

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

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

[Docket ID: FEMA–2019–0011]

RIN 1660–AA96

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

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) proposes to amend its Hazard Mitigation Assistance (HMA) program regulations to reflect current statutory authority and agency practice. FEMA's HMA program regulations consist of the Flood Mitigation Assistance (FMA) grant program, the Hazard Mitigation Grant Program (HMGP), financial assistance for property acquisition and relocation of open space, and mitigation planning program regulations. FEMA proposes to revise the FMA grant program regulations to incorporate changes made by amendments to the National Flood Insurance Act of 1968 (NFIA). Finally, FEMA proposes to update terms and definitions throughout the HMA and Mitigation Planning program regulations to better align with uniform administrative requirements that apply to all Federal assistance.

**DATES:** Comments are due on or before October 27, 2020.

**ADDRESSES:** You may submit comments, identified by Docket ID: FEMA–2019–0011, by one of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*Mail/Hand Delivery/Courier:* Regulatory Affairs Division, Office of Chief Counsel, Federal Emergency Management Agency, Room 8NE, 500 C Street, SW, Washington, DC 20472–3100.

To avoid duplication, please use only one of these methods. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For instructions on submitting comments, see the Public Participation portion of the **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:**

Katherine Fox, Assistant Administrator for Mitigation, Federal Emergency Management Agency, 202–646–1046, [Katherine.Fox5@fema.dhs.gov](mailto:Katherine.Fox5@fema.dhs.gov).

## SUPPLEMENTARY INFORMATION:

### I. Public Participation

We encourage you to participate in this rulemaking by submitting comments and related materials. We will consider all comments and material received during the comment period.

If you submit a comment, identify the agency name and the docket ID for this rulemaking, indicate the specific section of this document to which each comment applies, and give the reason for each comment. You may submit your comments and material by electronic means, mail, or delivery to the address under the **ADDRESSES** section. Please submit your comments and material by only one means.

Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal e-Rulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy and Security Notice that is available via a link on the homepage of <http://www.regulations.gov>.

*Viewing comments and documents:* For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>. Background documents and submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 8NE, 500 C Street SW, Washington, DC 20472–3100.

*Public Meeting:* We do not plan to hold a public meeting, but you may submit a request for one at the address under the **ADDRESSES** section explaining why one would be beneficial. If FEMA determines that a public meeting would aid this rulemaking, it will hold one at a time and place announced by a notice in the **Federal Register**.

### II. Background

#### A. Overview of Hazard Mitigation Assistance Programs

FEMA's Hazard Mitigation Assistance (HMA) grant programs provide funding for eligible mitigation activities that reduce disaster losses and protect life and property from future disaster damages. FEMA currently administers three hazard mitigation assistance programs under the HMA umbrella: (1) The Flood Mitigation Assistance (FMA) program (a grant program, described in 44 CFR parts 78 and 79); (2) the Hazard Mitigation Grant Program (HMGP) (44 CFR part 206, subpart N); and (3) the Pre-Disaster Mitigation (PDM) program

(implemented via guidance and the annual grants process without corresponding regulations). Mitigation planning requirements (44 CFR part 201) and requirements for property acquisition and relocation for open space (44 CFR part 80) apply to all three HMA programs. The *Hazard Mitigation Assistance Guidance* (hereinafter "HMA Guidance") provides comprehensive guidance for all three HMA programs and supplements the FMA program and HMGP program regulations.<sup>1</sup>

The majority of the revisions FEMA proposes in this rulemaking apply to the FMA regulations. FEMA proposes a few changes to the HMGP regulations as well. Below, FEMA provides a general description of the FMA and HMGP programs, and then a more detailed discussion of how FEMA administers the FMA program.

#### 1. Flood Mitigation Assistance Program (FMA)

Section 1366 of the National Flood Insurance Act of 1968 (NFIA), 42 U.S.C. 4104c, as amended, authorized the FMA program to reduce or eliminate claims under the National Flood Insurance Program (NFIP). The FMA program provides funds on an annual basis for projects to reduce or eliminate risk of flood damage to buildings, manufactured homes, and other structures insured under the NFIP. *See* 42 U.S.C. 4104c(a); 44 CFR 79.1(c). Currently, 44 CFR parts 78 and 79 prescribe actions, procedures, and requirements for the administration of the FMA program. The requirements in part 78 applied only to those FMA grants for which the application period opened prior to December 3, 2007. *See* 44 CFR 78.1(a). The requirements in part 79 apply to all FMA funds awarded on or after December 3, 2007. *See* 44 CFR 79.1(a).

In accordance with 44 CFR part 201, "Mitigation Planning," all State and Tribal applicants must have a FEMA-approved State or Tribal mitigation plan as a condition of receiving any FEMA mitigation grant, including FMA grants. *See* 44 CFR 201.4(a), 201.7(a)(1). Subapplicants consisting of local governments and Tribal governments

<sup>1</sup> Federal Emergency Management Agency, *Hazard Mitigation Assistance Guidance* (hereinafter "HMA Guidance"), Feb. 27, 2015, available at [https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA\\_Guidance\\_022715\\_508.pdf](https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf) (last accessed Feb. 13, 2020). As noted in this preamble, the PDM program does not have implementing regulations, but rather is implemented through the annual grants process, including the Notice of Funding Opportunity, and other policy and guidance statements, including the HMA Guidance.

must have a FEMA-approved mitigation plan in order to apply for and receive mitigation project grants under FMA and PDM. *See* 44 CFR 201.6(a), 201.7(a)(3).

## 2. Hazard Mitigation Grant Program (HMGP)

Section 404 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. 5170c, authorized HMGP. Implementing regulations for HMGP are found at 44 CFR part 206, subpart N. The key purpose of HMGP is to substantially reduce the risk of future damage, hardship, loss, or suffering in any area affected by a major disaster. *See* 42 U.S.C. 5170c(a). HMGP funding is available, when authorized under a Presidential major disaster declaration,<sup>2</sup> in the areas requested by the Governor or chief executive of the Tribe. *See id.*; *HMA Guidance Part 1.B(1)*, p. 4. State agencies, local governments, private nonprofit organizations, and Indian Tribal governments are eligible to apply for HMGP assistance.<sup>3</sup> The level of HMGP funding available for a given disaster is based on a percentage of the estimated total Federal assistance available under the Stafford Act, excluding administrative costs, for each Presidential major disaster declaration. *See* 44 CFR 206.432(b). States and Indian Tribal governments applying for HMGP funding must have a FEMA-approved State or Tribal mitigation plan at the time of the Presidential major disaster declaration and at the time FEMA obligates HMGP funding. *See* 42 U.S.C. 5165; 44 CFR 201.4. Subapplicants, including local governments and Indian Tribal governments, must have a FEMA-approved mitigation plan in order to receive HMGP subawards. *See* 42 U.S.C. 5165(a), (b); 44 CFR 201.6(a), 201.7(a), 206.434(b).

## 3. Property Acquisition and Relocation for Open Space

Part 80 provides guidance on the administration of FEMA mitigation assistance for projects to acquire

<sup>2</sup>Note that there is an exception to the requirement that there be a Presidential major disaster declaration to receive HMGP funding. This exception is HMGP Post Fire, which provides mitigation assistance under HMGP generally for wildfire. It is triggered not by a Presidential major disaster declaration, but by a Fire Management Assistance Grant declaration under section 420 of the Stafford Act. *See* 42 U.S.C. 5170c(a).

<sup>3</sup>44 CFR 206.434(a). Eligible subapplicants apply to the recipient (also known as the “grantee”) for HMGP subawards. The recipient may be the State for which the major disaster is declared, or an Indian Tribal government choosing to act as a recipient instead of a subrecipient. *See* 44 CFR 206.431, definition of “grantee.”

property for open space purposes under all FEMA HMA programs. *See* 44 CFR 80.1.

### B. FMA Program Administration

FMA is a non-disaster program allowing communities to complete mitigation activities so that structures insured under the NFIP are protected from future damages and the need for future insurance claims is lessened. FMA grants are subject to availability of annual Federal appropriations, as well as to any program-specific directive or restrictions with respect to such funds.

The FMA is a competitive grant program, meaning FEMA reviews the applications submitted and selects the most qualified for an award. Each year, FEMA publishes a Notice of Funding Opportunity (NOFO) announcing the availability of funding and program requirements.<sup>4</sup> In addition, projects must meet the minimum eligibility criteria identified in 44 CFR 79.6. The criteria ensure that FEMA selects cost-effective and beneficial mitigation projects for FMA funding.

Applicants for the FMA program can be States and/or Indian Tribal governments.<sup>5</sup> *See* 44 CFR 79.2(b). Subapplicants can be a State agency, community,<sup>6</sup> or Indian Tribal government.<sup>7</sup> *See* 44 CFR 79.2(i). Subapplicants must participate in the NFIP. *See* 44 CFR 79.6(a)(1). Subapplicants that have withdrawn from the NFIP, or those that FEMA has suspended for failure to comply with floodplain management requirements, are not eligible. *See* 44 CFR 79.6(a)(3).

Subapplicants submit their applications to the applicant during the open application cycle as noted in the NOFO. Applicants then select, prioritize, and forward subapplications to FEMA by the deadline established in the NOFO. FEMA awards FMA funds to

<sup>4</sup>The most recent NOFO was posted on [www.grants.gov](http://www.grants.gov) and can be viewed at this link: <https://www.grants.gov/web/grants/search-grants.html>.

<sup>5</sup>An Indian Tribal government is any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals. 44 CFR 79.2(e).

<sup>6</sup>Community means a political subdivision, including any Indian Tribe, authorized Tribal organization, Alaska Native village or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and is participating in the NFIP, or a political subdivision of a State, or other authority that is designated by a political subdivision to develop and administer a mitigation plan. 44 CFR 79.2(c).

<sup>7</sup>*See supra* note 5.

the applicant, who becomes the recipient. The recipient then disburses funding for the approved subawards to the subapplicants, who become subrecipients. Recipients and subrecipients must comply with all program requirements and other applicable Federal, State, territorial, and Tribal laws and regulations. *See* 44 CFR 79.3(b)(6) and (d)(4).

A grant recipient/subrecipient must use FMA funds for mitigation planning and mitigation projects that will reduce or eliminate the risk of flood damages to properties insured under the NFIP. *See* 44 CFR 79.6(c). An example of a hazard mitigation project is the elevation of a home to reduce risk of flood damage. Eligible mitigation projects must be cost-effective or able to eliminate future payments from the National Flood Insurance Fund (NFIF) for severe repetitive loss structures through an acquisition or relocation activity. *See* 42 U.S.C. 4104(c)(2)(A). To demonstrate cost-effectiveness, a project's anticipated benefits must be equal to or more than the cost of implementing the project, which is demonstrated through a benefit-cost analysis that compares the cost of the project to the benefits anticipated to occur over the lifetime of the project.<sup>8</sup>

FMA applicants must have a FEMA-approved State or Tribal mitigation plan as a condition of receiving an FMA award. *See* 44 CFR 79.6(b)(1), 201.4(a), 201.7(a)(1). FMA subapplicants must have a FEMA-approved mitigation plan in order to apply for and receive mitigation project grants. *See* 44 CFR 79.6(b)(2), 201.6(a), 201.7(a)(3). Applicants/subapplicants must propose projects for FMA grants that are consistent with the goals and objectives of the State or Tribal Mitigation Plan, and, for subawards, the Local or Tribal Mitigation Plan.<sup>9</sup>

### C. Statutory Changes to FMA

The Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12), Public Law 112-141, 126 Stat. 916, reformed and streamlined the NFIA's hazard mitigation grant programs. Before BW-12, the NFIA authorized three distinct grant programs: (1) The FMA program (44 CFR part 79); (2) the Repetitive Flood Claims (RFC) program (implemented through guidance); and (3) the Severe Repetitive Loss (SRL) program (44 CFR part 79). BW-12 eliminated the RFC and SRL programs and consolidated aspects of those

<sup>8</sup>*See* HMA Guidance, Part III.E.3, Cost-Effectiveness, p. 44.

<sup>9</sup>42 U.S.C. 4104c(c)(1); *see* HMA Guidance, Part III.E.5, Hazard Mitigation Plan Requirement, p. 44.

programs into a reformed FMA program.<sup>10</sup>

### 1. Changes to Method of Program Funding

Before BW–12, FEMA allocated FMA program funding to States each fiscal year based upon the number of NFIP policies within the State, the number of repetitive loss structures within the State, and other criteria the Administrator determined to be in the best interests of the NFIP.<sup>11</sup> FEMA allocated funding under the SRL program to States each fiscal year based upon the percentage of the total number of severe repetitive loss properties located within that State.<sup>12</sup> Funds allocated to States that chose not to participate in either the FMA or SRL program in any given year were reallocated to participating States and Indian Tribal applicants.<sup>13</sup> BW–12 replaced this process with a fully competitive program under which, as described above, FEMA selects subapplications against agency priorities identified in annual appropriations and the NOFO. In addition to involving a simpler formula that is easier to implement, this allows FEMA to better prioritize funding awards to the most at-risk (*i.e.*, severe repetitive loss) properties.

### 2. Changes to Cost Share

Before BW–12, FEMA generally contributed up to 75 percent of the

eligible activity costs for mitigation projects under the FMA and SRL programs.<sup>14</sup> However, FEMA made available an increased Federal cost share of up to 90 percent for the mitigation of severe repetitive loss properties if the applicant had a repetitive loss strategy in its approved State or Tribal mitigation plan.<sup>15</sup> If neither the applicant nor the subapplicant could meet the FMA non-Federal share requirement, FEMA made available up to 100 percent of the project cost under the RFC program.<sup>16</sup>

Under the FMA program, as amended by BW–12, FEMA may contribute up to 90 percent of the eligible costs of projects that mitigate repetitive loss structures, and up to 100 percent of the eligible costs of projects that mitigate severe repetitive loss structures.<sup>17</sup> For all other mitigation activities, including activities to properties that are NFIP-insured but do not meet the repetitive loss or severe repetitive loss definitions, FEMA may contribute up to 75 percent of the eligible costs.<sup>18</sup> These changes to the FMA program resulted in increased funding to the most vulnerable properties (severe-repetitive loss properties) and decreased funding to less vulnerable (repetitive loss) properties.

### 3. Other Changes

BW–12 made a number of other changes to the FMA program, including eliminating the cap on FMA funding for States and communities (but not changing the overall amount of grant funding available); eliminating the limit on in-kind contributions for the non-Federal cost share; limiting funds for the development or update of mitigation plans to \$50,000 Federal share to any applicant or \$25,000 Federal share to any subapplicant; and removing the restriction on awarding State or community planning grants more than once every 5 years.

### III. Proposed Rule and Section-by-Section Analysis

FEMA implemented the provisions of BW–12 that affected the HMA grant programs through the HMA Guidance.<sup>19</sup>

<sup>14</sup> 44 CFR 79.4(c)(1).

<sup>15</sup> 44 CFR 79.4(c)(2).

<sup>16</sup> Public Law 108–264, 118 Stat. 722.

<sup>17</sup> 42 U.S.C. 4104c(d). The term “repetitive loss structure” is defined at 42 U.S.C. 4104c(h)(2) (cross-reference to 42 U.S.C. 4121(a)(7)). The term “severe repetitive loss structure” is defined at 42 U.S.C. 4104c(h)(2)(3).

<sup>18</sup> 42 U.S.C. 4104c(d).

<sup>19</sup> While the current HMA Guidance, *supra* note 1, reflects the changes required by BW–12, these changes were first implemented in the Fiscal Year 2013 version of the HMA Guidance. See Fiscal Year 2013 Hazard Mitigation Assistance Unified

FEMA now proposes to update the FMA program regulations (44 CFR parts 78 and 79) to reflect the revisions made by BW–12. This rule proposes to remove part 78 in its entirety, redesignate part 79 as part 77, and revise the FMA regulations which would be located in the new part 77.

FEMA proposes to make the following revisions pursuant to BW–12:

- Remove regulations pertaining to the SRL program;
- revise the cost share provisions to reflect the matching requirements established by BW–12;
- eliminate the cap on FMA funding for States and communities;
- eliminate the limit on in-kind contributions for the non-Federal cost share;
- specify that elevation, relocation or floodproofing of utilities are eligible activities;
- clarify that the required flood mitigation plan may be part of a community’s multi-hazard mitigation plan;
- limit funds for the development or update of mitigation plans to \$50,000 Federal share to any applicant or \$25,000 Federal share to any subapplicant; and
- remove the restriction on awarding State or community planning grants only once every 5 years.

FEMA also proposes revisions to streamline the FMA regulations and clarify current practice. FEMA describes these revisions in detail in this section. FEMA proposes to update terms and references throughout the various HMA-related regulations, including the hazard mitigation assistance and planning regulations in 44 CFR parts 80 (Property Acquisition and Relocation for Open Space), 201 (Mitigation Planning), and 206 subpart N (HMGP).

On December 26, 2013, the Office of Management and Budget (OMB) finalized government-wide guidance entitled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.<sup>20</sup> These standard requirements for Federal awards are codified at 2 CFR part 200. The regulations at 2 CFR part 200 apply to FEMA awards made on or after December 26, 2014, and to awards made under major disaster declarations on or after that date.<sup>21</sup> In this proposed

Guidance, July 12, 2013, Part I.B.1, Programmatic Changes, pp. 4–5, available at [https://www.fema.gov/media-library-data/15463cb34a2267a900bde4774c3f42e4/FINAL\\_Guidance\\_081213\\_508.pdf](https://www.fema.gov/media-library-data/15463cb34a2267a900bde4774c3f42e4/FINAL_Guidance_081213_508.pdf) (last accessed Jan 8, 2020).

<sup>20</sup> 78 FR 78589.

<sup>21</sup> As part of a joint interim final rule effective December 26, 2014, the Department of Homeland

<sup>10</sup> The RFC and SRL programs were authorized by the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Public Law 108–264, 118 Stat. 712. The RFC program was designed to reduce the long-term risk of flood damage to structures insured under the NFIP that have had one or more claim payments for flood damage. RFC funds were used to mitigate structures located within a State or community that were not eligible to receive funding under the FMA program at the time. Under the RFC program, funds could only be awarded if the State and community could not meet the FMA’s cost share requirement, or if the State or community lacked the capacity to manage the activity under the FMA program. The SRL program was a voluntary pilot program designed to reduce or eliminate the long-term risk of flood damage to severe repetitive loss residential structures insured under the NFIP. Under the SRL program, an SRL property was defined as a residential property that is covered under an NFIP flood insurance policy and: (a) That has at least four NFIP claim payments (including building and contents) over \$5,000 each, and the cumulative amount of such claims payments exceeds \$20,000; or (b) For which at least two separate claims payments (building payments only) have been made with the cumulative amount of the building portion of such claims exceeding the market value of the building. At least two of the referenced claims must have occurred within any 10-year period, and must be greater than 10 days apart.

<sup>11</sup> Public Law 108–264, 118 Stat. 721; 44 CFR 79.4(a)(2).

<sup>12</sup> Public Law 108–264, 118 Stat. 716; 44 CFR 79.4(a)(1).

<sup>13</sup> 44 CFR 79.4(b).

rule, FEMA proposes to replace outdated terms and definitions with substantively similar terms and definitions that align with 2 CFR part 200 and the HMA Guidance. These are nonsubstantive revisions intended to simplify definitions and improve consistency among FEMA's HMA programs.

#### A. 44 CFR Part 78, Flood Mitigation Assistance

Part 78 applies to the administration of funds under the FMA program for which the application period opened on or before December 3, 2007. Because all funds appropriated for FMA before December 3, 2007, have been expended, it is unnecessary to retain part 78 and therefore, FEMA proposes to remove part 78 in its entirety.

#### B. 44 CFR Part 79, Flood Mitigation Grants

The regulations governing the current FMA program are at 44 CFR part 79. FEMA proposes to redesignate part 79 as part 77, which is currently reserved, to establish the revised FMA program regulations. FEMA proposes to reserve part 79. Following is a detailed discussion of the proposed revisions to part 79 (proposed to be redesignated as part 77).

##### 1. Part 79 (Proposed Part 77) Authority

FEMA proposes to revise the authority citation for part 79 (proposed part 77) to remove historical authorities relating to FEMA's organization. FEMA proposes to remove the references to the Reorganization Plan No. 3 of 1978, Executive Order 12127, Executive Order 12148, and Executive Order 13286. The Reorganization Plan and Executive Orders 12127 and 12148 established FEMA as an agency in 1979 and established its functions. Executive Order 13286 revised Executive Order 12148 and transferred some of FEMA's authorities to the Department of Homeland Security (DHS). FEMA proposes to remove these cites but retain the citation to the Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, which provided organic authority for FEMA and made it a component agency of DHS. FEMA proposes to retain the citations to the NFIA (42 U.S.C. 4001 *et seq.*; 42 U.S.C. 4104c, 4104d) as they are the main authorities for this part.

Security (of which FEMA is a component) adopted the requirements of 2 CFR part 200 at 2 CFR part 3002. 79 FR 75871 (Dec. 19, 2014).

