conduct any necessary additional investigations. FEMA will then advise the policyholder and the appropriate flood insurance carrier of FEMA's decision regarding the appeal.

Discussion

The Act and the SFIP authorize an insured (or policyholder) who is dissatisfied with an insurer's decision to deny a claim, in whole, or part, to file a lawsuit in Federal district court for the disallowed portion of the claim, or invoke the appraisal provision of the SFIP (a procedure to resolve disputes regarding the actual value of covered losses). This rule provides a formal appeals process for resolving flood insurance disputes prior to commencement of litigation.

The appeals process outlined in this rule does not abolish or replace the right to file a lawsuit against the insurer pursuant to the Act (42 U.S.C. 4072), nor does it expand or change the one-year statute of limitation to file suit against the insurer for the disallowed portion of the insured's claim. To avoid potentially conflicting results and duplicative efforts, an insured who files suit against an insurer is prohibited

from filing an appeal under this appeals process.

Similarly, this appeals process is not meant to provide an insured with multiple contractual or administrative, pre-litigation remedies. Accordingly, an insured who seeks to resolve issues regarding the actual cash value or, if applicable, replacement cost of damaged property, must elect to resolve this dispute through either the appraisal provision in the SFIP or this appeals process. An insured cannot seek remedy under both processes.

Finally, this rule does not amend or change the conditions necessary to recover under the SFIP. In the case of a flood loss to insured property, the insured must comply with the requirements set out in the SFIP; including, but not limited to, providing the insurer with prompt notice of the loss, submitting a valid proof of loss within 60 days after the loss, cooperating with the adjuster, separating damaged and undamaged property so that the insurer may examine it, and preparing an inventory of damaged personal property. *See* SFIP, 44 CFR Part 61, App. A(1), Part 61, App. A(2), Part 61, App. A(3).

This appeals process is available after the issuance of the insurer's final claim determination, which is the insurer's written denial, in whole or in part, of the insured's claim. Once the final claim determination is issued, an insured may appeal any action taken by the insurer, FEMA employee, FEMA contractor, insurance adjuster, or insurance agent. An insured must file an appeal within 60 days after receiving the insurer's final claim determination.

Response to Comments

The interim rule requested public comment. FEMA received two written and one oral comment. A summary of the comments received, together with FEMA's responses, is set forth below.

One commenter, U.S. Senator James Bunning, asked that FEMA provide additional information to the public during the appeals process, including stating the grounds for the initial denial of a claim and eventual resolution of any appeal; and identifying a point of contact for claimants so that they can speak with someone at FEMA directly. The Senator also recommended that FEMA provide a timeframe for issuance of a decision on an appeal, as well as what information and documentation should be included in any appeal filed.

FEMA agrees with these comments and has amended 44 CFR 62.20 accordingly. Specifically, FEMA agrees to provide the policyholder with a written acknowledgement of the receipt

of the appeal and include in the acknowledgement letter a point of contact at FEMA who can assist the policyholder with information on the status of his or her claim. FEMA provided more detail in this final rule, by listing examples of the type of information and documentation to be included in an appeal. FEMA also will issue a written appeal decision to the policyholder and insurer within 90 days from the date that the policyholder has submitted all required information to FEMA. The appeal decision will include information on the grounds for the initial denial of the claim and the basis for the resolution of the appeal. FEMA believes the addition of this information will facilitate the NFIP appeals process.

FEMA will issue a bulletin to insurers and take other appropriate steps as part of the implementation of this rule. That bulletin will require that the Companies provide the denial in writing and include specific information as to the grounds on which the claim was denied initially.

A second commenter, a representative of State Farm (a member of WYO), offered two comments on the interim final rule. First, that FEMA should consider adding language permitting appeals only after the policyholder has given "management level personnel" within the WYO Company an opportunity to review the policyholder's concerns in the case of disputes arising under a SFIP issued by a WYO Company. The commenter stated that such a change would encourage handling of serious disputes at the appropriate level within the WYO Company and should serve to reduce the number of appeals that must be processed by FEMA.

While the comments are notable, FEMA has not included the language in this rule. FEMA agrees that there should be a management level review within the WYO Company of denials (in whole or in part) of which the policyholder is appealing. However, since each WYO Company handles denials differently, FEMA does not believe that it should mandate the level at which a denial is reviewed within individual WYO Companies. While FEMA believes this suggestion has merit, FEMA reserves to each Company the ability to conduct individual claims review process, including management oversight.

State Farm also requested that FEMA require policyholders to commence and complete either the appraisal process provided for in the SFIP or the appeals process prior to seeking judicial review. The commenter stated that such a change should reduce total litigation costs under the NFIP and encourage

policyholders to take advantage of these alternative dispute mechanisms.