##### 2. Section 79.1 (Proposed § 77.1)

###### Purpose

FEMA proposes to change the title from "Purpose" to "Purpose and applicability" to reflect the content of the section. FEMA proposes to revise paragraph (a), addressing the purpose of the part, to incorporate language from current paragraph (c) addressing the purpose of the FMA program. Paragraph (c) states that the FMA program is to provide financial assistance to "State and local governments" to reduce the risk of flood damage to NFIP-insured structures. FEMA proposes to replace "local governments" with "communities" because the term "community" is more inclusive of the entities eligible for assistance.<sup>22</sup> FEMA's definition of "community" at 44 CFR 79.2(c) includes Tribes as well as local governments. In addition to States and communities, FEMA proposes to also include Indian Tribal governments in revised paragraph (a). Indian Tribal governments have a unique and direct relationship with the Federal Government and are recognized as distinct sovereign entities.<sup>23</sup> While Indian Tribal governments can assume the responsibilities of the community (as subapplicant or subrecipient, when applying through the State), they can also be direct recipients of FMA funding. See 44 CFR 79.2(c), 79.2(d), 79.3(c)(2), and 79.3(c)(3). That an Indian Tribal government is eligible to apply directly to FEMA for FMA funding is already established in the current program regulations in part 79. See 44 CFR 79.2(d) and 79.3(c)(2). Including Indian Tribal governments in the purpose statement is consistent with the rest of the substantive FMA program regulations in part 79 and gives Indian Tribal governments the level of recognition commensurate with States. FEMA also proposes to remove references to the SRL program in paragraph (a), because BW-12 eliminated the SRL program. FEMA stopped issuing SRL grants in Fiscal Year 2013. FEMA also proposes to remove current paragraph (b), which describes the purpose of the SRL program.

FEMA proposes to add a new paragraph (b) to address the

<sup>22</sup> See 42 U.S.C. 4104c(a) "The Administrator shall carry out a program to provide financial assistance to States and communities." FEMA defines "community" in the current regulations at 44 CFR 79.2(c); the definition includes local governments and Tribes.

<sup>23</sup> See FEMA Tribal Policy, FEMA Policy #305-111-1, Dec. 27, 2016, available at [https://www.fema.gov/media-library-data/1483536222523-e549608aa77ec6cb623fae5d5de82930/FEMA\\_Tribal\\_Policy.pdf](https://www.fema.gov/media-library-data/1483536222523-e549608aa77ec6cb623fae5d5de82930/FEMA_Tribal_Policy.pdf) (last accessed Feb. 13, 2020).

applicability of the part to the administration of funds under the FMA program for which the application period opens on or after the effective date of the rule.

Finally, FEMA proposes to remove paragraph (c), as FEMA has incorporated the language describing the purpose of the FMA program into revised paragraph (a).

##### 3. Section 79.2 (Proposed § 77.2) Definitions

FEMA proposes to revise the definitions section to reflect changes required by BW-12. FEMA proposes to revise the definition of "community" to reflect the definition provided in BW-12.<sup>24</sup> This change is intended to mirror the statutory definition and is not a substantive change to the current definition at 44 CFR 79.2(c).

FEMA proposes to replace the definition of "severe repetitive loss properties" with the definition of "severe repetitive loss structure" from BW-12. The definition of "severe repetitive loss properties" at current 44 CFR 79.2(h) reflects the pre-BW-12 definition that was included in the statutory section authorizing the SRL pilot program.<sup>25</sup> BW-12 removed the statutory section for the SRL pilot program, including the definition of "severe repetitive loss property," and established a definition for "severe repetitive loss structure" that is applicable to the FMA program.<sup>26</sup> The BW-12 definition states that a severe repetitive loss structure is one for which four or more separate claims payments have been made with the amount of each claim exceeding \$5,000, and with the cumulative amount of such claims payments exceeding \$20,000. FEMA proposes to retain the provision providing that the amount of each claim includes building and contents payments. This is consistent with FEMA's prior interpretation of the definition of "severe repetitive loss property" as well as the HMA Guidance.<sup>27</sup> The BW-12 definition also states that in the alternative, a severe repetitive loss structure is one for which at least two separate flood insurance claims payments have been made, with the cumulative amount of such claims exceeding the value of the insured structure. FEMA proposes to retain the statement that that the claims payments include building payments only because weighing the value of the insured

<sup>24</sup> See 42 U.S.C. 4104c(h)(1).

<sup>25</sup> See Public Law 108-264, 118 Stat. 714.

<sup>26</sup> 42 U.S.C. 4104c(h)(3).

<sup>27</sup> See 44 CFR 79.2(h)(1); HMA Guidance, Part VIII.C.1, Eligible Properties, p. 116.

structure against the amount of building payments is a more direct comparison than weighing the value of the insured structure against the amount of both building *and* contents payments. This is consistent with FEMA's prior interpretation of the definition of "severe repetitive loss property" as well as the HMA Guidance.<sup>28</sup>

FEMA proposes to add a definition for "repetitive loss structure" to reflect the definition provided in BW-12. BW-12 established a distinction between repetitive loss structures and severe repetitive loss structures for purposes of the FMA program (which allows FEMA to better target funding based on a property's risk of damage). BW-12 defined the term "repetitive loss structure" to mean "a structure covered by a contract for flood insurance that— (A) has incurred flood-related damage on 2 occasions, in which the cost of repair, on the average, equaled or exceeded 25 percent of the value of the structure at the time of each such flood event; and (B) at the time of the second incidence of flood-related damage, the contract for flood insurance contains increased cost of compliance coverage." FEMA's proposed definition of "repetitive loss structure" parrots the statutory definition. *See* 42 U.S.C. 4121(a)(7) (cross referenced in 42 U.S.C. 4104c(h)(2)).

FEMA proposes to remove the definitions of "market value" and "multifamily property," currently found at 44 CFR 79.2(f) and (g), respectively, because the statutory definitions of "severe repetitive loss structure" and "repetitive loss structure" no longer include these terms and it is therefore not necessary to use or define these terms in the regulations.

In addition to the revisions to the definitions made pursuant to BW-12, FEMA proposes to add terms and to replace outdated terms and definitions with substantively similar terms and definitions that better align with 2 CFR part 200 and the HMA Guidance. These are nonsubstantive revisions intended to simplify definitions and improve consistency among FEMA's HMA programs. FEMA proposes to add definitions for "closeout," "Federal award," "management costs," "pass-through entity," and "State."

FEMA proposes to add a definition for "closeout" which is nearly identical to the definition in 2 CFR 200.16. FEMA proposes to add this definition for ease of the reader because the term is used in proposed part 77, and also to establish that it has the same meaning

as in the grants management regulations at 2 CFR part 200. This is a nonsubstantive change that reflects current practice.

FEMA proposes to add a definition for "Federal award" to reflect the definition in 2 CFR 200.38(a)(1),<sup>29</sup> with two exceptions. First, FEMA proposes to use the terms "recipient" and "subrecipient" instead of the term "non-Federal entity." The term "non-Federal entity," as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under the FMA program. While FMA recipients and subrecipients are "non-Federal entities" under 2 CFR part 200, FEMA proposes to tailor the definitions in the FMA regulations so that they are program-specific. Second, FEMA proposes to clarify that the terms "award" and "grant" may also be used to describe a "Federal award" under the FMA program regulations. This is a nonsubstantive change to clarify that the terms used throughout proposed part 77 are interchangeable.

FEMA proposes to add a definition for "management costs." "Management costs" are referenced throughout the FMA program regulations, but this term is not currently defined in part 79. FEMA proposes to define "management costs" consistent with existing FEMA regulations<sup>30</sup> and the HMA Guidance.<sup>31</sup>

FEMA proposes to add a definition for "pass-through entity" which is substantively the same as the definition in 2 CFR 200.74, with one exception. FEMA proposes to use the terms "recipient" and "subrecipient" instead of the term "non-Federal entity." The term "non-Federal entity," as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under the FMA program. While FMA recipients and subrecipients are "non-Federal entities" under 2 CFR part 200, FEMA proposes to tailor the definitions in the FMA regulations so that they are program-specific. The addition of this definition is for ease of the reader since the term is used in other definitions in proposed part 77.

FEMA proposes to add a definition for "State," which is consistent with 2 CFR 200.90 as well as FEMA's regulations for mitigation planning and HMGP.<sup>32</sup>

<sup>29</sup> In 2 CFR 200.38(a)(1), "Federal award" means the Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity.

<sup>30</sup> *See* 44 CFR 207.2.

<sup>31</sup> *See* HMA Guidance, Part III, E.1.5, Management Costs, p. 41.

<sup>32</sup> *See* the definition for "State" in the mitigation planning regulations at 44 CFR 201.2 and the definitions section of part 206 (§ 206.2(a)(22)) which applies to the HMGP program regulations at

Although not defined in the authorizing statute for the HMA programs, for purposes of these programs, and consistent with 2 CFR 200.90, FEMA considers a State to be any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

FEMA proposes to replace the definitions "grantee," "subgrant," and "subgrantee," with definitions for "recipient," "subaward," and "subrecipient," respectively, to better align with the terms and definitions used in 2 CFR part 200 and the HMA Guidance. The proposed definition of "recipient" is similar to the definition at 2 CFR 200.86; however, FEMA proposes to use the terms "State or Indian Tribal government" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to the FMA program. FEMA also proposes to add that the recipient may be a pass-through entity to clarify the relationship between the terms "recipient" and "pass-through entity."

The proposed definition of "subaward" is the same as the definition at 2 CFR 200.92.

The proposed definition of "subrecipient" is similar to the definition at 2 CFR 200.93; however, FEMA proposes to use the terms "State agency, community, or Indian Tribal government" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to the FMA program.

FEMA proposes to revise the definitions of "applicant" and "subapplicant." In the definition of "applicant," FEMA proposes to replace the term "grant" with the term "Federal award," which FEMA proposes to define in proposed § 77.2(e). This is a nonsubstantive change to use the newly defined term "Federal award" throughout the definitions. FEMA proposes to remove the provision stating that the applicant will be accountable for the use of the funds because it only serves as a vague reference to other applicable substantive requirements and is not necessary to include in the definition of "applicant."<sup>33</sup> FEMA also proposes to add that once funds have been awarded, the applicant becomes the recipient and may also be a pass-through entity. This is a nonsubstantive addition to clarify the relationship

part 206 subpart N. *See also*, HMA Guidance, Part III.A, Eligible Applicants, p. 25.

<sup>33</sup> *See, e.g.*, 44 CFR 79.9, Grant administration, and 2 CFR 200.300–200.309, Standards for Financial and Program Management.

<sup>28</sup> *See* 44 CFR 79.2(h)(2); HMA Guidance, Part VIII.C.1, Eligible Properties, p. 116.

between the terms “applicant,” “recipient,” and “pass-through entity” for the ease of the reader. FEMA proposes to revise the definition of “subapplicant” by removing the reference to the SRL program which is no longer authorized pursuant to BW–12. FEMA proposes to clarify that applications submitted by subapplicants are *subapplications*. These are nonsubstantive revisions intended to reflect FEMA’s current use of these terms.

Finally, FEMA makes no changes to the definitions of “Indian Tribal government,” “Administrator,” and “Regional Administrator.”

#### 4. Section 79.3 (Proposed § 77.3) Responsibilities

In proposed § 77.3, which covers responsibilities of FEMA, the recipient, and subrecipients, FEMA proposes to remove references to the SRL program, to replace terms to conform to the revised definitions in proposed § 77.2, to remove the paragraphs addressing Indian Tribal government responsibilities (as they are covered under the recipient responsibilities), and to add monitoring and closeout provisions.

Paragraph (a) addresses FEMA’s responsibilities under the FMA program. FEMA proposes to remove (a)(2), (a)(7), and (a)(8), which pertain to the former SRL program and are no longer necessary. FEMA proposes to add two paragraphs, (a)(6) and (7), regarding monitoring and closeout requirements. Consistent with 2 CFR 200.328 and 200.343, and the HMA Guidance,<sup>34</sup> FEMA proposes to add the following FEMA responsibilities: (1) Monitoring implementation of awards through quarterly reports; and (2) reviewing all closeout documentation for compliance and sending the recipient a request for additional supporting documentation, if needed.<sup>35</sup> These are nonsubstantive revisions intended to reflect and clarify existing requirements; they are already a part of the current grants process.

Paragraph (b) addresses the responsibilities of the State. However, the paragraph actually addresses the responsibilities of all recipients, including territories and Indian Tribal governments.<sup>36</sup> Therefore, FEMA proposes to replace “State” with “recipient” in the heading and

introductory paragraph of (b). As proposed in this rulemaking, the term “State” includes territories (see proposed § 77.2(1)), and the term “recipient” includes States and Indian Tribal governments (see proposed § 77.2(i)). This change is clarifying and is not substantive.

The introductory paragraph of (b) states that the State will serve as the applicant and grantee through a single point of contact for the FMA and SRL programs. FEMA proposes to remove this sentence because it relates to the former FMA program and the eliminated SRL program, and it is no longer necessary to have a single point of contact as there are no longer two programs being addressed in this part.

Paragraph (b)(2) states the recipient has responsibility to review and submit local mitigation plans to the FEMA Regional Administrator for final review and approval. FEMA proposes to remove this paragraph in its entirety. The requirement to submit plans for review and approval is now located in 44 CFR part 201 (local mitigation plans are specifically covered in § 201.6). FEMA prefers to refer to part 201 to avoid confusion. Repeating the same requirement in part 79 (proposed part 77) is duplicative, can cause confusion as it might appear to be a separate requirement, and is administratively burdensome if FEMA needs to make any changes, as it would have to change them in two different places in the regulations. Finally, submitting plans for review and approval is not an FMA grant requirement; the FMA requirement is to have an approved plan, which is already captured in current § 79.3(b)(1) (proposed § 77.3(b)(1)).

FEMA proposes to replace the term “subgrant(s)” with “subaward(s)” in paragraphs (b)(3) (proposed (b)(2)), (b)(4) (proposed (b)(3)), and (b)(5) (proposed (b)(4)), to reflect the terminology used in 2 CFR part 200. This is a nonsubstantive change and is already used in the HMA Guidance.

FEMA proposes to add two new paragraphs, (b)(5) and (6), regarding monitoring and closeout requirements. Consistent with 2 CFR 200.328 and 200.343, and the HMA Guidance,<sup>37</sup> FEMA proposes to add the following recipient responsibilities: (1) Monitor and evaluate the progress of the mitigation activity in accordance with the approved original scope of work and budget through quarterly reports; and (2) closeout the subaward in accordance with 2 CFR 200.343 and 200.344, and

applicable FEMA guidance. These are nonsubstantive revisions intended to reflect and clarify existing requirements; they are already a part of the current grants process.<sup>38</sup>

Paragraph (c) addresses the responsibilities of Indian Tribal governments acting as recipients. As these responsibilities would now be covered under paragraph (b), FEMA proposes to remove paragraph (c). Current paragraph (c)(1) states that an Indian Tribal government must have a FEMA approved Tribal mitigation plan in accordance with § 201.7. Proposed paragraph (b)(1) states this requirement generally, to cover both States and Indian Tribal governments, as proposed paragraph (b) would now cover all recipients (States or Indian Tribal governments) instead of just States. Current paragraph (c)(2) states that a federally-recognized Indian Tribal government as defined by the Federally Recognized Indian Tribe List Act of 1994, applying directly to FEMA for mitigation grant funding will assume the responsibilities of the State as the term is used in part 79, as applicant or grantee, described in current paragraphs (b)(3) through (b)(6) (*i.e.*, the responsibilities of the State). This provision is now captured in proposed paragraph (b), which applies to all recipients, including Indian Tribal governments, since Indian Tribal governments are included in the definition of “recipient” in proposed § 77.2(i). Current paragraph (c)(3) states that a federally-recognized Indian Tribal government as defined by the Federally Recognized Indian Tribe list Act of 1994, applying through the State, will assume the responsibilities of the community (as the subapplicant or subgrantee) described in current paragraphs (d)(2) through (4). This provision would be captured in proposed paragraph (c), addressing the responsibilities of subrecipients (which can include Indian Tribal governments), as described below.

Current paragraph (d) addresses the responsibilities of the community. FEMA proposes to redesignate paragraph (d) as paragraph (c) and to change the paragraph heading from “Community” to “Subrecipient.” The responsibilities in this paragraph apply not just to communities, but to any entity that qualifies as a subrecipient, *i.e.*, a State agency, community, or Indian Tribal government (see proposed definition of “subrecipient” in

<sup>34</sup> See HMA Guidance, Part II.M, Project Monitoring, and Part II.N, Closeout, pp. 23–24.

<sup>35</sup> These requirements are covered by OMB Information Collection 1660–0072, “Mitigation Grant Programs/e-grants”. This collection is approved by OMB until October 31, 2021.

<sup>36</sup> See HMA Guidance, Part I.C, Roles and Responsibilities, p. 5.

<sup>37</sup> See HMA Guidance, Part II.M, Project Monitoring, and Part II.N, Closeout, pp. 23–24.

<sup>38</sup> These requirements are covered by OMB Information Collection 1660–0072, “Mitigation Grant Programs/e-grants”. This collection is approved by OMB until October 31, 2021.

§ 77.2(o). This is a nonsubstantive change for clarification purposes only.

FEMA proposes to replace “community” with “subrecipient” in the introductory sentence as well, and to add that this can mean subapplicant because some of these responsibilities occur before the award. This is also a nonsubstantive change for clarification purposes only.

FEMA proposes to remove paragraph (d)(1), stating that the community must prepare and submit a FEMA approved local mitigation plan, consistent with 44 CFR part 201. The requirement to prepare and submit plans for review and approval is now located in 44 CFR part 201 (local mitigation plans are specifically covered in § 201.6). FEMA prefers to refer to part 201 to avoid confusion. Repeating the same requirement in part 79 (proposed part 77) is duplicative, can cause confusion as it might appear to be a separate requirement, and is administratively burdensome if FEMA needs to make any changes, as it would have to change them in two different places in the regulations. Finally, submitting plans for review and approval is not an FMA grant requirement; the requirement is to have an approved plan in order to be eligible for FMA project grants, which is already captured in current § 79.6(b)(2) (proposed § 77.6(b)(2)).

Current paragraph (d)(2) states that the community (proposed: subrecipient) must complete and submit subgrant applications to the State POC for FMA planning, project and management cost subgrants, and for SRL project and management costs subgrants. FEMA proposes to replace “subgrant” with “subaward,” consistent with the terminology in 2 CFR part 200. FEMA proposes to replace “State POC” with “recipient” as “recipient” captures the universe of entities to which a subrecipient would submit an application (*i.e.*, in addition to a State, the recipient can be a territory or Indian Tribal government). FEMA proposes to replace the phrase “FMA planning, project and management cost subgrants” with “FMA planning and project subawards” because FEMA proposes to replace the term “subgrant” with the term “subaward,” and because “management costs” are not a separate type of grant. Rather, “management costs” are defined under proposed § 77.2(g) and eligible as described under proposed § 77.7(a)(1). FEMA proposes to remove the clause pertaining to SRL subgrants, as the SRL program is no longer authorized under the NFIA. FEMA proposes to redesignate current paragraph (d)(2) as paragraph (c)(1). The proposed changes to paragraph (d)(2)

are nonsubstantive to clarify and conform the regulations with the changed definitions described above.

Current paragraph (d)(3) states that the community (proposed: subrecipient) must implement all approved subgrants; notifying each holder of a record interest in severe repetitive loss properties when an offer of mitigation assistance has been made under the SRL program, and when such offer has been refused. FEMA proposes to revise this provision to simply state that the subrecipient must “implement all approved subawards.” As the SRL program is no longer authorized under the NFIA, the clause pertaining to SRL assistance is not necessary. However, it is a current responsibility of all subrecipients to implement any approved subawards, so FEMA proposes to retain this portion of current paragraph (d)(3). FEMA proposes to redesignate current paragraph (d)(3) as paragraph (c)(2). These are nonsubstantive clarifying revisions.

FEMA proposes to add two paragraphs to address the monitoring and closeout requirements that are currently part of the grants process. Consistent with 2 CFR part 200 and the HMA Guidance, FEMA proposes to add paragraph (c)(3), stating that the subrecipient must monitor and evaluate the progress of the mitigation activity in accordance with the approved original scope of work and budget through quarterly reports, and paragraph (c)(5), stating that the subrecipient must closeout the subaward in accordance with 2 CFR 200.343 and 200.344, and the HMA Guidance.<sup>39</sup> These are nonsubstantive revisions reflecting existing requirements.<sup>40</sup>

Current paragraph (d)(4) states that the community must comply with program requirements under this part, grant management requirements under 2 CFR parts 200 and 3002, the grant agreement articles, and other applicable Federal, State, Tribal and local laws and regulations. FEMA proposes to retain this language and redesignate current paragraph (d)(4) as paragraph (c)(4).

##### 5. Section 79.4 (Proposed § 77.4) Availability of Funding

Section 79.4 addresses the method of funding under the SRL and FMA programs prior to BW–12. As explained in the Background section of this preamble, prior to BW–12, FMA

program funding was allocated to States each fiscal year based upon the number of NFIP policies within the State, the number of repetitive loss structures within the State, and other criteria the Administrator determined to be in the best interests of the NFIF.

Paragraph (a) addresses automatic allocations. FEMA proposes to remove paragraph (a)(1), which addresses the SRL program, as that program is no longer authorized under the NFIA. Paragraph (a)(2) describes how the automatic allocation process worked for the FMA program prior to BW–12. Pursuant to the introductory language of current paragraph (a)(2), for the amount made available for the FMA program, the Administrator allocates the available funds each fiscal year. Funds are distributed based upon the number of NFIP policies, repetitive loss structures, and any other such criteria the Administrator determines are in the best interest of the NFIF. FEMA proposes to revise the introductory language of current paragraph (a)(2) to state that the Administrator will allocate funds based upon criteria established for each application period rather than “each fiscal year,” because this is more accurate. Although each application period is usually tied to the specific fiscal year, referring to “each application period” would allow flexibility in the event that a particular application period did not line up exactly with a particular fiscal year (for example, if the appropriations process delayed the announcement of an application period beyond the normal schedule). FEMA also proposes to add “severe repetitive loss structures” to the list of criteria because under the NFIA, as amended by BW–12, these structures are defined separately and subject to different cost share provisions.<sup>41</sup> FEMA proposes to renumber revised paragraph (a)(2) as § 77.4(a)(1).

Current paragraph (a)(2)(i) states that a maximum of 7.5 percent of the amount made available in any fiscal year may be allocated for FMA planning grants nationally, that a planning grant will not be awarded to a State or community more than once every 5 years, and an individual planning grant will not exceed \$150,000 to any State agency applicant, or \$50,000 to any community subapplicant. It states that the total planning grant made in any fiscal year to any State, including all communities located in the State, will not exceed \$300,000. FEMA proposes to redesignate this paragraph as paragraph (a)(2). FEMA also proposes to revise this paragraph because BW–12 revised the

<sup>39</sup> See 2 CFR 200.328, 200.343; HMA Guidance, Part II. M, Project Monitoring, and Part II.N, Closeout, pp. 23–24.

<sup>40</sup> These requirements are covered by OMB Information Collection 1660–0072, “Mitigation Grant Programs/e-grants.” This collection is approved by OMB until October 31, 2021.

<sup>41</sup> See 42 U.S.C. 4104c(d)(1) and (h)(3).

\$150,000 and \$50,000 caps, and explicitly removed the 7.5 percent cap, the 5-year limit, and the \$300,000 total cap. Under the current statutory authority, the amount of an individual planning grant under the FMA program shall not exceed \$50,000 for any mitigation plan of a State (or, a “recipient” as defined in this proposed rule) or \$25,000 for any mitigation plan of a community (or, a “subrecipient” as defined in this proposed rule).<sup>42</sup> FEMA proposes to reflect these revised caps in proposed § 77.4(a)(2). This removal is a nonsubstantive change to the FMA program as FEMA has already implemented this provision of BW–12.<sup>43</sup>

Current paragraph (a)(2)(ii) states that the total amount of FMA project grant funds provided during any 5-year period will not exceed \$10,000,000 to any State agency(s) or \$3,300,000 to any community. It states that the total amount of project grant funds provided to any State, including all communities located in the State will not exceed \$20,000,000 during any 5-year period. The Administrator may waive the limits of this paragraph for any 5-year period when a major disaster or emergency is declared pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act for flood conditions. FEMA proposes to remove this paragraph because BW–12 removed these caps and time period restrictions. Under the current statutory authority, FMA project grants must meet the eligibility requirements in 42 U.S.C. 4104c(c), are subject to the availability of funds, and may be subject to additional restrictions as Congress may establish in the annual appropriation for the FMA program. This removal is a nonsubstantive change to the FMA program as FEMA has already implemented this provision of BW–12.<sup>44</sup>

Paragraph (b) addresses redistribution. It states that funds allocated to States that choose not to participate in either the FMA or SRL program in any given year will be reallocated to participating States and Indian Tribal applicants. It states that any funds allocated to a State, and the communities within the State, which have not been obligated within the timeframes established by the Administrator shall be redistributed by the Administrator to other States and communities to carry out eligible

activities in accordance with this part. FEMA proposes to remove this paragraph because BW–12 eliminated automatic allocations. As there are no automatic allocations, there is no need for a provision regarding re-allocations. Under the current program post-BW–12, FEMA considers all eligible subapplications and selects subapplications against agency priorities identified in annual appropriations and the NOFO.<sup>45</sup>

Current paragraph (c) addresses the cost share provisions that were applicable prior to BW–12. Under current paragraph (c)(1), FEMA may provide up to 75 percent of the eligible cost of activities for grants approved for funding. Under current paragraph (c)(2), FEMA may contribute up to 90 percent of the cost of the eligible activities for severe repetitive loss properties if the applicant has an approved mitigation plan meeting the repetitive loss requirements identified in § 201.4 or § 201.7.

FEMA proposes to redesignate current paragraph (c) as paragraph (b) and to replace current paragraphs (c)(1) and (2) with proposed paragraphs (b)(1) through (3) to reflect the new cost share structure under BW–12. FEMA proposes to add a new paragraph (b)(1) to state that for each severe repetitive loss structure, FEMA may contribute up to 100 percent of all eligible costs if the activities are technically feasible and cost-effective, or, up to the amount of the expected savings to the NFIP for acquisition or relocation activities.<sup>46</sup> FEMA is not retaining the requirement that severe repetitive loss properties have an approved mitigation plan meeting the repetitive loss requirements identified in part 201 because BW–12 removed this requirement.<sup>47</sup> Note that all applicants must still have a FEMA-approved mitigation plan that addresses flood losses to structures covered by the NFIP, but the mitigation planning requirements are no longer tied to specific cost shares.<sup>48</sup> FEMA proposes to clarify the mitigation planning requirements in proposed § 77.6(b), discussed elsewhere in this preamble.

FEMA proposes to add a new paragraph (b)(2) to state that for repetitive loss structures, FEMA may contribute up to 90 percent of eligible

costs.<sup>49</sup> Prior to BW–12, repetitive loss structures received a 75 percent cost share.

FEMA proposes to add a new paragraph (b)(3) to state that for all other mitigation activities, FEMA may contribute up to 75 percent of all eligible costs.<sup>50</sup> FEMA has implemented this new cost structure in the HMA Guidance.<sup>51</sup>

Some projects include different types of structures. FEMA proposes to add a new paragraph (b)(4) stating that for projects that contain a combination of severe repetitive loss, repetitive loss, and/or insured structures, FEMA will calculate the cost share as appropriate for each type of structure submitted in the project subapplication, meaning that FEMA will determine the cost share based on the type of structure, even if the structure is combined with other types in the same project. FEMA is adding this provision to make clear that a structure is not eligible to receive an increased Federal cost share just because it is included in the same project as structures that are eligible to receive an increased Federal cost share. For example, the cost of mitigating a repetitive loss structure is still subject to the 90 percent Federal/10 percent non-Federal cost share requirement, even if it is included in a project that also mitigates severe repetitive loss structures. This is not a substantive change and reflects FEMA’s current practice. FEMA proposes to add this provision to ensure that potential subrecipients do not mistakenly expect to receive increased cost shares for which they are ineligible.

Current paragraph (c)(3) states that for the FMA program only, of the non-Federal contribution, not more than one half can be provided from in-kind contributions. FEMA proposes to remove this paragraph because BW–12 eliminated the limit on the amount of in-kind contributions that may make up the non-Federal portion of an FMA award.<sup>52</sup>

BW–12 includes a provision stating that for any application for a grant for which FEMA fails to make a grant award within 5 years of the date of application, the grant application is considered to be denied and any funding amounts allocated for such grant application will remain available

<sup>45</sup> See HMA Guidance, Part IV.H.1, Required Components, p. 59.

<sup>46</sup> 42 U.S.C. 4104c(c)(2) and (d)(1); implemented via HMA Guidance at section VIII.C.3, Cost Sharing, p. 117.

<sup>47</sup> See Public Law 112–141, section 100225(a)(1), (9); 42 U.S.C. 4104c(d).

<sup>48</sup> See 42 U.S.C. 4104c(b).

<sup>49</sup> 42 U.S.C. 4104c(d)(2); implemented via HMA Guidance at section VIII.C.3, Cost Sharing, p. 118.

<sup>50</sup> 42 U.S.C. 4104c(d)(3); implemented via HMA Guidance at section VIII.C.3, Cost Sharing, p. 118.

<sup>51</sup> See HMA Guidance, Part VIII. C.3, Cost Sharing, pp. 117–18.

<sup>52</sup> See Public Law 112–141, section 100225(a); 42 U.S.C. 4104c(d).

<sup>42</sup> 42 U.S.C. 4104c(c)(3)(F).

<sup>43</sup> See HMA Guidance, Part IV.E.3, FMA Funding Restrictions, p. 54.

<sup>44</sup> See HMA Guidance, Part VIII.C, Additional Program Guidance: Flood Mitigation Assistance Program, pp. 116–18.



for other FMA grants.<sup>53</sup> FEMA proposes to add a new paragraph (c) to implement this provision. FEMA notes that while the statute uses the term “application,” FEMA is interpreting this to mean subapplications as well. While FEMA makes awards to the applicant, it is the applicant who awards funds to the subapplicant. Therefore FEMA is applying the 5-year requirement to applicants to ensure they in turn are timely in making the subawards to their subapplicants. Otherwise, the intent of the statute would not be fully realized if FEMA makes the award within 5 years, but the applicant does not in turn make a timely award to the subapplicant. FEMA interprets “date of application” to mean date of submission, meaning the date the applicant/subapplicant submits the application to FEMA. This is to avoid any potential confusion about the date that marks the beginning of the 5-year period. FEMA has implemented this provision in the HMA Guidance.<sup>54</sup>

#### 6. Section 79.5 (Proposed § 77.5) Application Process

Current § 79.5 addresses the application process. Paragraph (a) is entitled “Applicant or grantee.” FEMA proposes to remove the reference to grantee so that the title of paragraph (a) would just be “Applicant.” While 2 CFR part 200 uses recipient rather than grantee, this section addresses the point in the grants process where money has not yet been awarded, so the appropriate term for this paragraph is applicant rather than recipient. Current paragraph (a)(1) states that States will be notified of the amount allocated to them for the SRL and FMA programs each fiscal year, along with the application timeframes. As discussed above, automatic allocations are no longer used under the FMA program, and the SRL program is no longer authorized. Further, FEMA prefers to use “applicant” rather than State, as applicant captures the full universe of entities who may be an applicant (*i.e.*, States (including territories) and Indian Tribal governments).<sup>55</sup> Therefore FEMA proposes to revise paragraph (a)(1) to state that applicants will be notified of the availability of funding for the FMA program pursuant to 2 CFR 200.202 and 200.203. Section 200.202 requires agencies to provide public notice of grant fund availability, and § 200.203 lists the requirements surrounding these notices (including the information they

must contain). As discussed above, FEMA publishes a NOFO when funds become available. The NOFO includes the application timeframes, and therefore FEMA did not retain in paragraph (a)(1) the specific requirement to provide application timeframes.

Paragraph (a)(2) states that the State is responsible for soliciting applications from eligible communities, or subapplicants, and for reviewing and prioritizing applications prior to forwarding them to FEMA for review and award. FEMA proposes to replace “State” with “applicant” to cover the entire universe of potential applicants (States (including territories) and Indian Tribal governments).<sup>56</sup>

Paragraph (a)(3) states that participation in these flood mitigation grant programs is voluntary, and States may elect not to participate in either the SRL or FMA program in any fiscal year without compromising their eligibility in future years. FEMA proposes to remove this paragraph because it was relevant pre-BW-12 when the programs were allocation based and each eligible State received an annual allocation. While the current FMA program is voluntary, this is not necessary to repeat in the regulations relating to the application process because the voluntary nature of the program is established in the statute and made clear in § 79.6 (proposed § 77.6), each annual NOFO, and the HMA Guidance.<sup>57</sup>

Paragraph (a)(4) states that Indian Tribal governments interested in applying directly to FEMA for either the FMA or SRL program grants should contact the appropriate FEMA Regional Administrator for application information. FEMA proposes to remove this paragraph because proposed paragraphs (a)(1) and (2) would apply to Indian Tribal government applicants and eliminate the need to address these applicants in a separate paragraph.

Paragraph (b) is entitled “Subapplicant or subgrantee.” FEMA proposes to remove the term “subgrantee” because the paragraph applies to subapplicants before they become subgrantees (proposed “subrecipients”), and thus it is only necessary to include “subapplicant” in the paragraph title. No substantive change is intended. The first sentence states that participation in the SRL and the FMA program is voluntary, and communities may elect not to apply.

FEMA proposes to remove this sentence because it was relevant pre-BW-12 when the programs were allocation based and each eligible State received an annual allocation. While the current FMA program is voluntary, this is not necessary to repeat in the regulations relating to the application process because the voluntary nature of the program is established in the statute and made clear in § 79.6 (proposed § 77.6), each annual NOFO, and the HMA Guidance.<sup>58</sup>

The second sentence states that communities or other subapplicants who choose to apply must develop applications within the timeframes and requirements established by FEMA and must submit applications to the State. FEMA proposes to replace “State” with “applicant” for reasons discussed above, and proposes to replace “applications” with “subapplications,” which is the proper terminology. Subapplicants submit subapplications, while applicants submit applications. This is not a substantive change.

#### 7. Section 79.6 (Proposed § 77.6) Eligibility

##### i. Paragraph (a) Eligible Applicants and Subapplicants

FEMA proposes to change the heading of paragraph (a) from “Eligible applicants and subapplicants” to “NFIP requirements” to better reflect the provisions of this paragraph.

Paragraph (a)(1) states that States, Indian Tribal governments, and communities participating in the NFIP may apply for planning and project grants and associated management costs. FEMA proposes to revise this paragraph to say that States, Indian Tribal governments, and communities must be participating in the NFIP and may not be suspended or withdrawn under the program. FEMA proposes to omit “planning and project grants and associated management costs” from this paragraph because eligible activities are covered in paragraph (c) and need not be listed here as well. FEMA also proposes to incorporate into paragraph (a)(1) the eligibility restriction for communities that are suspended or withdrawn under the NFIP. This requirement is currently listed in paragraph (a)(3), which FEMA proposes to remove. This is a nonsubstantive revision intended to incorporate the relevant NFIP participation requirements into a simplified paragraph (a)(1).

Paragraph (2) states that States, Indian Tribal governments, and communities

<sup>53</sup> See 42 U.S.C. 4104c(g).

<sup>54</sup> See HMA Guidance, Part VIII.C.6, Failure to Make Federal Award within 5 Years, p. 118.

<sup>55</sup> See proposed § 77.2(b).

<sup>56</sup> *Id.*

<sup>57</sup> See 42 U.S.C. 4104c(a); 44 CFR 79.6; HMA Guidance, Part II, Frontloading HMA Program Eligibility Requirements, p. 13.

<sup>58</sup> *Id.*

participating in the NFIP may apply for SRL project grants and associated management costs. FEMA proposes to remove this paragraph because the SRL program is no longer authorized under the NFIA.

Paragraph (3) states that communities withdrawn, suspended, or not participating under part 60 (Criteria for Land Management and Use) of the NFIP are not eligible for either the FMA or SRL programs. FEMA proposes to remove this paragraph because the SRL program was eliminated by BW-12, and the NFIP participation requirement for the FMA program is already covered under proposed § 77.6(a)(1). While paragraph (3) specifically references part 60, FEMA proposes to omit the reference to part 60 in proposed paragraph (a)(1) because it is unnecessary. The reference to part 60 effectively means communities that are participating in the NFIP and who are not suspended or withdrawn *under the program*. FEMA intends proposed paragraph (a)(1) to have the same meaning, but proposes to reference the NFIP generally so that the meaning remains clear even if the regulations at part 60 are revised or renumbered.

While current part 79 addresses NFIP requirements in terms of applicant and subapplicant eligibility, it does not address NFIP requirements specific to property eligibility. FEMA proposes to add a new paragraph (a)(2) to clarify that, for projects that impact individual structures, an NFIP policy for the structure must be in effect prior to the opening of the application period and be maintained for the life of the structure. This is consistent with the HMA Guidance, which explains that properties must be NFIP-insured at the time of the application submittal and prior to the period of availability or application start date and be maintained for the life of the structure.<sup>59</sup> In the absence of such a requirement, a property owner could obtain an NFIP policy immediately before receiving an FMA award and drop the policy after taking advantage of NFIF funds. The establishment of a clear and measurable eligibility requirement will help ensure that FMA funding is awarded to policy holders who consistently maintain coverage for eligible structures. This requirement is consistent with the NFIA's statutory mandate to use funds for activities designed to reduce the risk of flood damage to structures covered under contracts for flood insurance,<sup>60</sup>

<sup>59</sup> See HMA Guidance, Part VIII.C.1, Eligible Properties, p. 116.

<sup>60</sup> See 42 U.S.C. 4104c(a).

and is intended to support good stewardship of NFIF funds.

#### ii. Paragraph (b) Plan Requirement

FEMA proposes to revise paragraph (b), *Plan requirement*, to remove the reference to the SRL program and to clarify current mitigation planning requirements consistent with BW-12. To be eligible for FMA awards, applicants and subapplicants must have a FEMA-approved mitigation plan that describes the mitigation activities to be carried out with FMA awards and provides for the reduction of flood losses to structures covered under the NFIP.<sup>61</sup>

Paragraph (1) states that States must have an approved mitigation plan meeting the requirements of 44 CFR 201.4 or 201.5 in order to apply for grants through the FMA or SRL programs. FEMA proposes to remove the reference to 201.5 as this section addresses enhanced State mitigation plans which are not necessary for eligibility. FEMA also proposes to revise this sentence to clarify that the plan must be approved by FEMA. While it is implied in part 201 that the plan must be approved by FEMA, it is not explicit, so FEMA proposes to add this clarification to avoid any potential confusion. This is not a substantive change and is intended only to improve clarity and consistency with part 201.<sup>62</sup> FEMA also proposes to add language specifying that the FEMA-approved mitigation plan “provides for reduction of flood losses to structures for which NFIP coverage is available” to make the language more consistent with the current statutory requirement at 42 U.S.C. 4104c(b). FEMA proposes to remove the language “in order to apply for grants through the FMA or SRL programs,” first because the SRL is no longer authorized, and second, even though FMA is still an authorized program, it is not necessary because the regulation already makes it clear that a plan is required.

The second sentence of paragraph (1) states that Indian Tribal governments must have an approved plan meeting the requirements of 44 CFR 201.7 at the time of application. As with States, FEMA proposes to revise this provision to clarify that the plan must be approved by FEMA. While it is implied in part 201 that the plan must be approved by FEMA, it is not explicit, so FEMA proposes to add this clarification to avoid any potential confusion. FEMA proposes to add “mitigation” before “plan” for the sake of clarity. As with

<sup>61</sup> See 42 U.S.C. 4104c(b).

<sup>62</sup> See 44 CFR 201.3(b).

State mitigation plans, FEMA proposes to add language specifying that the FEMA-approved mitigation plan “provides for reduction of flood losses to structures for which NFIP coverage is available” to make the language more consistent with the current statutory requirement at 42 U.S.C. 4104c(b). Finally, FEMA proposes to remove the language “at the time of application” and address this requirement in a separate sentence as described below.

Applicants must have a FEMA-approved mitigation plan at the time of application and award. This comports with the NFIA, which requires applicants to have a FEMA-approved mitigation plan as a condition of eligibility for FMA awards.<sup>63</sup> Currently, the regulation is silent as to this requirement for States. For Indian Tribal governments, the current regulation states only “at the time of application.” FEMA proposes to add a sentence stating that both States and Indian Tribal governments must have a FEMA-approved mitigation plan at the time of application and award. This is a nonsubstantive change intended for clarification purposes only.<sup>64</sup>

Paragraph (2) states that in order to be eligible for FMA and SRL grants, subapplicants must have an approved mitigation plan at the time of application in accordance with 44 CFR part 201 that at a minimum addresses flood hazards. As with applicants, FEMA proposes to revise this provision to clarify that the plan must be approved by FEMA. While it is implied in part 201 that the plan must be approved by FEMA, it is not explicit, so FEMA proposes to add this clarification to avoid any potential confusion. Also as with applicants, FEMA proposes to add that the plan must provide for reduction of flood losses to structures for which NFIP coverage is available. FEMA proposes to remove the language “at a minimum, addresses flood hazards” and replace it with the language “provides for reduction of flood losses to structures for which NFIP coverage is available” to make the language more consistent with the current statutory requirement at 42 U.S.C. 4104c(b).

FEMA proposes to add a sentence stating that the FEMA-approved mitigation plan is required at the time of application and award for reasons described above.<sup>65</sup>

<sup>63</sup> See 42 U.S.C. 4104c(b).

<sup>64</sup> See HMA Guidance, Part III.E.5.1, Applicant Mitigation Plan Requirement, p. 45.

<sup>65</sup> See HMA Guidance, Part III.E.5.2, Subapplicant Mitigation Plan Requirement, p. 45.

Finally, FEMA proposes to add paragraph headings to aid the reader. It proposes to add the header “applicants” for paragraph (b)(1), and the header “subapplicants” for paragraph (b)(2) to make the paragraph structure easier to follow.