FEMA agrees it would be preferable for a policyholder to commence and complete either the appraisal process or the appeals process prior to litigation. The Act, however, expressly permits policyholders to file suit against the insurer and does not require a policyholder to exhaust available contractual or administrative remedies. *See*, 42 U.S.C. 4072. Although FEMA can make contractual or administrative remedies, such as this appeals process, available to policyholders, FEMA therefore cannot require a policyholder to participate in the appraisal or appeal process before seeking remedy in a Federal district court. FEMA anticipates that having the formal appeals process in place will limit the number of claims brought to suit, even without making it a requirement prior to suit.

In response to State Farm's comment, however, FEMA has modified the language in 44 CFR 62.20(e) "Procedures," to add a new paragraph (2). This paragraph requires policyholders who have filed an appeal to "[p]rovide a copy of the insurer's written denial, in whole or in part, of the claim." The purpose of this modification is to further clarify that FEMA requires a denial of a claim in order to initiate an appeal. FEMA inserted the new language to ensure that a policyholder receives a denial from the WYO Company before the policyholder pursues an appeal.

FEMA also received a comment from a private citizen who takes issue with the NFIP overall. That comment did not relate specifically to the appeals process set forth in the May 2006 interim rule and is not within the scope of this rulemaking. FEMA, therefore, did not consider that comment in the development of this final rule.

Administrative Procedure Act

FEMA, through this final rule, is implementing changes to the appeals process that were not specified in the May 2006 interim rule. FEMA has determined that these changes are procedural in nature and do not alter the substantive rights of the affected parties. Therefore, the changes made under this final rule are exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553(b)(A).)

National Environmental Policy Act

This rule falls within the exclusion category 44 CFR 10.8(d)(2)(ii), which addresses the preparation, revision, and adoption of regulations, directives, and other guidance documents related to

actions that qualify for categorical exclusions. Since this is an administrative action that qualifies for the exclusion category described in 44 CFR 10.8(d)(2)(ii) and because no other extraordinary circumstances have been identified, this rule will not require the preparation of either an environmental assessment or environmental impact statement as defined by the National Environmental Policy Act.

Executive Order 12866, Regulatory Planning and Review

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, 58 FR 51735, October 4, 1993, a significant regulatory action is subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. 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 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.

This final rule has been determined to not be a significant regulatory action under Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget.

Paperwork Reduction Act

This rule contains information collection requirements subject to the Paperwork Reduction Act of 1995. Under the Paperwork Reduction Act, a person may not be penalized for failing to comply with an information collection that does not display a currently valid OMB control number.

FEMA, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed extension of a currently approved collection. In accordance with the Paperwork Reduction Act of 1995, this notice seeks comments concerning a

formal appeals process to allow policyholders to request an appeal for an unsatisfactory decision on their flood insurance claims.

Section 205 of FIRA of 2004 requires FEMA to establish by regulation a formal process for the appeal of decisions of flood insurance claims issued through the NFIP. The appeals process is available after the issuance of the insurer's final claim determination, which is the insurers' written denial, in whole or in part, of the insured claim. An insured must file an appeal within

60 days after receiving the insurer's final claim determination.

Title: National Flood Insurance Claims Appeal Process.

Type of Information Collection: Extension of a currently approved collection.

OMB Number: 1660-0095.

Forms: Forms are not used in the appeals process, but rather the policyholder will provide a letter requesting an appeal and any supporting documentation.

Abstract: This information collection implements the mandates of section 205

of FIRA of 2004 to establish an appeals process for NFIP policyholders in cases of unsatisfactory decisions on SFIP claims. The policy, proof of loss, loss estimates, photographs, and any other supporting documentation will be reviewed by the Director of Claims, and claims examiners, to determine if the policyholder/claimant is entitled to additional remedies for his or her loss.

Affected Public: Individuals or households and business or other for profit.

ANNUAL BURDEN HOURS

Information collection activity	Number of respondents (A)	Frequency of responses (B)	Burden hours per respondent (C)	Annual responses (D) = (A×B)	Total annual burden hours (E) = (C×D)
Appeal Letter	2,000	1	2	2,000	4,000
Total	2,000	1	2	2,000	4,000

It is estimated that, in a typical year, the number of claims received will be approximately 68,000. However, considering the impact of Hurricanes Katrina, Rita, and Wilma on the number of claims received, the program has estimated that approximately 2,000 respondents per year will file an appeal, each spending an average of two hours drafting the appeals letter and collecting the required information.

Comments: Written comments are solicited to (a) evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Comments must be submitted on or before November 6, 2006.

Interested persons should submit written comments to Chief, Records Management and Privacy, Information Resources Management Branch, Information Technology Services Division, Federal Emergency

Management Agency, 500 C Street, SW., Room 316, Washington, DC 20472.

Executive Order 13175, Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distinction of power and responsibilities between the Federal Government and Indian tribes. It does not have a substantial direct effect because the rule does not make distinctions of where the property insured is located, the rule will apply uniformly to all policyholders regardless if they live on or off Tribal lands.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, dated August 4, 1999, sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with State and

local officials before implementing any such action.