### iii. Paragraph (c) Eligible Activities

FEMA proposes to revise paragraph (c), *Eligible activities*, to reflect the changes from BW–12.

Paragraph (1) addresses planning and states that FMA planning grants are limited to those activities necessary to develop or update the flood portion of any mitigation plan. FEMA proposes to remove this sentence because the NFIA, as amended by BW–12, explicitly provides that a mitigation plan that provides for the reduction of flood losses to structures for which NFIP coverage is available *may be included in a multi-hazard mitigation plan*.<sup>66</sup> FEMA proposes to remove the “flood portion” language because there may be multi-hazard mitigation plans that meet the statutory requirements but that do not distinguish and address all flood-related provisions in a separate “flood portion” of the plan. FEMA proposes to say, instead, that the plans must provide for reduction of flood losses to structures for which NFIP coverage is available. This change is intended to reflect the statutory language at 42 U.S.C. 4104c(b).

FEMA proposes to also remove the following sentence, which states that planning grants are not eligible for funding under the SRL program; as the SRL program is no longer authorized, this provision is no longer necessary.

Paragraph (c)(2) addresses projects. The first sentence of the introductory text states that projects funded under the SRL program are limited to those activities that specifically reduce or eliminate flood damages to severe repetitive loss properties. FEMA proposes to remove this sentence and make necessary grammatical adjustments to this paragraph because the SRL program is no longer authorized.

In paragraph (c)(2)(v), FEMA proposes to remove language that limits the eligibility of demolition and rebuilding of properties to the SRL program. The demolition and rebuilding of properties to at least base flood levels or higher, if required by FEMA or by State or local ordinance, has been an eligible activity under the FMA program since before BW–12’s passage. FEMA implemented this provision in the HMA Guidance.<sup>67</sup>

Paragraph (c)(2)(vi) lists as an eligible project “minor physical localized flood reduction measures” that lessen the frequency or severity of flooding and decrease predicted flood damages. FEMA proposes to replace “minor physical localized flood reduction measures” with “localized flood risk reduction projects.” The following sentence states that “major flood control projects” such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible. FEMA proposes to replace “major flood control projects” with “non-localized flood risk reduction projects.” Major flood control projects are known as “non-localized flood risk reduction projects” for purposes of FMA. FEMA proposes to replace major flood control projects with non-localized flood risk reduction projects so that these projects are known by one common name. These changes are intended to ensure consistency between program implementation, guidance, and regulation, and do not impose new requirements. The terms “localized flood risk reduction projects” and “non-localized flood risk reduction projects” are used throughout the HMA Guidance.<sup>68</sup>

BW–12 added elevation, relocation, and floodproofing of utilities as eligible activities.<sup>69</sup> FEMA proposes to add these activities to a new paragraph (c)(2)(vii). These activities were implemented in the HMA Guidance.<sup>70</sup>

BW–12 provides that eligible activities may include mitigation activities that are described in the mitigation plan of a State or community but not specified by statute or regulation.<sup>71</sup> FEMA proposes to implement this provision in a new paragraph (c)(2)(viii) for mitigation activities described in a State, Tribal, or local mitigation plan that are not listed in paragraphs (c)(2)(i) through (vii). This flexibility is important because it allows FEMA to consider innovative or novel projects that are consistent with the goals of the FMA program but are not specifically identified in statute or regulation. This is a nonsubstantive

available at [https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA\\_Addendum\\_022715\\_508.pdf](https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Addendum_022715_508.pdf) (last accessed Feb. 13, 2020).

<sup>68</sup> See, e.g., HMA Guidance, Part III.E.1.1, Mitigation Projects, p. 36.

<sup>69</sup> See 42 U.S.C. 4104c(c)(3)(D), Public Law 112–141, section 100225(a)(5)(D).

<sup>70</sup> HMA Guidance, Part III.E.1.1, Mitigation Projects, pp. 34–35.

<sup>71</sup> See 42 U.S.C. 4104c(c)(3)(I).

change; FEMA has already implemented this provision in the HMA Guidance.<sup>72</sup>

BW–12 provides that if a State applied for and was awarded at least \$1,000,000 in FMA grants in the prior fiscal year, FEMA may provide funding for technical assistance to communities not to exceed \$50,000 per State in any fiscal year to identify eligible activities, to develop grant applications, and to implement FMA grants.<sup>73</sup> FEMA proposes to add new paragraph (c)(3) to implement this provision. The new paragraph would state that if a recipient applied for and was awarded at least \$1 million in the prior fiscal year, that recipient may be eligible to receive a technical assistance grant for up to \$50,000. FEMA has already implemented this provision in the HMA Guidance.<sup>74</sup> The HMA Guidance lists potential eligible activities under this grant, such as promoting FMA to communities, visiting sites with communities/applicants, developing and reviewing project applications and mitigation plans, participating in planning meetings, providing planning workshops and materials, performing benefit cost analyses and providing grants management workshops and materials, funding (in part) salaries and expenses of staff working to develop, review, monitor, and close FMA grants.<sup>75</sup>

### iv. Paragraph (d) Minimum Project Criteria

Paragraph (d) addresses minimum project criteria which lists specific criteria FMA grant projects must meet in addition to being an eligible project type as described in paragraph (c). Paragraph (d)(1) states that projects must be in conformance with mitigation plans approved under 44 CFR part 201 for the State and community where the project is located. FEMA proposes to revise this provision for the sake of clarity, to state that projects must be in conformance with “State, Tribal, and/or local” mitigation plans approved under part 201 for the “jurisdiction” where the project is located.

Paragraph (d)(2) states that projects must be in conformance with part 9 of this chapter, Floodplain Management and Protection of Wetlands, § 60.3 of this subchapter, Flood plain management criteria for floodprone areas, and other applicable Federal, State, Tribal, and local laws and regulations. FEMA proposes to revise

<sup>72</sup> HMA Guidance, Part III.E.1.1, Mitigation Projects, p. 38.

<sup>73</sup> See 42 U.S.C. 4104c(c)(3)(J).

<sup>74</sup> HMA Guidance, Part III.E.1.4, Technical Assistance, pp. 40–41.

<sup>75</sup> *Id.*

<sup>66</sup> 42 U.S.C. 4104c(b).

<sup>67</sup> See HMA Guidance Addendum, Feb. 27, 2015, Part D, Mitigation Reconstruction Projects, p. 59,

this provision to state that the project must be in conformance with applicable environmental and historic preservation laws, regulations, and agency policy, including parts 9 and 60 of this chapter, and other applicable Federal, State, Tribal, and local laws and regulations. FEMA proposes to remove the reference to § 60.3 and replace it with a more general reference to part 60, which captures additional requirements that fall under current paragraph (d)(2). FEMA also proposes to emphasize that projects must be in conformance “with applicable environmental and historic preservation laws, regulations, and agency policy,” which includes FEMA regulations at parts 9 and 60. Applicable environmental and historic preservation requirements also include the requirements in DHS Directive and Instruction 023–01, “Implementation of the National Environmental Policy Act,” and FEMA Directive and Instruction 108–1, “Environmental Planning and Historic Preservation Responsibilities and Program Requirements.”<sup>76</sup> This is a nonsubstantive change intended to capture all applicable legal requirements and to highlight applicable environmental and historic preservation requirements, which are particularly relevant to the implementation of mitigation grants.<sup>77</sup>

Paragraph (d)(3) states that mitigation grant projects must “be technically feasible.” Under the NFIA, as amended by BW–12, mitigation projects must be “technically feasible and cost-effective” or “eliminate future payments from the [NFIF] for severe repetitive loss structures through an acquisition or relocation activity.”<sup>78</sup> FEMA proposes to add to paragraph (d)(3) “and cost-effective; or, eliminate future payments from the NFIF for severe repetitive loss structures through an acquisition or relocation activity.” FEMA proposes this revision to capture all of the statutory requirements in 42 U.S.C. 4104c(c)(2)(A) in the same regulatory provision. This is not a substantive change; FEMA had already implemented this provision prior to BW–12.<sup>79</sup>

Paragraph (d)(5) states that the project must be cost effective and reduce the risk of future flood damage. FEMA proposes to remove this paragraph because cost-effectiveness is addressed in the proposed revisions to paragraph (d)(3). Proposed paragraph (d)(3) does

not include the language “reduce the risk for future flood damage” because FEMA is proposing language that mirrors the statutory provision at 42 U.S.C. 4104c(c)(2)(A)(ii), as explained above.

Finally, FEMA proposes to replace “subgrantee” with “subrecipient” in current paragraph (d)(6) to reflect the terminology in 2 CFR part 200, and to redesignate current paragraph (d)(6) as paragraph (d)(5), and current paragraph (d)(7) as paragraph (d)(6).

#### 8. Section 79.7 Offers and Appeals Under the SRL Program

Section 79.7 deals solely with the SRL program, which is no longer authorized under the NFIA. Accordingly, FEMA proposes to remove this section in its entirety.

#### 9. Section 79.8 (Proposed § 77.8) Allowable Costs

This section addresses allowable costs under the FMA program. Paragraph (a)’s introductory text states that general policies for allowable costs are addressed in 2 CFR 200.101, 200.102, 200.400–200.475. FEMA proposes to revise this provision to clarify that the allowable costs are “for implementing awards and subawards.” This is a nonsubstantive change.

Paragraph (a)(1) is entitled “Eligible management costs.” Paragraph (a)(1)(i) is entitled “grantee.” FEMA proposes to replace “grantee” with “recipient” to reflect the updated terminology in 2 CFR part 200. The first sentence of paragraph (a)(1)(i) states that States are eligible to receive management costs consisting of a maximum of 10 percent of the planning and project activities awarded to the State, each fiscal year under FMA and SRL, respectively. FEMA proposes to replace “State(s)” with “recipient(s)” to reflect the terminology in 2 CFR part 200 and to capture all possible applicants (States (including territories) and Indian Tribal governments).<sup>80</sup> FEMA proposes to remove the reference to the SRL program, which is no longer authorized under the NFIA. The last sentence states that an Indian Tribal government applying directly to FEMA is eligible for management costs consisting of a maximum of 10 percent of grants awarded for planning and project activities under the SRL and FMA programs respectively. FEMA proposes to remove this sentence as it would no longer be necessary under the proposed revisions to this paragraph, which replaces “States” with “recipients.” The

term “recipients” includes Indian Tribal governments.

FEMA proposes to replace the header of paragraph (a)(1)(ii), “subgrantee,” with “subrecipient” to reflect the terminology in 2 CFR part 200. FEMA proposes to replace the term “State” with “recipient” to capture the full universe of entities to which a subapplicant may apply (States (including territories) and Indian Tribal governments).

Paragraph (a)(2) is entitled “Indirect Costs.” FEMA proposes to remove the reference to the SRL program, as the program is no longer authorized under the NFIA. FEMA proposes to replace “grantee” with “recipient” and “subgrantee” with “subrecipient” to reflect the terminology in 2 CFR part 200.

Paragraph (b) is entitled “Pre-award costs.” The first sentence states that FEMA may fund eligible pre-award planning or project costs at its discretion and as funds are available. FEMA proposes to revise this sentence to state that FEMA may fund eligible pre-award costs related to developing the application or subapplication at its discretion and as funds are available. FEMA interprets “pre-award planning or project costs” to mean pre-award costs related to developing an application or subapplication. This revision is intended to clarify the regulatory language, consistent with FEMA’s interpretation established in the HMA Guidance, and is not a substantive change.<sup>81</sup> FEMA proposes to replace “grantees” with “recipients” and “subgrantees” with “subrecipients” to reflect the terminology in 2 CFR part 200. Finally, FEMA proposes to make nonsubstantive grammatical changes to reflect that this section applies just to FMA grants, and proposes to replace the phrase “incurred prior to grant award” with “incurred prior to award” as the word “grant” is not necessary.

Paragraph (c) is entitled “Duplication of Benefits.” FEMA proposes to replace “grantee” with “recipient” and “subgrant award” with “subaward” to reflect the terminology in 2 CFR part 200.

#### 10. Section 79.9 (Proposed § 77.9) Grant Administration

Paragraph (a) states that the grantee must follow FEMA grant requirements, including submission of performance and financial status reports, and shall follow adequate competitive procurement procedures, and that grantees are responsible for ensuring

<sup>76</sup> See 81 FR 56514 and 81 FR 56682.

<sup>77</sup> See HMA Guidance, Part III.E.6, Environmental Planning and Historic Preservation Requirements, pp. 47–48.

<sup>78</sup> 42 U.S.C. 4104c(c)(2)(A).

<sup>79</sup> HMA Guidance, Part III.E.3, Cost Effectiveness, and Part III.E.4, Feasibility and Effectiveness, p.44.

<sup>80</sup> See proposed 77.2(i).

<sup>81</sup> See HMA Guidance, Part IV.F.2, Pre-award costs, p. 55.

that all subgrantees are aware of and follow the requirements of 2 CFR parts 200 and 3002. Finally, it states that the grantee must follow FEMA grant requirements, including submission of performance and financial status reports. FEMA proposes to revise this paragraph for a more streamlined approach and to eliminate some of the repetition in the current paragraph. Accordingly, FEMA proposes to revise paragraph (a) to state that recipients must comply with the requirements of 2 CFR parts 200 and 3002, and FEMA award requirements, including submission of performance and financial status reports, and that recipients must also ensure that subrecipients are aware of and comply with 2 CFR parts 200 and 3002. Finally, FEMA proposes to add a header to paragraph (a), entitled “General,” to distinguish it from the other paragraphs and for the ease of the reader. These are nonsubstantive changes.

FEMA proposes to add a header to paragraph (b), “Cost overruns,” for the ease of the reader. In paragraph (b)’s introductory text, FEMA proposes to replace “State POC” with “recipient” to capture the universe of all possible recipients (States (including territories) and Indian Tribal governments). FEMA proposes to redesignate the introductory text of paragraph (b) as paragraph (b)(1), and to redesignate paragraph (b)(1) as (b)(1)(i), and paragraph (b)(2) as (b)(1)(ii). Current paragraph (b)(2) (proposed paragraph (b)(1)(ii)), which lists one of the requirements for reimbursement of an overrun, states that the amended grant award must meet the cost share requirements identified in this section. FEMA proposes to revise this to state that the amended grant award must meet the eligibility requirements, including cost share requirements, identified in this section. FEMA proposes this change to capture all eligibility requirements, including but not limited to cost share requirements. This is a nonsubstantive change, because all FMA eligibility requirements apply to amended grant awards, and is consistent with the HMA Guidance.<sup>82</sup>

Paragraph (b)(3) limits cost overrun reimbursements so that the total amount obligated to the State does not exceed the maximum funding amounts set in § 79.4(a)(2). FEMA proposes to remove this provision because BW-12 eliminated automatic allocations under the FMA program and the NFIA no

longer establishes maximum funding amounts for project awards.<sup>83</sup>

Current paragraph (c) addresses the ability of grantees to use cost overruns to offset overruns in other awards. FEMA proposes to redesignate paragraph (c) as paragraph (b)(2), since it more appropriately belongs in the paragraph on cost overruns rather than as a stand-alone paragraph. The first sentence of current paragraph (c) (proposed paragraph (b)(2)) states that grantees may use cost overruns from ongoing subawards to offset overruns incurred by another subgrant(s) awarded under the same grant. FEMA proposes to replace “grantees” with “recipients” and “subgrants” with “subawards” to reflect the terminology in 2 CFR part 200, and to replace the final word of the sentence (“grant”) with “award.” These are nonsubstantive changes. The second sentence of current paragraph (c) (proposed paragraph (b)(2)) states that all costs for which funding is requested must have been included in the original application’s cost estimate. FEMA proposes to replace “application” with “subapplication” because the need for an overrun is at the subaward level. This is a nonsubstantive change for clarification purposes—the program currently applies this to the subapplication amount for a specific project, not the application amount which encompasses all projects under the recipient’s award. FEMA proposes to add that in cases where an overrun is not available to cover an overrun, the Administrator may, with justification from the recipient or subrecipient, use other available FMA funds to cover the cost overrun. FEMA implements this practice pursuant to 42 U.S.C. 4104c(c)(1), which requires FEMA to provide FMA assistance to the extent amounts are available in the NFIF pursuant to appropriation Acts, subject only to the absence of approvable mitigation plans. This practice is consistent with the HMA Guidance which provides that “[t]he pass-through entity may request additional Federal funds for identified overruns, which FEMA may approve if program funds are available.”<sup>84</sup> This flexibility allows FEMA and recipients to address unanticipated needs.

Current paragraph (d) addresses the requirement that the request for an overrun be in writing to the FEMA Regional Administrator. FEMA proposes to redesignate this paragraph as paragraph (b)(3), as it appropriately

belongs in the paragraph that addresses overruns rather than as a stand-alone paragraph. FEMA proposes to replace “grant” with “award” for the sake of clarity, and to replace “State POC” with “recipient” to capture the universe of potential recipients (States (including territories) and Indian Tribal governments). FEMA proposes to replace “shall” with “must” and “will” pursuant to the Office of the Federal Register’s Principles of Clear Writing.<sup>85</sup>

Current paragraph (e) addresses the circumstances under which FEMA recaptures funds. FEMA proposes to redesignate this paragraph as paragraph (c) and to add a paragraph heading “Recapture” for the ease of the reader. FEMA proposes to replace “these programs” with “this part” for the sake of clarity.

FEMA proposes to add a new paragraph (d) to address remedies for noncompliance, consistent with 2 CFR part 200. FEMA proposes to add that FEMA may terminate an award or take other remedies for noncompliance in accordance with 2 CFR 200.338 through 200.342.

Finally, FEMA proposes to add a new paragraph (e) to address the reconsideration process under the FMA program. FEMA proposes to state that it will reconsider determinations of noncompliance, additional award conditions, or its decision to terminate a Federal award. Requests for reconsideration must be made in writing within 60 calendar days after receipt of a notice of the action, and in accordance with submission procedures set out in guidance. FEMA will notify the requester of the disposition of the request for reconsideration. If the decision is to grant the request for reconsideration, FEMA will take appropriate implementing action. FEMA proposes to add these provisions to reflect the existing opportunity to request reconsideration<sup>86</sup> and the procedures for when a recipient/subrecipient challenges a remedy for noncompliance, as required by 2 CFR 200.341.<sup>87</sup> FEMA believes that a 60 calendar day deadline for submitting requests for reconsideration is appropriate and consistent with the

<sup>85</sup> <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>.

<sup>86</sup> See HMA Guidance, Part V.B.3, Reconsideration Process, p. 77.

<sup>87</sup> See 2 CFR 200.341, *Opportunities to object, hearings and appeals*, providing that “[U]pon taking any remedy for non-compliance, the Federal awarding agency must provide the non-Federal entity an opportunity to object and provide information and documentation challenging the suspension or termination action, in accordance with written processes and procedures published by the Federal awarding agency.”

<sup>83</sup> See discussion *supra* regarding the proposed revisions to § 79.4 (proposed § 77.4).

<sup>84</sup> See HMA Guidance, Part VI.D.3.3, Cost overruns and Underruns, p. 85.

<sup>82</sup> See HMA Guidance, Part IV.D.3.3, Cost overruns and Underruns, p. 85.

amount of time provided to submit appeals or requests for reconsideration in other FEMA programs.<sup>88</sup> This is a nonsubstantive change that codifies current practice.

### C. 44 CFR part 80, Property Acquisition and Relocation for Open Space

Throughout part 80,<sup>89</sup> FEMA proposes to replace outdated terms and definitions with substantively similar terms and definitions that better align with 2 CFR part 200 and the HMA Guidance. These are nonsubstantive revisions intended to simplify definitions and improve consistency among FEMA's HMA programs. FEMA also proposes to replace the word "shall" with the word "will" or "must," as appropriate, and to remove references to the SRL program.

#### 1. Part 80 Authority

FEMA proposes to revise the authority citation for part 80 to remove historical authorities relating to FEMA's organization. FEMA proposes to remove the references to the Reorganization Plan No. 3 of 1978, Executive Order 12127, Executive Order 12148, and Executive Order 13286. The Reorganization Plan and Executive Orders 12127 and 12148 established FEMA as an agency in 1979 and established its functions. Executive Order 13286 revised Executive Order 12148 and transferred some of FEMA's authorities to DHS. The Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, superseded previous organizational authorities and provided organic authority for FEMA as a component agency of DHS. FEMA proposes to remove the superseded authorities and retain the citation to the Homeland Security Act of 2002.

#### 2. Section 80.3 Definitions

FEMA proposes nonsubstantive revisions to simplify definitions and improve consistency among FEMA's HMA programs. FEMA proposes to simplify the definition of "market value" to provide clearer meaning and reflect the definition found in widely recognized resources.<sup>90</sup>

FEMA proposes to add a definition for "Federal award" to reflect the definition in 2 CFR part 200. FEMA's proposed

definition is similar to the definition in 2 CFR 200.38(a)(1),<sup>91</sup> with two exceptions. First, FEMA's proposed definition uses the terms "recipients" and "subrecipients" instead of the term "non-Federal entities." The term "non-Federal entity," as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under all of FEMA's HMA programs. While all HMA recipients and subrecipients are "non-Federal entities" under 2 CFR part 200, FEMA proposes to tailor the definitions in part 80 so that they are program-specific and work when read in conjunction with the regulations for the FMA Program and HMGP. Second, FEMA proposes to add a sentence to the definition to clarify that the terms "award" and "grant" may also be used to describe a "Federal award." This is a nonsubstantive change to make it clear that the terms are interchangeable.

FEMA proposes to add a definition for "pass-through entity" to reflect the definition in 2 CFR part 200. FEMA's proposed definition of "pass-through entity" is substantively the same as the definition in 2 CFR 200.74, with one exception. FEMA's proposed definition uses the terms "recipients" and "subrecipients" instead of the term "non-Federal entities." The term "non-Federal entity," as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under all of FEMA's HMA programs. While all HMA recipients and subrecipients are "non-Federal entities" under 2 CFR part 200, FEMA proposes to tailor the definitions in part 80 so that they are program-specific and work when read in conjunction with the regulations for the FMA Program and HMGP.

FEMA proposes to replace the definitions "grantee," "subgrant," and "subgrantee," with definitions for "recipient," "subaward," and "subrecipient," respectively, to better align with the terms and definitions used in 2 CFR part 200 and the HMA Guidance. The proposed definition of "recipient" is similar to the definition at 2 CFR 200.86; however, FEMA proposes to use the terms "State or Indian Tribal government" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to part 80 and reflect which entities are eligible recipients for purposes of part 80. The proposed definition of "subaward" is similar to

the definition at 2 CFR 200.92; however, FEMA proposes to use the terms "recipient" and "subrecipient" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to part 80. The proposed definition of "subrecipient" is similar to the definition at 2 CFR 200.93; however, FEMA proposes to use the terms "State agency, community, or Indian Tribal government" instead of the term "non-Federal entity" to reflect which entities are eligible subrecipients for purposes of part 80.

Finally, FEMA proposes to revise the definitions of "applicant" and "subapplicant." FEMA proposes to replace the term "grant" in the current definition of "applicant" with the term "Federal award." This is a nonsubstantive change to use the newly defined term "Federal award" (proposed § 80.3(c)) throughout the definitions. FEMA also proposes to add that once funds have been awarded, the applicant becomes the recipient and may also be a pass-through entity. This is a nonsubstantive addition to clarify the relationship between the terms "applicant," "recipient," and "pass-through entity" for the ease of the reader. FEMA proposes to revise the definition of "subapplicant" to replace "grantee" with "recipient" and "subgrantee" with "subrecipient" to reflect the terms and definitions in this proposed rule, which are tailored to part 80. FEMA proposes to make conforming amendments to these terms throughout part 80.

#### 3. Section 80.13 Application Information

In paragraph (a)(3), FEMA proposes to replace "FEMA's Office of General Counsel" with "FEMA's Office of Chief Counsel." This is a nonsubstantive change intended to reflect FEMA's current organizational structure (FEMA's Office of General Counsel became the Office of Chief Counsel when FEMA became a component of DHS).

#### 4. Section 80.19 Land Use and Oversight

In addition to replacing outdated terms with substantively similar terms that better align with 2 CFR part 200 and the HMA Guidance (*i.e.*, replacing "grantee" with "recipient," etc.), FEMA proposes in paragraph (e) to move the sentence in (e)(1)(i) to paragraph (e)(1), and redesignate paragraphs (e)(1)(ii), and (e)(1)(ii)(A) through (C) as (e)(2), and (e)(2)(i) through (iii), respectively. This nonsubstantive redesignation is intended to conform this section to the

<sup>88</sup> See, e.g., 44 CFR 206.101(m), 206.115(a), 206.171(f)(5), 206.204(e)(2), 206.206(c), and 206.366(d)(4).

<sup>89</sup> See, e.g., §§ 80.5 (Roles and responsibilities), 80.9 (Eligible and ineligible costs), 80.11 (Project eligibility), 80.13 (Application information), 80.17 (Project implementation), 80.19 (Land use and oversight), and 80.21 (Closeout requirements).

<sup>90</sup> See, e.g., The Law Dictionary, Black's Law Dictionary Free Online Legal Dictionary, 2nd ed.; West's Encyclopedia of American Law, 2nd ed.

<sup>91</sup> 2 CFR 200.38(a)(1) (the Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity).

regulatory drafting principle of proper subordination (e.g., it is improper to have an (e)(1) where there is not an (e)(2)).

#### 5. Section 80.21 Closeout Requirements

In paragraph (d), FEMA proposes to replace the word “property” with the word “structure” to conform to the definition of “repetitive loss structure” provided in BW–12 and proposed § 77.2, discussed above.

#### D. 44 CFR Part 201, Mitigation Planning

FEMA proposes to replace outdated terms and definitions throughout part 201 with substantively similar terms and definitions that better align with 2 CFR part 200 and the HMA and Mitigation Planning programs guidance documents. These are nonsubstantive revisions intended to simplify definitions and improve consistency among FEMA’s HMA and Mitigation Planning programs. FEMA also proposes to replace the word “shall” with the word “will” or “must,” as appropriate.

##### 1. Part 201 Authority

FEMA proposes to revise the authority citation for part 201 to remove historical authorities relating to FEMA’s organization. FEMA proposes to remove the references to the Reorganization Plan No. 3 of 1978, Executive Order 12127, Executive Order 12148, and Executive Order 13286. The Reorganization Plan and Executive Orders 12127 and 12148 established FEMA as an agency in 1979 and established its functions. Executive Order 13286 revised Executive Order 12148 and transferred some of FEMA’s authorities to DHS. The Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*, superseded previous organizational authorities and provided organic authority for FEMA as a component agency of DHS. FEMA proposes to remove the superseded authorities and retain the citation to the Homeland Security Act of 2002.

##### 2. Section 201.1 Purpose

FEMA proposes to replace the word “policies” with “policies” in paragraph 201.1(a) as the word “polices” is a typographical error.

##### 3. Section 201.2 Definitions

FEMA proposes to revise the definition of “severe repetitive loss” properties and to add a new definition for “repetitive loss structure” to reflect the definitions provided in BW–12 and proposed in this rulemaking.<sup>92</sup> FEMA

proposes to remove the definitions of the “repetitive flood claims” and “severe repetitive loss” programs as BW–12 eliminated the RFC and SRL programs.

FEMA proposes to add definitions for the terms “applicant” and “subapplicant” to reflect the terms and definitions in proposed § 77.2. FEMA also proposes to add new definitions for “Federal award” and “pass-through Entity” to reflect the definitions in 2 CFR part 200. FEMA’s proposed definition of “Federal award” is similar to the definition in 2 CFR 200.38(a)(1),<sup>93</sup> with two exceptions. First, FEMA’s proposed definition uses the terms “recipients” and “subrecipients” instead of the term “non-Federal entities.” The term “non-Federal entity,” as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under FEMA’s HMA programs. While FMA recipients and subrecipients are “non-Federal entities” under 2 CFR part 200, FEMA proposes to tailor the definitions so that they work in conjunction with the regulations for the FMA program and HMGP. Second, FEMA proposes to add a sentence to the definition to clarify that the terms “award” and “grant” may also be used to describe a “Federal award” under the FMA program regulations. This is a nonsubstantive change to make it clear that the terms are interchangeable. FEMA proposes to add a definition for “pass-through entity” to reflect the definition in 2 CFR part 200. FEMA’s proposed definition of “pass-through entity” is substantively the same as the definition in 2 CFR 200.74, with one exception. FEMA’s proposed definition uses the terms “recipients” and “subrecipients” instead of the term “non-Federal entities.” The term “non-Federal entity,” as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under FEMA’s HMA programs. While all HMA recipients and subrecipients are “non-Federal entities” under 2 CFR part 200, FEMA proposes to tailor the definitions so that they work in conjunction with regulations for the FMA program and HMGP.

FEMA proposes to replace the definitions of “grantee” and “subgrantee” with definitions for “recipient” and “subrecipient,” respectively, to better align with the terms and definitions used in 2 CFR part 200 and the HMA Guidance. The

proposed definition of “recipient” is similar to the definition at 2 CFR 200.86; however, FEMA proposes to use the terms “State or Indian Tribal government” instead of the term “non-Federal entity” to reflect the terms and definitions in this proposed rule, which are tailored to part 201 and reflect which entities are eligible recipients for purposes of part 201. The proposed definition of “subrecipient” is similar to the definition at 2 CFR 200.93; however, FEMA proposes to specify which entities are eligible subrecipients for purposes of part 201. Depending on the program, subrecipients of hazard mitigation assistance subawards can be a State agency, local government, private nonprofit organization, or Indian Tribal government. Subrecipients of FMA subawards can be a State agency, community, or Indian Tribal government, as described in 44 CFR part 77. Finally, FEMA proposes to add a definition of “subaward” similar to the definition at 2 CFR 200.92; however, FEMA proposes to use the terms “recipient” and “subrecipient” instead of the term “non-Federal entity” to reflect the terms and definitions tailored to part 201 in this proposed rule.

##### 4. Section 201.3 Responsibilities

FEMA proposes to revise paragraph (c)(1) to reflect the elimination of the SRL program and to conform to the mitigation planning requirements proposed in this rulemaking. *See* proposed 44 CFR 77.6. The last sentence of paragraph (c)(1) would be removed and replaced with a sentence describing the mitigation plan requirement in proposed § 77.6(b). *See* proposed 44 CFR 201.3(c)(1). FEMA proposes similar revisions to paragraph (e)(1). The last two sentences of paragraph (e)(1) would be removed and replaced with a sentence describing the mitigation plan requirement in proposed § 77.6(b). *See* proposed 44 CFR 201.3(e)(1).

##### 5. Section 201.4 Standard State Mitigation Plans

FEMA proposes to revise paragraph (c)(3)(v) to reflect the elimination of the SRL program and to conform to the mitigation planning requirements proposed in this rulemaking. *See* proposed 44 CFR 77.6. The current language would be removed and replaced with a sentence describing the mitigation plan requirement found in proposed § 77.6(b). *See* proposed 44 CFR 201.4(c)(3)(v). In paragraph (c)(4)(iii), FEMA proposes to replace the word “properties” with the word “structures” to reflect the definition of “repetitive loss structure” used in BW–12 and proposed § 77.2.

<sup>92</sup> 42 U.S.C. 4104c(h), 4121(a)(7); proposed 44 CFR 77.2.

<sup>93</sup> 2 CFR 200.38(a)(1) (the Federal financial assistance that a non-Federal entity receives directly from a Federal awarding agency or indirectly from a pass-through entity).

## 6. Section 201.6 Local Mitigation Plans

In § 201.6(a)(1), FEMA proposes to remove the reference to the RFC program, which was eliminated by BW-12.

## 7. Section 201.7 Tribal Mitigation Plans

FEMA proposes to revise § 201.7 to reflect the elimination of the SRL and RFC programs and to conform to the mitigation planning requirements proposed in this rulemaking. See proposed 44 CFR 77.6. FEMA proposes to remove paragraph (a)(2) to reflect the elimination of the SRL program and to remove the reference to the RFC program in paragraph (a)(3). FEMA proposes to redesignate current paragraphs (a)(3) and (4) as (a)(2) and (3), respectively. The language in current paragraph (c)(3)(vi) would be removed and replaced with a sentence describing the mitigation plan requirement in proposed § 77.6(b). See proposed 44 CFR 201.7(c)(3)(vi).

### E. 44 CFR part 206 Subpart N, Hazard Mitigation Grant Program

Throughout part 206,<sup>94</sup> FEMA proposes to replace outdated terms and definitions with substantively similar terms and definitions that better align with 2 CFR part 200 and the HMA guidance. These are nonsubstantive revisions intended to simplify definitions and improve consistency among FEMA's HMA programs. FEMA also proposes to replace the word "shall" with the word "will" or "must," as appropriate.

#### 1. Section 206.431 Definitions

FEMA proposes to add a definition for "pass-through entity" to reflect the definition in 2 CFR part 200. FEMA's proposed definition of "pass-through entity" is substantively the same as the definition in 2 CFR 200.74, with one exception. FEMA's proposed definition uses the terms "recipients" and "subrecipients" instead of the term "non-Federal entities." The term "non-Federal entity," as defined at 2 CFR 200.69, includes entities that are not eligible recipients or subrecipients under HMGP. While all HMGP recipients and subrecipients are "non-Federal entities" under 2 CFR part 200, FEMA proposes to tailor the definitions in part 206 subpart N so that they are program-specific and work when read in conjunction with the HMA-related

regulations in parts 79 (proposed part 77), 80, and 201.

FEMA proposes to replace the definitions "grantee," "subgrant," and "subgrantee," with definitions for "recipient," "subaward," and "subrecipient," respectively, to better align with the terms and definitions used in 2 CFR part 200 and the HMA Guidance. The proposed definition of "recipient" is similar to the definition at 2 CFR 200.86; however, FEMA proposes to use the terms "State or Indian Tribal government" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to reflect which entities are eligible recipients of HMGP. The proposed definition of "subaward" is similar to the definition at 2 CFR 200.92; however, FEMA proposes to use the terms "recipient" and "subrecipient" instead of the term "non-Federal entity" to reflect the terms and definitions in this proposed rule, which are tailored to the HMGP regulations. The proposed definition of "subrecipient" is similar to the definition at 2 CFR 200.93; however, instead of the term "non-Federal entity," FEMA proposes to keep the language explaining which entities are eligible subrecipients of HMGP. FEMA proposes to make conforming amendments to these terms throughout part 206 subpart N.

FEMA also proposes to revise the definitions of "applicant" and "Indian Tribal government" and add a definition for "subapplicant." Section 206.431 currently defines "applicant" as a State agency, local government, Indian Tribal government, or eligible private nonprofit organization, submitting an application to the grantee for assistance under the HMGP. FEMA proposes to clarify that an "applicant" is the non-Federal entity consisting of a State or Indian Tribal government, applying to FEMA for a Federal award under HMGP, and that upon award, the applicant becomes the recipient and may also be a pass-through entity. FEMA proposes this revision because the current definition mistakenly includes local governments and private nonprofit organizations (they are subapplicants, not applicants) and applicants do not submit an application to a recipient, but rather to FEMA. FEMA proposes to add a sentence to the end of the current definition of "Indian Tribal government" to clarify that Indian Tribal governments have the option to apply as an applicant or subapplicant. Lastly, FEMA's proposed definition for "subapplicant" would clarify that it means the State agency, local government, eligible private

nonprofit organization, or Indian Tribal government submitting a subapplication to the applicant for financial assistance under HMGP, and that upon award, the subapplicant becomes the subrecipient. FEMA proposes adding this definition to more clearly distinguish the entities which may be subapplicants from those which may be applicants.

#### 2. Section 206.432 Federal Grant Assistance

FEMA proposes to revise 206.432(b), *Amounts of Assistance*, to remove the references to specific sections of the Stafford Act. Pursuant to 42 U.S.C. 5170c(a), the total contributions for HMGP in each disaster should be based upon the estimated aggregate amount of grants to be made under the Stafford Act for the major disaster. Although 42 U.S.C. 5170c originally specified that the total should be based on the estimated aggregate amount of grants to be made under *Section 406* of the Act,<sup>95</sup> Congress later amended this provision to remove the specific section reference.<sup>96</sup> FEMA included specific section references when it promulgated the HMGP regulations in 1990 to reflect the level of specificity in the statute at that time.<sup>97</sup> FEMA subsequently revised 206.432(b) to include additional sections of the Stafford Act under which major disaster assistance is made.<sup>98</sup> However, this approach requires FEMA to update 206.432(b) whenever statutory amendments change the section numbers or authorize assistance under new sections of the Act.<sup>99</sup> FEMA now proposes to remove specific section references from 206.432(b) so that the regulation mirrors the statutory provision and captures all of the sections under which grants are made with respect to a major disaster. This change would improve consistency with the statute and eliminate the need to continuously update a list of Stafford Act sections.

FEMA also proposes to remove the second sentence of paragraph (c), which provides the cost share under HMGP for major disasters declared before June 10, 1993. As this date has long since passed, it is no longer necessary to include in the HMGP regulations.

#### 3. Section 206.434 Eligibility

Paragraph (a), *Applicants*, currently describes the entities which are eligible

<sup>95</sup> Public Law 100-707, 102 Stat. 4698 (Nov. 23, 1988).

<sup>96</sup> Public Law 103-181, 107 Stat. 2054 (Dec. 3, 1993).

<sup>97</sup> See 55 FR 35537 (Aug. 30, 1990).

<sup>98</sup> See 59 FR 24356 (May 11, 1994).

<sup>99</sup> See, e.g., 67 FR 8853 (Feb. 26, 2002); 72 FR 61750 (Oct. 31, 2007); 74 FR 47482 (Sep. 16, 2009).

<sup>94</sup> See, e.g., §§ 206.433 (State responsibilities), 206.435 (Project identification and selection criteria), 206.436 (Application procedures), 206.437 (State Administrative Plan), 206.438 (Project management), 206.439 (Allowable costs), and 206.440 (Appeals).



to apply for the Hazard Mitigation Grant Program, listing States and local governments, private nonprofit organizations owning or operating a private nonprofit facility, and Indian Tribes. FEMA proposes to remove the word “Applicants” from the first sentence, clarify in subparagraph (a)(1) that applicants include States and Indian Tribal governments, and revise subparagraph (a)(2) to clarify that State agencies and local governments, eligible private nonprofit organizations, and Indian Tribal governments may be subapplicants. FEMA proposes to remove the language at subparagraph (a)(3) (Indian Tribes or authorized Tribal organizations and Alaska Native villages or organizations, but not Alaska native corporations with ownership vested in private individuals) because this language refers to non-federally recognized Tribes, which are included under local governments. 42 U.S.C. 5122(8)(B). FEMA proposes this revision to more clearly distinguish the entities which may be applicants from those which may be subapplicants.

In paragraph (e), *Property acquisitions and relocation requirements*, FEMA proposes to retain the first sentence and remove the rest of the paragraph. FEMA proposes to remove this language because it addresses requirements for major disasters declared before December 3, 2007. For all major disasters declared on or after December 3, 2007, the property acquisitions and relocation requirements are found in part 80.

#### IV. Regulatory Analysis

##### A. Executive Order 12866, as Amended, Regulatory Planning and Review; Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation

issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

The Office of Management and Budget (OMB) has not designated this rule a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. This rule is exempt from the requirements of Executive Order 13771 because it is non-significant under Executive Order 12866. See OMB’s Memorandum “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

##### Need for Regulation

The Biggert-Waters Flood Insurance Reform Act of 2012 (BW–12), Pub. L. 112–141, 126 Stat. 916, amended the National Flood Insurance Act of 1968 (NFIA) to require changes to FEMA’s hazard mitigation assistance (HMA) programs. FEMA implemented most of these changes through the *Hazard Mitigation Assistance Guidance* in 2013.<sup>100</sup> FEMA now proposes to update its hazard mitigation assistance regulations to reflect these changes.

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

Under a no-action baseline, this rule would result in cost savings to FEMA, and familiarization costs to HMA recipients. Under a pre-statutory baseline, this rule results in distributional impacts and qualitative benefits, but no marginal costs. The annual distributional impact of this rule is estimated at \$4.16 million in increased transfers from FEMA to HMA recipients.

FEMA addressed the substantive changes in this analysis and presented how they affect costs, benefits, and transfers. The remaining changes are nonsubstantive, meaning they are technical and include definitional updates and other changes that modernize and standardize regulations, reduce redundancy, or increase

readability. The nonsubstantive changes do not have an economic impact. FEMA included a detailed marginal analysis table that summarizes the changes in this proposed rule and the related impacts in the public docket for this rulemaking available on [www.regulations.gov](http://www.regulations.gov) under Docket ID FEMA–2019–0011.

##### Affected Population

The proposed rule would affect all recipients of FEMA’s Flood Mitigation Assistance (FMA) grants. Recipients include 56 State and territorial governments and 573 Indian Tribal governments.<sup>101</sup> Local governments and governmental organizations such as flood districts and sewer districts are considered subrecipients and must apply through a State or Indian Tribal government. For simplicity, FEMA refers to the affected population as “recipients” throughout the analysis, except in cases where there are different requirements for recipients or subrecipients.

##### Baselines

BW–12 made substantial changes to FEMA’s HMA programs. FEMA implemented most of these changes via the HMA Guidance in 2013. FEMA now proposes to codify those changes in this rule. Following guidance in OMB Circular A–4, FEMA assessed the impacts of this rule against a pre-statutory baseline covering 2006–2012 (pre-BW–12) and a no-action baseline covering 2013–2017<sup>102</sup> (post-BW–12).

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

Under the pre-statutory baseline, the proposed rule has distributional impacts and qualitative benefits. The distributional impacts would affect recipients of Repetitive Loss (RL) grants and Severe Repetitive Loss (SRL) grants that were combined into the FMA program pursuant to BW–12. Under BW–12, RL and SRL properties received increased assistance, while standard mitigation properties received decreased assistance. Under the no-action baseline, the only impacts are

<sup>100</sup> FEMA, Hazard Mitigation Assistance Guidance, July 12, 2013, available at <https://www.fema.gov/media-library/assets/documents/33634> (last accessed Jan 8, 2020).

<sup>101</sup> Indian Entities Recognized by, and Eligible to Receive Services from the United States Bureau of Indian Affairs, 84 FR 1200, (Feb 1, 2019).