FEMA has reviewed this rule under Executive Order 13132 and has concluded the rule does not have federalism implications as defined by the Executive Order. FEMA has determined the rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion.

Executive Order 12898 and 12948, Environmental Justice

Under Executive Orders 12898 and 12948, respectively, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," FEMA incorporates environmental justice into our policies and programs. Executive Order 12898 requires each Federal agency to conduct its programs, policies and activities that substantially affect human health or the environment in a manner that ensures those programs, policies and activities do not have the effect of excluding persons from participation in, denying persons the benefits of, or subjecting persons to discrimination because of their race, color, or national origin. Executive Order 12898 also requires that each Federal Agency shall identify and address as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.

FEMA does not anticipate that actions under the rule would have a disproportionately high and adverse human health effect on any segment of the population. FEMA has determined that the requirements of these Executive Orders do not apply to this rule.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) mandates that an agency conduct an RFA analysis when an agency is "required by section 553 * * *, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for interpretative rule involving the internal revenue laws of the United States * * *." 5 U.S.C. 603(a). RFA analysis is not required when a rule is exempt from notice and comment rulemaking under 5 U.S.C. 553(b). As discussed in the interim rule, because a notice of proposed rulemaking was not required under the Administrative Procedure Act (5 U.S.C. 553), FEMA was not required to conduct an RFA analysis for the interim rule or this final rule under 5 U.S.C. 603.

Executive Order 12988

This final rule meets the applicable standards of Executive Order 12988.

List of Subjects in 44 CFR Part 62

Flood insurance.

■ Accordingly, the interim final rule amending 44 CFR part 62 of FEMA's regulations, which was published at 71 FR 30294, May 26, 2006 is adopted as a final rule with certain changes as discussed above and set forth as follows:

PART 62—SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS

■ 1. The authority citation for part 62 continues to read as follows:

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

■ 2. Revise paragraphs (e)(2) through (e)(4), (f)(1), and (f)(3) to § 62.20 to read as follows:

§ 62.20 Claims appeals.

* * * * *

(e) * * *

(2) Provide a copy of the insurer's written denial, in whole or in part, of the claim;

(3) Identify relevant policy and claim information and state the basis for the appeal; and

(4) Submit relevant documentation to support the appeal. The policyholder should submit only the documentation that pertains to his or her claim. The following are examples of the kinds of documentation which FEMA will require to adjudicate the appeal: A copy of the proof of loss submitted to the insurer as required in the policy; room by room itemized estimates from the adjuster (includes contractors' estimates), detailing unit cost and quantities for the items needing repair or replacement; replacement cost proofs of loss; Preliminary Report; Final Report; detailed damaged personal property inventories that include the approximate age of the items; completed Mobile Home Worksheet; Mobile Home Title, including Salvage Titles; real estate appraisals that exclude land values; advance payment information; clear photographs (exterior and interior) confirming damage resulted from direct physical loss by or from flood; proof of prior repair; evidence of insurance and policy information, *i.e.* declarations page; Elevation Certificate, if the risk is an elevated building; the community's determination made concerning substantial damage; information regarding substantial improvement; zone determinations; pre-loss and post-loss inventories; financial statements; tax records, lease agreements, sales contracts, settlement papers, deed, *etc.*; emergency (911) address change information; salvage information (proceeds and sales); condominium association by-laws; proof of other insurance, including homeowners or wind policies and any claim information submitted to the other companies; Waiver, Letter of Map Revision (LOMR) or Letter of Map Amendment (LOMA) information; paid receipts and invoices including cancelled checks that support an

insured's out-of-pocket expenses pertaining to the claim; underwriting decisions; architectural plans and drawings; death certificates; a copy of the will; divorce decree, power of attorney; current lienholder information; current loss payee information; paid receipts and invoices documenting damaged stock; detailed engineering reports specifically addressing flood-related damage and pre-existing damage; engineering surveys; market values; documentation of Flood Insurance Rate Maps (FIRM) dates; documentation reflecting date(s) of construction and substantial improvement; loan documents including closings; evidence of insurability as a Residential Condominium Association; Franchise Agreements; letters of representation, *i.e.* attorneys and public adjusters, *i.e.* assignment of interest in a claim; and, any other pertinent information which FEMA may request in processing a claim.

(f) * * *

(1) FEMA will acknowledge, in writing, receipt of a policyholder's appeal and include in the acknowledgement contact information for a FEMA point of contact who can advise the policyholder as to the status of his or her claim.

* * * * *

(3) The Administrator will review the appeal documents, including any reinspection report, if appropriate. The Administrator will provide specific information on what grounds the claim was denied initially. The Administrator will provide an *appeal decision* in writing to the policyholder and insurer within 90 days from the date that all information has been submitted by the policyholder and include specific information for the resolution of the appeal. No further administrative review will be provided to the insured.

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Dated: October 6, 2006.

R. David Paulison,

Under Secretary for Federal Emergency Management and Director of FEMA.

[FR Doc. E6-17028 Filed 10-12-06; 8:45 am]

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