<sup>102</sup> 2017 is the last year complete data is available.

implementation costs and Federal cost savings. Table 1 shows the impacts of this proposed rule under the pre-statutory and no-action baselines.

TABLE 1—ANNUAL EFFECTS OF PROPOSED RULE UNDER PRE-STATUTORY AND NO-ACTION BASELINES [2018\$]

| Baseline            | Costs                     | Benefits          | Transfers                                     |
|---------------------|---------------------------|-------------------|---|
| Pre-Statutory ..... | \$610 (year 1 only) ..... | Qualitative ..... | \$28.4 million from FEMA to grant recipients. |
| No-Action .....     | 610 (year 1 only) .....   | \$85,463 .....    | None.   |

Effects

The primary effects of BW-12 that would be codified by this proposed rule resulted from changes in the Federal cost shares. A cost share is the portion of the costs of a Federally assisted project or program borne by the Federal Government. FEMA pays a portion of

the cost of a project, or the Federal cost share, and the recipient pays the remaining share.

*FMA Grant Cost Sharing Changes.* The current regulations still reflect the pre-BW-12 cost share provisions of the RL and SRL grant programs. BW-12 modified these two programs and FEMA implemented the modifications in the

2013 HMA Guidance. The newly expanded FMA program now serves the recipients of these grant programs.

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

TABLE 2—COST SHARE BY TYPE OF GRANT

| Baseline                                  | RL                  |                          | SRL                 |                          |
|---|---------------------|--------------------------|---------------------|--------------------------|
|   | FEMA cost share (%) | Recipient cost share (%) | FEMA cost share (%) | Recipient cost share (%) |
| Pre-Statutory (2006–2012) Pre-BW-12 ..... | 75                  | 25                       | 90 to 100           | 10 to 0                  |
| No-Action (2013–2017) Post-BW-12 .....    | 75–90               | 10–25                    | 100                 | 0                        |

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

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

*Shifting from State Allocations to Competition.* Prior to BW-12, FEMA annually allocated FMA program funding to recipients based on the number of insured properties and RL properties present within the recipient’s jurisdiction. Recipients that did not meet the minimum threshold to receive a target allocation had to apply against funds that were set aside for this purpose. BW-12 replaced this process with a fully competitive program that

selects subapplications against agency priorities identified annually. This change allows FEMA to identify and mitigate properties with the highest risk from flooding, thereby providing the greatest savings to the NFIP.

Costs

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

*Familiarization Costs.* FEMA estimated familiarization costs for States, but not for local emergency management divisions or jurisdictions. FEMA assumed States regularly update their emergency response networks and notify local emergency management divisions on any changes. FEMA believes that States would continue to disseminate the new information through each State’s established process. FEMA assumed that each State grant recipient would have two personnel that would need to familiarize themselves and understand the proposed rule by reading the existing and new regulations to understand the changes. FEMA expects

each person to spend one hour to become familiar with the changes. FEMA assumes that the rule is likely to be reviewed by each State’s Emergency Management Director and one administrative support personnel. FEMA assumes that BLS occupations Emergency Management Director (SOC: 11–9160, mean hourly wage \$39.70)<sup>103</sup> and First-Line Supervisor of Office and Administrative Support Workers (SOC: 43–1010, mean hourly wage \$28.53)<sup>104</sup> are most representative of these roles in a State. Using the 1.46 multiplier,<sup>105</sup> the fully loaded wage rates are \$57.96 and \$41.65 respectively. The estimated total cost of recipients making themselves

<sup>103</sup> May 2018 National Occupational Employment and Wage Rates, National File (xls), First-Line Supervisors of Office & Admin Support Workers (OCC Code: 43–1010, Average, Column Title: H\_Mean). Accessed and downloaded June 4, 2019. <https://www.bls.gov/oes/tables.htm>.

<sup>104</sup> May 2018 National Occupational Employment and Wage Rates, National File (xls), Emergency Management Directors (OCC Code: 11–9160, Average, Column Title: H\_Mean). Accessed and downloaded June 4, 2019. <https://www.bls.gov/oes/tables.htm>.

<sup>105</sup> December 2018 Bureau of Labor Statistics, Employer Costs for Employee Compensation, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group, page 4. Accessed and downloaded June 4, 2019. [https://www.bls.gov/news.release/archives/eccc\\_03192019.pdf](https://www.bls.gov/news.release/archives/eccc_03192019.pdf).

familiar with the proposed rule is \$4,582 in year 1 (\$742 per year annualized at 7 percent over 10 years, and \$635 at 3 percent). ((56 recipients × 1 hour × \$57.96 wage) + (56 recipients × 1 hour × \$41.65 wage) = \$5,578.16).

*Summary of Costs.* FEMA estimated the proposed rule would have familiarization costs of \$5,578 in the first year of implementation. FEMA assumed that all staff and resources would come from existing sources and thus represent an opportunity cost.

**Benefits**

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

*Cost Savings.* Under a no-action baseline, FEMA estimated costs savings of \$85,463 that would result from removing the definition of “market value” at 44 CFR 79.2(f). Currently, the regulation requires FEMA to use the market value of a structure when making grant determinations. Removal of this requirement would allow FEMA to consider the value of the structure listed on the flood insurance policy when considering a grant request related to a vulnerable structure, rather than the “market value.” This would result in a reduction in the time it takes FEMA personnel to review a grant application. Using “market value” required additional research and appraisals, whereas the flood insurance property value is readily available to FEMA personnel. FEMA estimated this change would reduce the personnel time it takes to review a grant application by an estimated 2 hours per review for a total of \$85,463 annually.

FEMA based its estimates on the estimated annual average number of FMA grant applications that required a market value review between 2013 and 2017 and the wage rates of the personnel reviewing the grants. The annual average number of grant requests was 512. Table 3 shows the annual number of grant requests for vulnerable

properties that required a market value review between 2013 and 2017.

**TABLE 3—ANNUAL GRANT REQUESTS REQUIRING MARKET VALUE REVIEW**

| Year                 | FMA program |
|----------------------|-------------|
| 2013 .....           | 602         |
| 2014 .....           | 438         |
| 2015 .....           | 508         |
| 2016 .....           | 592         |
| 2017 .....           | 418         |
| Total .....          | 2,558       |
| Annual average ..... | 512         |

Reviews of the grant applications can vary widely from simple—all documentation accompanies the request and requires very little follow-up—to complex. For this analysis, FEMA chose to capture the variability in the grant application reviews by using a weighted average of the hours it takes to complete the reviews. FEMA estimated that 25 percent of the reviews are simple; these reviews take 8 hours each on average to complete. Reviews of applications that are average in their complexity comprise 50 percent of the reviews and are assumed to take 12 hours each. Twenty-five percent of the reviews are complex and take 16 hours on average to complete.<sup>106</sup> Taking a weighted average of the times listed and using the distribution of 25 percent simple/50 percent average/25 percent complex, FEMA estimated that grant application reviews take 12 hours on average to complete.  $((0.25 \times 8) + (0.50 \times 12) + (0.25 \times 16)) = 12$  hours).

Program Specialists (GS 13, step 5) and contracted Civil Engineers conduct the reviews, the Program Specialists conduct 75 percent of reviews and the Civil Engineers conduct the remaining 25 percent. The fully-loaded average hourly wage for GS 13, step 5 at the FEMA regional locations is \$89.35<sup>107</sup> and \$65.79<sup>108</sup> is the fully-loaded hourly

wage rate for Civil Engineers. Using the 12-hour average estimate for reviewing the grant application, FEMA estimates that each year it spends \$512,778 on average to review FMA grant applications.  $((512 \text{ grant reviews} \times 12 \text{ hours per review} \times \$89.35 \text{ hourly wage for Program Specialist} \times 0.75) + ((512 \text{ grant reviews} \times 12 \text{ hours per review} \times \$65.79 \text{ hourly wage for Civil Engineer} \times 0.25)) \div (0.75 + 0.25) = \$512,778.20$ .

FEMA estimated that removing the definition of “market value” would reduce its administrative burden by 2 hours per review. This results in each review taking 10 hours instead of 12, on average. Using the same calculation as above and 10 hours instead of 12 hours per review, FEMA’s average amount spent each year on reviewing FMA grant applications would be \$427,315 and would result in an estimated annual cost savings of \$85,463.  $(\$512,778 - \$427,315 = \$85,463)$ .

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

*Revising, Adding, or Removing Definitions.* FEMA proposes to revise existing definitions for clarification purposes, to add several definitions to conform with BW-12 and current agency practice, and to delete others that are obsolete. FEMA believes the changes are clear and more consistent with definitions used in 2 CFR part 200 and the HMA Guidance.<sup>109</sup>

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

<sup>106</sup>FEMA personnel who review the FMA grant requests provided the information on the average time to review and the discussion of complexity.

<sup>107</sup>Based on the OPM General Schedule of Pay, January 2018, the average base wage of GS 13, step 5 in each of the FEMA regional office locations is \$61.20 (Boston, MA; NY, NY; Philadelphia, PA; Atlanta, GA; Chicago, IL; Denton, TX; KC, MO; Denver, CO; Oakland, CA; and Bothell, WA), which is multiplied by a 1.46 benefits multiplier (December 2018, BLS Employer Costs for Employee Compensation) to get a fully loaded wage rate of \$89.35/hour. Access and downloaded July 5, 2019. <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2018/salhr.pdf>.

<sup>108</sup>Based on Bureau of Labor Statistics May 2018 National Employment and Wage Rate, National File (xls), a Civil Engineer, SOC 17-2050, has a base wage of \$45.06, which is multiplied by a benefits multiplier of 1.46 (December 2018, BLS Employer

Costs for Employee Compensation) to get a fully loaded wage rate of \$65.79/hour. Accessed and downloaded July 5, 2019. <https://www.bls.gov/oes/tables.htm>.

<sup>109</sup>Hazard Mitigation Assistance Guidance (HMA Guidance), Feb. 27, 2015, available at [https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA\\_Guidance\\_022715\\_508.pdf](https://www.fema.gov/media-library-data/1424983165449-38f5dfc69c0bd4ea8a161e8bb7b79553/HMA_Guidance_022715_508.pdf) (last accessed Feb. 13, 2020).

protected from flooding, and can be removed from the repetitive flood loss list of un-mitigated properties insured by the NFIP. This reduces the flood vulnerability to RL and SRL structures, preventing further losses to the policyholders, as well as to FEMA. This benefit applies to the pre-statutory baseline, but not the no-action baseline because recipients and FEMA both realized this benefit beginning in 2013 when FEMA implemented it through the HMA Guidance.

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

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

when FEMA implemented it through the HMA Guidance.

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

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

FEMA estimated annual cost savings of \$85,463 per year. Removing the definition of "market value" would lead to cost savings to FEMA. Removing this definition would reduce the time it takes to conduct an initial grant application review by 2 hours.

Under a pre-statutory (pre-BW-12) baseline, FEMA believes there are considerable benefits associated with the shift to entirely competitive awards for the grants instead of the previous State-specific allocations, as well as the

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

Transfers

*Federal Cost Shares.* The adjustments in cost shares made by BW-12 result in distributional impacts, with certain grant programs receiving relative increases and decreases in grant funds. To analyze the impact of changes to the cost shares, FEMA summarized available mitigation project data for standard, RL, and SRL grants.<sup>110</sup>

Between 2006 and 2012 (pre-BW-12), FEMA provided a total of 390 grants to 244 recipients for 1,014 properties. The value of those grants was \$287,140,206 with FEMA paying \$202,072,763 and recipients paying \$85,067,443. Table 4 shows the distribution of these grants by category.

TABLE 4—PRE-BW-12 MITIGATION PROJECTS AND ASSOCIATED VALUE BY GRANT CATEGORY [2018\$]

| Year          | Standard<br>(≤75% federal cost share) |                 |                         | Repetitive loss<br>(75% federal cost share) |                 |                         | Severe<br>repetitive loss<br>(90–100% federal cost share) |                 |                         |
|---------------|---------------------------------------|-----------------|-------------------------|---|-----------------|-------------------------|---|-----------------|-------------------------|
|               | Number of grants                      | Value of grants | Federal share obligated | Number of grants                            | Value of grants | Federal share obligated | Number of grants  | Value of grants | Federal share obligated |
| 2006 .....    | 93                                    | \$38,326,383    | \$28,399,846            | .....                                       | \$              | \$                      | 2   | \$147,974       | \$147,974               |
| 2007 .....    | 85                                    | 45,485,645      | 33,225,037              | .....                                       | .....           | .....                   | .....   | .....           | .....                   |
| 2008 .....    | 70                                    | 36,449,791      | 24,638,444              | .....                                       | .....           | .....                   | 1   | 34,540          | 31,086                  |
| 2009 .....    | 54                                    | 79,692,889      | 57,976,016              | 3   | 2,973,885       | 2,431,695               | 3   | 611,432         | 550,289                 |
| 2010 .....    | 35                                    | 32,133,654      | 22,507,910              | 2   | 1,454,583       | 881,884                 | .....   | .....           | .....                   |
| 2011 .....    | 17                                    | 17,218,947      | 11,035,040              | .....                                       | .....           | .....                   | .....   | .....           | .....                   |
| 2012 .....    | 25                                    | 32,610,483      | 20,247,542              | .....                                       | .....           | .....                   | .....   | .....           | .....                   |
| Average ..... | 54                                    | 40,273,970      | 28,289,976              | 3   | 632,638         | 473,368                 | 2   | 113,421         | 104,193                 |
| Total .....   | 379                                   | 281,917,792     | 198,029,835             | 5   | 4,428,468       | 3,313,579               | 6   | 793,946         | 729,349                 |

<sup>110</sup> FEMA assumes that the mitigation project level grant data with applications comprising mixed property categories resulting in blended cost share percentages (any total cost share not equal to 100 percent, 90 percent, or 75 percent Federal) would

be rounded up to the nearest threshold category. This would not round up project values or Federal cost shares in dollar terms, only their tabulation and consideration as RL or SRL. An application with a determined Federal cost share of 91–99

percent would be counted as part of the 100 percent SRL category, while applications with 76–89 percent Federal cost shares would be counted as part of the 90 percent Federal RL category.

The 390 grants from pre-BW-12 were one of three types—Standard Mitigation (up to 75 percent Federal cost share); RL (75 percent Federal cost share); or SRL (90–100 percent Federal cost share). Prior to BW-12, there were 379 Standard Mitigation grants with a total value of \$281,917,792. FEMA’s share was \$198,029,835 and the recipients’ share was \$83,887,957 (70 percent

average Federal cost share). For RL grants, there were five grants with a total value of \$4,428,468. FEMA’s share was \$3,313,579 and the recipients’ share was \$1,114,889 (75 percent Federal cost share). For SRL grants, there were six grants made with a total value of \$793,946. FEMA’s share was \$729,349 and the recipients’ share was \$64,597 (92 percent Federal cost share).

Post-BW-12 (2013–2017), FEMA provided a total of 527 grants to 204 recipients for 2,873 properties. The total value of those grants was \$682,040,624. FEMA’s share was \$622,171,437 and recipients’ share was \$59,869,187. Table 5 shows the distribution of these grants by category.

TABLE 5—POST-BW-12 MITIGATION PROJECTS AND ASSOCIATED VALUE BY GRANT CATEGORY [2018\$]

| Year               | Standard (≤75% federal cost share) |                   |                         | Repetitive loss (75–90% federal cost share) |                   |                         | Severe repetitive loss (100% federal cost share) |                    |                         |
|--------------------|------------------------------------|-------------------|-------------------------|---|-------------------|-------------------------|--|--------------------|-------------------------|
|                    | Number of grants                   | Value of grants   | Federal share obligated | Number of grants                            | Value of grants   | Federal share obligated | Number of grants                                 | Value of grants    | Federal share obligated |
| 2013 .....         | 18                                 | \$10,723,474      | \$7,079,996             | 5   | \$11,904,781      | \$10,163,082            | 65   | \$98,392,747       | \$88,681,628            |
| 2014 .....         | 28                                 | 8,730,394         | 5,245,019               | 5   | 6,731,307         | 5,749,293               | 68   | 73,550,347         | 74,444,363              |
| 2015 .....         | 16                                 | 7,187,417         | 5,375,058               | 8   | 33,162,836        | 29,399,251              | 80   | 122,139,120        | 117,708,589             |
| 2016 .....         | 26                                 | 11,762,427        | 8,729,565               | 12  | 29,128,628        | 24,800,531              | 99   | 170,742,360        | 156,950,119             |
| 2017 .....         | 33                                 | 13,430,244        | 9,967,987               | 5   | 5,835,914         | 4,880,298               | 59   | 78,618,628         | 72,996,658              |
| Average .....      | 24                                 | 10,366,791        | 7,279,525               | 7   | 17,352,693        | 14,998,491              | 74   | 108,688,640        | 102,156,271             |
| <b>Total .....</b> | <b>121</b>                         | <b>51,833,956</b> | <b>36,397,625</b>       | <b>35</b>                                   | <b>86,763,466</b> | <b>74,992,455</b>       | <b>371</b>                                       | <b>543,443,202</b> | <b>510,781,357</b>      |

These 527 grants were one of three types—Standard Mitigation (up to 75 percent Federal cost share); RL (75–90 percent Federal cost share); or SRL (90–100 percent Federal cost share) (all post-BW-12 cost shares). There were 121 Standard Mitigation grants with a total value of \$51,833,956. FEMA’s share was \$36,397,625 and the recipients’ share was \$15,436,331 (70 percent average Federal cost share). For RL grants, there were 35 grants with a total value of \$86,763,466. FEMA’s share was \$74,992,455 and the recipients’ share was \$11,771,011 (86 percent Federal cost share). For SRL grants, there were 371 grants made with a total value of \$543,443,202. FEMA’s share was \$510,781,357 and the recipients’ share was \$325,661,845 (94 percent Federal cost share).

These grants often include some ineligible costs, including cost overruns or underruns, the use of insurance proceeds that FEMA deducted as a duplication of benefits,<sup>111</sup> or increased cost of compliance (ICC),<sup>112</sup> so the actual cost shares do not equal the percentages listed above. For example, although SRL grants have a 100 percent

Federal cost share, the actual average Federal share was 94 percent.

Changing Cost Shares and to a Fully Competitive Grant Process for FMA

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

First, FEMA analyzed the shift in grant priorities as a distributional impact between grant programs. This was done by applying the change in percent share of standard, RL, and SRL grants (from pre-BW-12 to post-BW-12), to the total FMA grant funding post-BW-12, showing the relative decreases and increases by type of FMA grant in

terms of post-BW-12 grant funding caused by making the grants competitive and shifting funding to riskier properties.

- The five-year total share of standard mitigation grants decreased by \$617,928,805 post-BW-12 (7.6 percent of total funding post-BW-12 – 98.2 percent of funding pre-BW-12) × \$682,040,624 total grant funds post-BW-12)).
- The five-year total share of RL grants increased by \$76,388,550 post-BW-12 (12.7 percent – 1.5 percent × \$682,040,624).
- The five-year total share of SRL grants increased by \$541,540,225 post-BW-12 (79.7 percent – 0.3 percent × \$682,040,624).

This shows the total five-year relative increases and decreases between FMA programs in terms of post-BW-12 grant funding: (–\$617,928,805 for standard grants + \$76,388,550 for SL grants + \$541,540,225 SRL grants = \$0).

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

<sup>111</sup>Duplication of Benefits refers to assistance from more than one source that is used for the same mitigation purpose or activity. The purpose may apply to the whole project or only part of it. HMA funds cannot duplicate funds received by or available to applicants or subapplicants from other sources for the same purpose. Examples of other sources include insurance claims, other assistance programs (including previous project or planning grants and subawards from HMA programs), legal awards, or other benefits associated with properties

or damage that are the subject of litigation. HMA does not require that property owners seek assistance from other sources (except for insurance claims). However, it is the responsibility of the property owner to report other benefits received, any applications for other assistance, the availability of insurance proceeds, or the potential for other compensation, such as from pending legal claims for damages, relating to the property. References: Sec. 312 of the Stafford Act; 44 CFR 79.6(d)(7); Hazard Mitigation Assistance Guidance

(February 27, 2015), Part III, D.5, pages 31–32; HMA Tool for Identifying Duplication of Benefits <http://www.fema.gov/library/viewRecord.do?id=6815>.

<sup>112</sup>Increased Cost of Compliance (ICC) provides up to \$30,000 to help cover the cost of mitigation measures that will reduce flood risk. ICC coverage is a part of most standard flood insurance policies available under the NFIP. <https://www.fema.gov/media-library/assets/documents/1130>.

TABLE 6—CHANGE IN AVERAGE ANNUAL NUMBER OF GRANTS AND FUNDING PRE-BW–12 TO POST-BW–12 [2018\$]

|                               | Pre-BW–12    | Percent pre-BW–12 | Post-BW–12    | Percent post-BW–12 | Percent change |
|-------------------------------|--------------|-------------------|---------------|--------------------|----------------|
| <b>Standard Mitigation</b>    |              |                   |               |                    |                |
| Grants per Year .....         | 54           | 91.5              | 24            | 22.9               | – 68.6         |
| Funding per year .....        | \$40,273,970 | 98.2              | \$10,366,791  | 7.6                | – 90.6         |
| <b>Repetitive Loss</b>        |              |                   |               |                    |                |
| Grants per Year .....         | 3            | 5.1               | 7             | 6.7                | +1.6           |
| Funding per year .....        | \$632,638    | 1.5               | \$17,352,693  | 12.7               | +11.2          |
| <b>Severe Repetitive Loss</b> |              |                   |               |                    |                |
| Grants per Year .....         | 2            | 3.4               | 74            | 70.5               | +67.1          |
| Funding per year .....        | \$113,421    | 0.3               | \$108,688,640 | 79.7               | +79.4          |

When comparing pre-BW–12 standard mitigation grants to post-BW–12, both the average annual number of approved grants and the average annual total amount of funding dropped from \$40.3 million to \$10.4 million. For RL structures, the average annual number of approved grants increased and the amount of funding increased from \$1.8 million to \$17.4 million. For SRL structures, both the average annual number of approved grants and the average annual funding increased from \$0.25 million to \$108.7 million when compared to pre-BW–12. This reflects BW–12 shifting priority from standard mitigations to RL and SRL structures. FEMA’s data indicate a trend toward both larger project sizes and more recently an increased number of RL and SRL projects.

FEMA then analyzed the distributional impacts of the Federal cost shares that resulted from both the shift in priorities and the changes in cost shares. The Federal cost share for standard mitigation grants remained at 75 percent over the post-BW–12 period analyzed. The cost share for RL grants increased from an average of 75 percent pre-BW–12 to 86 percent post-BW–12. SRL grants had an average 92 percent cost share pre-BW–12 and a 94 percent

cost share post-BW–12. FEMA also analyzed the change in the Federal cost share for the three grant categories together, which shows the impact of BW–12’s changes to cost share amounts as well as shifting funding to RL and SRL grants, which have higher cost shares.

The total Federal share of all FMA grant categories pre-BW–12 was 70.4 percent (\$287,140,206 ÷ \$202,072,763). Post BW–12, the Federal share was 91.2 percent (\$682,040,624 ÷ \$622,171,437). The increase in transfers from FEMA to grantees as a result of the changed cost shares and changed priorities, in terms of post-BW–12 grant funding, was \$141,864,450 (91.2 percent – 70.4 percent × \$682,040,624) over five years, or an average increase of \$28,372,890 per year.

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

from FEMA to grant recipients. The discounted total 10-year transfers from FEMA to grant recipients are \$283.7 million (\$28.4 million annualized<sup>113</sup>).

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

TABLE 7—MITIGATION PLANNING GRANTS 2006–2017 [2018\$]

| Year       | Applications | Approved grants | Average grant amount |
|------------|--------------|-----------------|----------------------|
| 2006 ..... | 167          | 92              | \$286,765            |
| 2007 ..... | 561          | 481             | 89,709               |
| 2008 ..... | 523          | 374             | 82,248               |
| 2009 ..... | 491          | 346             | 82,248               |
| 2010 ..... | 364          | 288             | 81,514               |
| 2011 ..... | 417          | 363             | 102,173              |

<sup>113</sup> The annualized amounts for 3 percent and 7 percent are equal to the estimated annual transfers

of \$28.4 million because the amounts for each year are identical and the first year is discounted.

TABLE 7—MITIGATION PLANNING GRANTS 2006–2017—Continued  
[2018\$]

| Year               | Applications | Approved grants | Average grant amount |
|--------------------|--------------|-----------------|----------------------|
| 2012               | 173          | 155             | 142,411              |
| Average Pre-BW–12  | 385          | 300             | 107,838              |
| 2013               | 260          | 228             | 115,022              |
| 2014               | 293          | 264             | 87,772               |
| 2015               | 351          | 315             | 93,000               |
| 2016               | 329          | 287             | 170,262              |
| 2017               | 422          | 377             | 98,268               |
| Average Post-BW–12 | 331          | 294             | 111,899              |

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

amount that can be granted to a recipient. Further, the lower caps per recipient and subrecipient allow FEMA to assist more recipients and subrecipients.

Alternatives

Most of the changes in this proposed rule are based on statute. FEMA has limited discretion in determining which changes to make. The changes that carry

an economic impact under a pre-statutory (pre-BW–12) baseline are the proposed changes to 44 CFR 79.4 (proposed § 77.4); FMA Grant Federal Cost Shares and 44 CFR 79.6 (proposed § 77.6): Flood Portion of Multi-Hazard Mitigation Plans. BW–12 prescribed these changes. These changes are neither new nor discretionary and FEMA did not consider alternatives.

TABLE 8—A–4 ACCOUNTING STATEMENT  
[2018\$]

| Period of analysis: 2006 to 2017        |  |                         |                                       |
|---|--|-------------------------|---------------------------------------|
| Category                                | 7 Percent discount rate  | 3 Percent discount rate | Source citation (RIA, preamble, etc.) |
| <b>BENEFITS:</b>                        |  |                         |                                       |
| Annualized Monetized \$millions/year.   | .085463  | .085463                 | Preamble (RA)                         |
| Annualized Quantified                   | N/A  | N/A.                    |                                       |
| Qualitative                             | <ul style="list-style-type: none"> <li>Allows FEMA to target most vulnerable properties and streamline mitigation grant process.</li> <li>Modernize and standardize regulations to match current practice and statute and increase readability.</li> <li>Shift from State-based allocations to a competitive process, allowing FEMA to select applications according to FEMA priorities rather than location.</li> <li>Eliminate limits on in-kind contributions allowing recipients more flexibility to cover their portion of the cost share.</li> </ul> |                         | Preamble (RA).                        |
| <b>COSTS:</b>                           |  |                         |                                       |
| Annualized Monetized \$millions/year.   | 0.000742   | 0.000635                | Preamble (RA).                        |
| Annualized quantified                   | N/A  | N/A.                    |                                       |
| Qualitative                             | N/A.   |                         |                                       |
| <b>TRANSFERS:</b>                       |  |                         |                                       |
| Annualized Monetized \$millions/year.   | 28.4   | 28.4                    | Preamble (RA).                        |
| From/To                                 | Increase in transfers from FEMA to HMA recipients  |                         | Preamble (RA).                        |
| Category                                | Effects  |                         | Source citation (RIA, preamble, etc.) |
| State, Local, and/or Tribal Government. | Qualitative benefits. Increase in transfers from FEMA to State, local, Tribal governments.   |                         | Preamble (RA).                        |

| Category             | Effects   | Source citation (RIA, preamble, etc.) |
|----------------------|---|---------------------------------------|
| Small business ..... | There were 231 Small entity recipients from 2006–2017. Prior to BW–12, an average of 16 recipients per year were small entities. Post-BW–12, there were an average of 24 small entity recipients per year. Small entities were more likely to receive RL or SRL grants and slightly less likely to receive standard mitigation grants, so the Federal cost shares for small entities were, on average, higher post-BW–12. | Preamble (IRFA).                      |
| Wages .....          | None.   |                                       |
| Growth .....         | None.   |                                       |

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires agency review of proposed and final rules to assess their impact on small entities. When an agency promulgates a notice of proposed rulemaking under 5 U.S.C. 553, the agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies pursuant to 5 U.S.C. 605(b) that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. FEMA believes this proposed rule does not have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small entity impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential direct economic impacts on small entities that would result from the adoption of this NPRM. FEMA will consider all comments received in the public comment process.

In accordance with the Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FEMA prepared this IRFA to examine the effects of the adjustments made by BW–12 and implemented by FEMA in the 2013 HMA Guidance on small entities. A small entity may be: A small independent business, defined as independently owned and operated, is organized for profit, and is not dominant in its field per the Small Business Act (5 U.S.C. 632); a small not-for-profit organization (any not-for-profit enterprise which is independently owned and operated and is not dominant in its field); or a small governmental jurisdiction (locality with fewer than 50,000 people) per 5 U.S.C. 601–612.

**1. A Description of the Reasons Why Action by the Agency Is Being Considered**

FEMA initiated this rulemaking to codify legislative requirements included in the Biggert-Waters Flood Insurance Reform Act of 2012, Public Law 112–141, 126 Stat. 916 (BW–12), which amended the National Flood Insurance Act of 1968 (NFIA) and required changes to all major components of the National Flood Insurance Program (NFIP), including mitigation grants authorized under the NFIA. FEMA implemented the legislative requirements in BW–12 through policy/guidance in 2013 and is now proposing to codify these changes in regulation, to reflect current agency practice, and to clarify existing regulations.

Annually, FEMA provides grant funding to reduce or eliminate risk of flood damage to buildings that are insured under the NFIP. Before BW–12, FEMA administered three distinct NFIP grant programs: (1) The Flood Mitigation Assistance (FMA) Program; (2) the Repetitive Flood Claims (RFC) Program; and (3) the Severe Repetitive Loss (SRL) Program. BW–12 eliminated the RFC and SRL programs and consolidated aspects of those programs into the FMA Program.

There are two BW–12 provisions that FEMA codifies in this rule that result in substantive modifications to the FMA regulations: (1) Cost shares for mitigation projects and (2) the amount of FMA funds available for mitigation planning grants. BW–12 requires these changes and FEMA implemented them through the HMA Guidance in 2013. In addition, the proposed rule would make nonsubstantive revisions intended to clarify the current grant regulations at 44 CFR parts 79, 80, 201, and 206, subpart N by adding new definitions and substitute terms that reflect the current version of 2 CFR parts 200 and 3002. Other nonsubstantive changes in the proposed rule remove references to programs eliminated by BW–12. In general, the changes in the proposed rule do not reduce the amount of funding appropriated for the FMA

program or the number of grant recipients. Rather, the proposed rule alters the distribution of those funds to recipients with NFIP insured facilities with the highest risk of flood damage. Specifically, BW–12 requires changes to the Federal cost shares used for FMA grants. These changes to the cost shares prioritize the most vulnerable severe repetitive loss properties by increasing FEMA’s cost share portion from 75 percent Federal to 75–90 percent Federal for RL properties and from 90 to 100 percent Federal to 100 percent Federal for SRL properties. FEMA does not change the cost share for “standard” mitigation properties; that cost share remains at the current level of 75 percent Federal.

FEMA includes a detailed marginal analysis table which lists all of the changes made by BW–12; that table is posted in the public docket for this rulemaking available on [www.regulations.gov](http://www.regulations.gov) under Docket ID FEMA–2019–0011. Most of the changes in this rule are nonsubstantive clarifications. Many of the changes remove language describing a program or a feature of the FMA program that expired or is no longer relevant, applicable, or necessary. FEMA expects that the changes offer negligible or inconsequential benefits to FEMA and other administrating authorities.

**2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule**

The objective of this proposed rule is to codify the legislative requirements in BW–12 and to clarify existing regulations. Specifically, this proposed rule would make substantive changes intended to codify BW–12 by removing 44 CFR part 78 and substantially revising Part 79. In addition, the proposed rule would make nonsubstantive revisions intended to clarify 44 CFR parts 79, 80, 201, and 206, subpart N by adding new definitions and substitute terms that reflect the current version of 2 CFR parts 200 and 3002. Other nonsubstantive changes included in the proposed rule



would remove references to programs eliminated by BW-12.

3. A Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply

The proposed rule directly affects all eligible FMA grant recipients. FEMA estimates that the changes from BW-12 affect FMA grant recipients that are small governmental jurisdictions with a population of less than 50,000, as defined at 5 U.S.C. 601(5).<sup>114</sup> To estimate the effects of the adjustments made by BW-12, and codified in this

rule, FEMA used the same methodology used in the regulatory analysis.<sup>115</sup> In general, FEMA identified the affected population—recipients of FEMA’s FMA grants—and analyzed how the changes affect those recipients. Using those results, FEMA then evaluated which recipients qualified as “small entities.” Eligible FMA grant recipients may include States, U.S. territories, and Indian Tribal governments; subrecipients may include local governments and governmental organizations such as flood, sewer, and water districts. FEMA removed from its RFA dataset and analysis any recipients

that are States and U.S. territories because they have populations greater than 50,000. FEMA also removed any Indian Tribal governments because they are not included in the definition of a small entity.<sup>116</sup> The remaining recipients were either local governments or governmental organizations. FEMA used the U.S. Census Bureau’s annual population estimates for 2018 produced by its Population Estimates Program (PEP)<sup>117</sup> to determine the population for each recipient.<sup>118</sup> Table 9 summarizes the number of small entities affected by the changes in BW-12.

TABLE 9—ESTIMATED NUMBER OF SMALL ENTITIES AFFECTED BY PROPOSED RULE

|  | Year                                | Grants to small entities | Properties within grants | Small entity recipients |
|--|-------------------------------------|--------------------------|--------------------------|-------------------------|
| Pre-BW-12 .....  | 2006 .....                          | 30                       | 67                       | 30                      |
|  | 2007 .....                          | 25                       | 39                       | 25                      |
|  | 2008 .....                          | 16                       | 14                       | 16                      |
|  | 2009 .....                          | 18                       | 41                       | 18                      |
|  | 2010 .....                          | 11                       | 76                       | 11                      |
|  | 2011 .....                          | 4                        | 12                       | 4                       |
|  | 2012 .....                          | 8                        | 75                       | 8                       |
| Post-BW-12 .....   | 2013 .....                          | 23                       | 64                       | 23                      |
|  | 2014 .....                          | 27                       | 66                       | 27                      |
|  | 2015 .....                          | 18                       | 71                       | 18                      |
|  | 2016 .....                          | 25                       | 56                       | 25                      |
|  | 2017 .....                          | 26                       | 78                       | 26                      |
|  | Total Small Entity Recipients ..... |                          | 231                      | 659                     |
| Total All Recipients .....                                     |                                     | 917                      | 3,887                    | 448                     |
| Small Entity Recipients as a Percent of Total Recipients ..... |                                     | 25.2%                    | 17.0%                    | 51.6%                   |
| Pre-BW-12: .....   | Total .....                         | 112                      | 324                      | 112                     |
|  | Annual Average .....                | 16                       | 46                       | 16                      |
| Post-BW-12: .....  | Total .....                         | 119                      | 335                      | 119                     |
|  | Annual Average .....                | 24                       | 67                       | 24                      |

Between 2006 and 2017, FEMA awarded a total of 917 FMA grants to 448 recipients to mitigate flood risk to 3,887 properties. Of the total 448 recipients, 231 recipients, or 25.2 percent, had populations under 50,000 and are considered small entities. These

small entities used the FMA grants to mitigate flood risk to 659 vulnerable properties. These 231 small entity recipients are all local governments.

Pre-BW-12, FEMA awarded 112 grants to small entities. Of these, 109

were for standard mitigation with an average Federal cost share of 73 percent, 2 were RL with an average Federal cost share of 82 percent, and 1 was SRL with a cost share of 90 percent.

<sup>114</sup> See 5 U.S.C. 601(3)–(6). In general, the term “small entity” can have the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction” for purposes of this analysis. Specifically, section 601(3) defines a “small business” as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated that is not dominant in its field of operation. Section 601(4) defines a “small organization” as any not-for-profit enterprise that is independently owned and operated that is not dominant in its field of operation. Section 601(5) defines “small governmental jurisdiction” as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000. Accessed and

downloaded June 4, 2019. [http://uscode.house.gov/view.xhtml?req=\(title:5 section:601 edition:prelim\) OR \(granuleid:USC-prelim-title5-section601\)&f=treesort&edition=prelim&num=0&jumpTo=true](http://uscode.house.gov/view.xhtml?req=(title:5 section:601 edition:prelim) OR (granuleid:USC-prelim-title5-section601)&f=treesort&edition=prelim&num=0&jumpTo=true).

<sup>115</sup> FEMA’s methodology is included in section IV. Regulatory Analysis of this NPRM

<sup>116</sup> The Regulatory Flexibility Act (RFA) defines a small entity as a small business, small nonprofit organization, or a small governmental jurisdiction. Section 601(5) defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

<sup>117</sup> FEMA used the U.S. Census Bureau’s PEP estimates file entitled, “sub-est2018\_all.csv”

because it provided 2018 estimated populations for all states and all subgovernmental jurisdictions, including counties, parishes, etc., towns, cities, villages, etc. Accessed and downloaded June 4, 2019. <https://www2.census.gov/programs-surveys/popest/datasets/2010-2018/cities/totals/>.

<sup>118</sup> FEMA used the population of the county, parish, or borough in which the grant project was located as a proxy to determine the populations for governmental organizations. For example, FEMA used the New Castle County, DE 2018 population of 559,335 to determine if the New Castle Conservation District was a small entity. In this example, the population of 559,335 is greater than the 50,000 small entity threshold; thus, the new Castle Conservation District is not a small entity.

TABLE 10—PRE-BW–12 PROJECTS AND VALUE BY GRANT CATEGORY (2018\$) AWARDED TO SMALL ENTITIES

| Year        | Standard (≤75% federal cost share) |                 |                         | Repetitive loss (RL) (75% federal cost share) |                    |                         | Severe repetitive loss (SRL) (90%–100% federal cost share) |                 |                         |
|-------------|------------------------------------|-----------------|-------------------------|---|--------------------|-------------------------|--|-----------------|-------------------------|
|             | Grants                             | Value of grants | Federal share obligated | Grants  | \$ Value of grants | Federal share obligated | Grants   | Value of grants | Federal share obligated |
| 2006 .....  | 30                                 | \$5,907,776     | \$4,388,166             | .....   | .....              | .....                   | .....  | .....           | .....                   |
| 2007 .....  | 25                                 | 10,819,810      | 7,647,471               | .....   | .....              | .....                   | .....  | .....           | .....                   |
| 2008 .....  | 16                                 | 2,150,269       | 1,575,275               | .....   | .....              | .....                   | .....  | .....           | .....                   |
| 2009 .....  | 15                                 | 7,924,904       | 5,763,784               | 2   | \$2,350,766        | \$1,917,922             | 1  | \$58,406        | \$52,565                |
| 2010 .....  | 11                                 | 15,128,995      | 11,345,865              | .....   | .....              | .....                   | .....  | .....           | .....                   |
| 2011 .....  | 4                                  | 2,897,824       | 2,042,931               | .....   | .....              | .....                   | .....  | .....           | .....                   |
| 2012 .....  | 8                                  | 6,393,968       | 4,789,345               | .....   | .....              | .....                   | .....  | .....           | .....                   |
| Total ..... | 109                                | 51,223,546      | 37,552,837              | 2   | 2,350,766          | 1,917,922               | 1  | 58,406          | 52,565                  |

Post-BW–12, FEMA awarded 119 grants to small entities. Of these, 40 were standard mitigation with an average Federal cost share of 69 percent, 3 were RL with an average Federal cost

share of 88 percent, and 76 were SRL with an average Federal cost share of 90 percent. While the cost shares did not change significantly, more applicants received SRL grants when compared to

the pre-BW–12 period. This shows the prioritization of more vulnerable properties.

TABLE 11—POST-BW–12 PROJECTS AND VALUE BY GRANT CATEGORY (2018\$) AWARDED TO SMALL ENTITIES

| Year        | Standard (≤75% federal cost share) |                 |                         | Repetitive loss (RL) (75%–90% federal cost share) |                 |                         | Severe repetitive loss (SRL) (100% federal cost share) |                 |                         |
|-------------|------------------------------------|-----------------|-------------------------|---|-----------------|-------------------------|--|-----------------|-------------------------|
|             | Grants                             | Value of grants | Federal share obligated | Grants  | Value of grants | Federal share obligated | Grants   | Value of grants | Federal share obligated |
| 2013 .....  | 8                                  | \$955,085       | \$427,739               | 1   | \$7,145,136     | \$6,337,841             | 14   | \$5,618,711     | \$3,711,417             |
| 2014 .....  | 11                                 | 2,529,635       | 1,594,317               | .....   | .....           | .....                   | 16   | 12,335,444      | 12,017,816              |
| 2015 .....  | 3                                  | 2,434,059       | 1,825,543               | .....   | .....           | .....                   | 15   | 10,486,133      | 9,829,253               |
| 2016 .....  | 6                                  | 285,707         | 194,186                 | 2   | 1,766,776       | 1,528,423               | 17   | 10,488,578      | 9,134,257               |
| 2017 .....  | 12                                 | 5,098,868       | 3,812,839               | .....   | .....           | .....                   | 14   | 9,034,842       | 8,474,084               |
| Total ..... | 40                                 | 11,303,354      | 7,854,624               | 3   | 8,911,912       | 7,866,264               | 76   | 47,963,708      | 43,166,827              |

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

This proposed rulemaking would codify FEMA’s current practice and make changes for clarity and accuracy. For that reason, FEMA does not anticipate this rulemaking places an increase in burden on small entities.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

There are no relevant Federal rules that duplicate, overlap, or conflict with the proposed rule.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

BW–12 mandated most of the changes in this proposed rule, and therefore FEMA has limited discretion in implementing these changes. These are not new or discretionary program changes and for this reason, FEMA did not consider alternatives. Given that this rule is largely distributive in nature, entailing transfers between less vulnerable and more vulnerable groups of properties at all levels, no less burdensome alternatives to the proposed rule are available. In the absence of this proposed rule, small entities would experience negative repercussions that might result from inconsistencies between the statutes, regulations, and agency policy.

7. Conclusion

FEMA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the

proposals in this NPRM. FEMA will consider all comments received in the public comment process. FEMA is interested in the potential impacts from the proposed rule on small entities and requests public comment on these potential impacts. If you think that this rule would have a significant economic impact on you, your business, your organization, or your local government, please submit a comment to the docket at the address under the **ADDRESSES** section. In your comment, explain why, how, and to what degree you think this rule would have an economic impact on you. After reviewing the public comments, FEMA may certify the final rule as not having a significant economic impact on a substantial number of small entities. FEMA will consider all comments received in the public comment process when making a final determination.

*C. Unfunded Mandates Reform Act of 1995*

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of

Federal regulatory actions on state, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and Tribal governments and the private sector. The proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

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

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

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

001-01, Revision 01, Implementation of the National Environmental Policy Act, section (V)(B)(2).

#### *E. Paperwork Reduction Act of 1995*

Under the Paperwork Reduction Act of 1995 (PRA), as amended, 44 U.S.C. 3501-3520, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency obtains approval from the Office of Management and Budget (OMB) for the collection and the collection displays a valid OMB control number. See 44 U.S.C. 3506, 3507. This rule contains collections of information that are subject to review by OMB. The information collections included in this rule are approved by OMB under control numbers 1660-0072 (Flood Mitigation Assistance (eGrants) and Grant Supplement Information), 1660-0062 (State/Local/Tribal Hazard Mitigation Plans), 1660-0026 (State Administrative Plan for the Hazard Mitigation Grant Program), and 1660-0076 (Hazard Mitigation Grant Program Application and Reporting). Currently, FEMA is working to reinstate 1660-0103 (Property Acquisition and Relocation for Open Space).

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

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

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

or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

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

#### *G. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments*

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

Although Indian Tribal governments are potentially eligible applicants under HMA programs, FEMA has determined that this rule does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. There is no substantial direct compliance cost associated with this proposed rule. The HMA programs are voluntary programs that provide funding to applicants, including Tribal governments, for eligible mitigation planning and projects that reduce disaster losses and protect life and property from future disaster

damages. An Indian Tribal government may participate as either an applicant/recipient or a subapplicant/subrecipient. FEMA does not expect the regulatory changes in this proposed rule to disproportionately affect Indian Tribal governments acting as recipients.

#### *H. Executive Order 13132, Federalism*

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

FEMA has reviewed this proposed rule under Executive Order 13132 and has determined that this rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive Order. FEMA has determined that this rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion. This rulemaking proposes amendments to regulations governing voluntary grant programs that may be used by State, local and Tribal governments to fund eligible mitigation activities that reduce disaster losses and protect life and property from future disaster damages. States are not required to seek grant funding, and this rulemaking does not limit their policymaking discretion.

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

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

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

Before promulgating any regulation, an agency must determine whether the proposed regulations will affect a floodplain(s), and if so, the agency must consider alternatives to avoid adverse effects and incompatible development in the floodplain(s). If the head of the agency finds that the only practicable alternative consistent with the law and with the policy set forth in Executive Order 11988 is to promulgate a regulation that affects a floodplain(s), the agency must, prior to promulgating the regulation, design or modify the regulation in order to minimize potential harm to or within the floodplain, consistent with the agency's floodplain management regulations and prepare and circulate a notice containing an explanation of why the action is proposed to be located in the floodplain. The purpose of the proposed rule is to update FEMA's HMA program regulations to reflect statutory changes that have already been implemented. While the proposed rule would revise the regulations FMA administered by the NFIP, it would not impact other NFIA regulations that pertain to land use, floodplain management, or flood insurance. The majority of the revisions FEMA is proposing in this rulemaking apply to the regulations for the FMA program, which is a voluntary grant program that provides funding for activities designed to reduce the risk of flood damage to structures insured under the NFIP. When FEMA undertakes specific actions that may have effects on floodplain management, FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with this Executive Order. These procedures include a specific, 8-step process for conducting floodplain management and wetland reviews. The proposed rule would not change this process.

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

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

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

The requirements of Executive Order 11990 apply in the context of the provision of Federal financial assistance relating to, among other things, construction and property improvement activities. However, the changes proposed in this rule would not have an effect on land use or wetlands. The purpose of the proposed rule is to update FEMA's HMA program regulations to reflect statutory changes that have already been implemented. While the proposed rule would revise the regulations for FMA administered by the NFIP, it would not impact other NFIP regulations that pertain to land

use, floodplain management, or flood insurance. The majority of the revisions FEMA is proposing in this rulemaking apply to the regulations for the FMA program, which is a voluntary grant program that provides funding for activities designed to reduce the risk of flood damage to structures insured under the NFIP. When FEMA undertakes specific actions that may have effects on wetlands, FEMA follows the procedures set forth in 44 CFR part 9 to assure compliance with this Executive Order. These procedures include a specific, 8-step process for conducting floodplain management and wetland reviews. The proposed rule would not change this process.

*K. Executive Order 12898, Environmental Justice*

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

This rulemaking will not have a disproportionately high or adverse effect on human health or the environment. This rulemaking will not have a disproportionately high or adverse effect on human health or the environment. Therefore the requirements of Executive Order 12898 do not apply to this rule.

*L. Congressional Review of Agency Rulemaking*

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

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

**List of Subjects**

*44 CFR Part 77*

Flood insurance, Grant programs.

*44 CFR Parts 78 and 79*

Flood insurance, Grant programs.

*44 CFR Part 80*

Disaster assistance, Grant programs.

*44 CFR Part 201*

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

*44 CFR Part 206*

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

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

**PART 78—[REMOVED AND RESERVED]**

- 1. Remove and reserve part 78 in its entirety.

**PART 79—FLOOD MITIGATION GRANTS [REDESIGNATED AS PART 77 AND AMENDED]**

- 2. Revise the authority citation for part 79 to read as follows:

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

- 3. Redesignate part 79 as part 77 and amend the references to §§ 79.1 through 79.9 as follows:

| Old section | New section |
|-------------|-------------|
| 79.1 .....  | 77.1        |
| 79.2 .....  | 77.2        |
| 79.3 .....  | 77.3        |
| 79.4 .....  | 77.4        |
| 79.5 .....  | 77.5        |
| 79.6 .....  | 77.6        |
| 79.7 .....  | 77.7        |
| 79.8 .....  | 77.8        |
| 79.9 .....  | 77.9        |

- 4. Amend § 77.1 by, revising the section heading and paragraphs (a) and (b), and removing paragraph (c).  
The revisions read as follows:

**§ 77.1 Purpose and applicability.**

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

(b) This part applies to the administration of funds under the FMA program for which the application period opens on or after [EFFECTIVE DATE OF THE FINAL RULE].

- 5. Amend § 77.2 by revising paragraphs (a) through (m) and adding paragraphs (n) through (q) to read as follows:

**§ 77.2 Definitions.**

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

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

(c) *Closeout* means the process by which FEMA or the pass-through entity determines that all applicable administrative actions and all required work of the Federal award have been completed and takes actions as described in 2 CFR 200.343, “Closeout.”

(d) *Community* means:

- (1) A political subdivision, including any Indian Tribe, authorized Tribal organization, Alaska Native village or authorized native organization, that has zoning and building code jurisdiction over a particular area having special

flood hazards, and is participating in the NFIP; or

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

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

(f) *Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

(g) *Management costs* mean any indirect costs, administrative expenses, and other expenses not directly chargeable to a specific project that are reasonably incurred by a recipient or subrecipient in administering and managing an award or subaward.

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

(i) *Recipient* means the State or Indian Tribal government that receives a Federal award directly from FEMA to carry out an activity under the FMA program. A recipient may also be a pass-through entity. The term recipient does not include subrecipients.

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

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

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

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

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

cumulative amount of such claims payments exceeding \$20,000; or

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

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

(m) *Subaward* means an award provided by a pass-through entity to a subrecipient, for the subrecipient to carry out part of a Federal award received by the pass-through entity. It does not include payments to a contractor or payments to an individual that is a beneficiary of a Federal program. A subaward may be provided through any form of legal agreement, including an agreement that the pass-through entity considers a contract.

(n) *Subapplicant* means a State agency, community, or Indian Tribal government submitting a subapplication to the applicant for assistance under the FMA program. Upon grant award, the subapplicant is referred to as the subrecipient.

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

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

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

■ 6. Amend § 77.3 by revising paragraphs (a) through (c) and removing paragraph (d).

The revisions read as follows:

### § 77.3 Responsibilities.

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

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

(2) Award all grants to the recipient after evaluating subaward applications for eligibility and ensuring compliance with applicable Federal laws, giving priority to such properties, or to the subset of such properties, as the

Administrator may determine are in the best interest of the NFIP;

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

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

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

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

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

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

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

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

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

(4) Award FEMA-approved subawards;

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

(6) Closeout the subaward in accordance with 2 CFR 200.343 and 200.344, and applicable FEMA guidance; and

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

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

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

(2) Implement all approved subawards;

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

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

(5) Closeout the subaward in accordance with 2 CFR 200.343 and 200.344, and applicable FEMA guidance.

■ 7. Revise § 77.4 to read as follows:

**§ 77.4 Availability of funding.**

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

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

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

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

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

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

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

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

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

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

made available for other FMA awards and subawards.

■ 8. Revise § 77.5 to read as follows:

**§ 77.5 Application process.**

(a) *Applicant.* (1) Applicants will be notified of the availability of funding for the FMA program pursuant to 2 CFR 200.202 and 200.203.

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

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

■ 9. Revise § 77.6 to read as follows:

**§ 77.6 Eligibility.**

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

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

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

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

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

(2) *Projects.* Projects funded under the FMA program are limited to activities

that reduce flood damages to properties insured under the NFIP. Applications involving any activities for which implementation has already been initiated or completed are not eligible for funding, and will not be considered. Eligible activities are:

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

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

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

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

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

(vi) Localized flood risk reduction projects that lessen the frequency or severity of flooding and decrease predicted flood damages, and that do not duplicate the flood prevention activities of other Federal agencies. Non-localized flood risk reduction projects such as dikes, levees, floodwalls, seawalls, groins, jetties, dams and large-scale waterway channelization projects are not eligible;

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

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

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

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

(1) Be in conformance with State, Tribal and/or local mitigation plans approved under part 201 of this chapter

for the jurisdiction where the project is located;

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

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

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

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

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

#### § 77.7 [Removed]

- 10. Remove § 77.7 in its entirety.
- 11. Redesignate § 77.8 as § 77.7 and amend newly redesignated § 77.7 by revising paragraphs (a) through (c) to read as follows:

#### § 77.7 Allowable costs.

(a) *General.* General policies for allowable costs for implementing awards and subawards are addressed in 2 CFR 200.101, 200.102, 200.400–200.475.

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

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

(2) *Indirect costs.* Indirect costs of administering the FMA program are eligible as part of the 10 percent management costs for the recipient or

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

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

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

\* \* \* \* \*

- 12. Redesignate § 77.9 as § 77.8 and revise the newly redesignated § 77.8 to read as follows:

#### § 77.8 Grant administration.

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

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

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

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

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

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

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

(d) *Remedies for noncompliance.* FEMA may terminate an award or take other remedies for noncompliance in accordance with 2 CFR 200.338 through 200.342.

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

- 13. Add and reserve part 79.

## PART 80—PROPERTY ACQUISITION AND RELOCATION FOR OPEN SPACE

- 14. Revise the authority citation for part 80 to read as follows:

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.*; Homeland Security Act of 2002, 6 U.S.C. 101.



■ 15. Amend § 80.3 by revising paragraphs (a) through (m) and adding paragraphs (n) and (o) to read as follows:

**§ 80.3 Definitions.**

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

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

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

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

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

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

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

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

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

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

(k) *Subapplicant* means the entity that submits an application for FEMA mitigation assistance to the State or Indian Tribal applicant/recipient. With respect to open space acquisition

projects under the Hazard Mitigation Grant Program (HMGP), this term has the same meaning as given to the term “applicant” in part 206, subpart N of this chapter. Upon grant award, the subapplicant is referred to as the subrecipient.

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

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

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

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

**§ 80.5 [Amended]**

■ 16. Amend § 80.5 by removing the word “grantee” and adding in its place the word “recipient” in paragraphs (a)(1), (b) introductory text, (c) introductory text, (c)(1), (7) and (8); and by removing the word “subgrantee” and adding in its place the word “subrecipient” in the introductory text, paragraphs (a)(5), (b) introductory text, (b)(1) and (3), (c) introductory text, and (d).

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

**§ 80.9 Eligible and ineligible costs.**

\* \* \* \* \*

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

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

benefits that it receives, anticipates, or has available from other sources for the same purpose. FEMA will reduce the subaward by the amounts available for the same purpose from another source.

\* \* \* \* \*

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

**§ 80.11 Project eligibility.**

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

\* \* \* \* \*

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

**§ 80.13 Application information.**

(a) \* \* \*

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

\* \* \* \* \*

■ 20. Revise § 80.17 to read as follows:

**§ 80.17 Project implementation.**

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

(b) *Clear title.* The subrecipient will obtain a title insurance policy demonstrating that fee title conveys to the subrecipient for each property to ensure that it acquires only a property with clear title. The property interest generally must transfer by a general warranty deed. Any incompatible easements or other encumbrances to the property must be extinguished before acquisition.

(c) *Purchase offer and supplemental payments.* (1) The amount of purchase offer is the current market value of the property or the market value of the property immediately before the

relevant event affecting the property (“pre-event”).

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

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

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

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

(4) Certain tenants who must relocate as a result of the project are entitled to relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Act (such as moving expenses, replacement housing rental payments, and relocation assistance advisory services) in accordance with 49 CFR part 24.

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

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

(d) *Removal of existing buildings.* Existing incompatible facilities must be removed by demolition or by relocation

outside of the hazard area within 90 days of settlement of the property transaction. The FEMA Regional Administrator may grant an exception to this deadline only for a particular property based upon written justification if extenuating circumstances exist, but will specify a final date for removal.

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

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

**§ 80.19 Land use and oversight.**

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

(2) The subrecipient may convey a property interest only to a public entity or to a qualified conservation organization. However, the subrecipient may convey an easement or lease to a private individual or entity for purposes compatible with the uses described in paragraph (a) of this section, with the prior approval of the Regional

Administrator, and so long as the conveyance does not include authority to control and enforce the terms and conditions of this section.

(3) If title to the property is transferred to a public entity other than one with a conservation mission, it must be conveyed subject to a conservation easement that must be recorded with the deed and must incorporate all terms and conditions set forth in this section, including the easement holder’s responsibility to enforce the easement. This must be accomplished by one of the following means:

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

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

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

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

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

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

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

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

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

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

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

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

**§ 80.21 Closeout requirements.**

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

\* \* \* \* \*

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

\* \* \* \* \*

**PART 201—MITIGATION PLANNING**

■ 23. Revise the authority citation for part 201 to read as follows:

**Authority:** Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101.

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

**§ 201.1 Purpose.**

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

\* \* \* \* \*

■ 25. Revise § 201.2 to read as follows:

**§ 201.2 Definitions.**

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

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

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

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

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

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

*Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

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

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

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

subrecipient to carry out part of a Federal program.

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

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

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

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

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

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

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

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

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

and activities required under the Stafford Act.

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

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

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

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

**§ 201.3 Responsibilities.**

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

(b) \* \* \*

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

\* \* \* \* \*

(c) \* \* \*

(1) Prepare and submit to FEMA a Standard State Mitigation Plan following the criteria established in § 201.4 as a condition of receiving non-emergency Stafford Act assistance and FEMA mitigation grants. In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

\* \* \* \* \*

(e) \* \* \*

(1) Prepare and submit to FEMA a Tribal Mitigation Plan following the criteria established in § 201.7 as a condition of receiving non-emergency Stafford Act assistance and FEMA mitigation grants as a recipient. This plan will also allow Indian Tribal governments to apply through the State, as a subrecipient, for any FEMA mitigation project grant. In accordance with § 77.6(b) of this chapter, applicants and subapplicants for FMA project

grants must have a FEMA-approved mitigation plan that addresses identified flood hazards and provides for reduction of flood losses to structures for which NFIP coverage is available.

\* \* \* \* \*

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

**§ 201.4 Standard State Mitigation Plans.**

\* \* \* \* \*

(c) \* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

\* \* \* \* \*

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

**§ 201.6 Local Mitigation Plans.**

\* \* \* \* \*

(a) *Plan requirements.* (1) A local government must have a mitigation plan

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

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

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

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

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

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

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

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

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

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

(2) A *risk assessment* that provides the factual basis for activities proposed

in the strategy to reduce losses from identified hazards. Local risk assessments must provide sufficient information to enable the jurisdiction to identify and prioritize appropriate mitigation actions to reduce losses from identified hazards. The risk assessment must include:

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

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

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

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

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

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

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

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

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

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

administered by the local jurisdiction. Prioritization will include a special emphasis on the extent to which benefits are maximized according to a cost benefit review of the proposed projects and their associated costs.

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

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

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

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

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

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

\* \* \* \* \*

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

**§ 201.7 Tribal Mitigation Plans.**

\* \* \* \* \*

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

(2) Indian Tribal governments applying through the State as a subrecipient must have an approved Tribal Mitigation Plan meeting the requirements of this section in order to receive HMGP project grants. A Tribe must have an approved Tribal Mitigation Plan in order to apply for and receive FEMA mitigation project grants under all other mitigation grant programs. The provisions in

§ 201.6(a)(3) are available to Tribes applying as subrecipients.

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

\* \* \* \* \*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## PART 206—FEDERAL DISASTER ASSISTANCE

■ 30. The authority citation for part 206 is revised to read as follows:

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

■ 31. Revise § 206.431 to read as follows:

**§ 206.431 Definitions.**

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

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

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

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

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

*Indian Tribal government* means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals. Indian Tribal governments have the option to apply as an applicant or subapplicant.

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

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

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

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

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

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

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

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

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

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

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

**§ 206.432 Federal grant assistance.**

\* \* \* \* \*

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

\* \* \* \* \*

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

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

(c) *Cost sharing.* All mitigation measures approved under the State's

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

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

**§ 206.433 State responsibilities.**

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

\* \* \* \* \*

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

**§ 206.434 Eligibility.**

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

(1) Applicants—States and Indian Tribal governments;

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

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

(iii) Indian Tribal governments.

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

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

(c) \* \* \*

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

conformance with the Tribal Mitigation Plan approved under 44 CFR 201.7;

\* \* \* \* \*

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

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

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

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

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

**§ 206.435 [Amended]**

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

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

**§ 206.436 Application procedures.**

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

(b) *Governor’s Authorized Representative*. The Governor’s

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

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

(1) Name of the subrecipient, if any;

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

\* \* \* \* \*

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

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

**§ 206.437 State administrative plan.**

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

(b) \* \* \*

(4) \* \* \*

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

\* \* \* \* \*

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

(xiii) Determine the percentage or amount of pass-through funds for

management costs provided under 44 CFR part 207 that the recipient will make available to subrecipients, and the basis, criteria, or formula for determining the subrecipient percentage or amount.

\* \* \* \* \*

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

■ 38. Revise § 206.438 to read as follows:

**§ 206.438 Project management.**

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

(b) *Cost overruns*. During the execution of work on an approved mitigation measure the Governor’s Authorized Representative may find that actual project costs are exceeding the approved estimates. Cost overruns which can be met without additional Federal funds, or which can be met by offsetting cost underruns on other projects, need not be submitted to the Regional Administrator for approval, so long as the full scope of work on all affected projects can still be met. For cost overruns which exceed Federal obligated funds and which require additional Federal funds, the Governor’s Authorized Representative will evaluate each cost overrun and submit a request with a recommendation to the Regional Administrator for a determination. The applicant’s justification for additional costs and other pertinent material must accompany the request. The Regional Administrator will notify the Governor’s Authorized Representative in writing of the determination and process a supplement, if necessary. All requests that are not justified must be denied by the Governor’s Authorized Representative. In no case will the total amount obligated to the State exceed the funding limits set forth in § 206.432(b). Any such problems or circumstances affecting project costs must be identified through the quarterly progress reports required in paragraph (c) of this section.

(c) *Progress reports*. The recipient must submit a quarterly progress report



to FEMA indicating the status and completion date for each measure funded. Any problems or circumstances affecting completion dates, scope of work, or project costs which are expected to result in noncompliance with the approved grant conditions must be described in the report.

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

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

**§ 206.439 [Amended]**

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

**§ 206.439 Allowable costs.**

\* \* \* \* \*

(c) \* \* \* Recipients and subrecipients may be reimbursed for eligible pre-award costs for activities

directly related to the development of the project or planning proposal. \* \* \* ■ 40. Amend § 206.440 by revising the introductory text and paragraphs (a), (b) heading, (c) heading, (c)(2) and (3), (d), and (e)(3) to read as follows:

**§ 206.440 Appeals.**

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

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

\* \* \* \* \*

(b) *Levels of appeal.*

\* \* \* \* \*

(c) *Time limits.*

\* \* \* \* \*

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

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

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

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

(e) \* \* \*

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

**Pete Gaynor,**  
*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2020-16004 Filed 8-27-20; 8:45 am]

**BILLING CODE 9110-11-P**