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[FR Doc. 2022-23963 Filed 11-10-22; 8:45 am]

**BILLING CODE 6560-50-P**

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## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR 296

[Docket ID FEMA-2022-0037]

RIN 1660-AB14

#### Hermit's Peak/Calf Canyon Fire Assistance

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** This interim final rule sets out the procedures for Claimants to seek compensation for injury or loss of property resulting from the Hermit's Peak/Calf Canyon Fire.

**DATES:**

*Effective Date:* This rule is effective November 14, 2022.

*Comment Date:* Comments must be received on or before January 13, 2023.

**ADDRESSES:** You may submit comments, identified by Docket ID FEMA-2022-0037, via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Angela Gladwell, Office of Response and Recovery, 202-646-3642, [FEMA-Hermits-Peak@fema.dhs.gov](mailto:FEMA-Hermits-Peak@fema.dhs.gov). Persons with hearing or speech challenges may access this number through TTY by calling the toll-free Federal Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation**

Interested persons are invited 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, include the Docket ID FEMA-2022-0037, indicate the specific section of this document to which each comment applies, and give the reason for each comment. All submissions may 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.

*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>.

FEMA will hold four in-person public meetings to solicit public feedback about this Interim Final Rule. FEMA is announcing these public meetings to give the public as much notice as possible regarding their dates. FEMA will hold meetings on the below dates. If the locations and times of these meetings change, FEMA will announce the specific times and locations in a separate **Federal Register** document.

November 17, 2022 from 5:00 p.m. to 7:00 p.m. MT at Old Memorial Middle School, 947 Legion Drive, Las Vegas, NM 87701;

December 1, 2022 from 5:00 p.m. to 7:00 p.m. MT at the Mora High School, 10 Ranger Road, Mora, NM 87732;

December 15, 2022 from 5:00 p.m. to 7:00 p.m. MT at Old Memorial Middle School, 947 Legion Drive, Las Vegas, NM 87701; and

January 5, 2023 from 5:00 p.m. to 7:00 p.m. MT at the Mora High School, 10 Ranger Road, Mora, NM 87732.

Depending on the number of speakers, the meetings may end before their announced end time, following the last call for comments. Reasonable accommodations are available for people with disabilities. To request a reasonable accommodation, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as

possible. Last minute requests will be accepted but may not be possible to fulfill. All comments on this IFR made during the meetings will be posted to <https://www.regulations.gov>, Docket ID FEMA-2022-0037. Please review <http://www.fema.gov/hermits-peak> for more information and any updates on these public meetings.

**II. Background**

On September 30, 2022, President Biden signed into law the Hermit's Peak/Calf Canyon Fire Assistance Act ("Act") as part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117-180, 136 Stat. 2114 (2022). The Congress passed the Act to compensate those parties who suffered injury and loss of property from the Hermit's Peak/Calf Canyon Fire ("Fire").

On April 6, 2022, the U.S. Forest Service initiated the Las Dispensas-Gallinas prescribed burn on Federal land in the Santa Fe National Forest in San Miguel County, New Mexico. That same day the prescribed burn, which became known as the "Hermit's Peak Fire," exceeded the containment capabilities of the U.S. Forest Service and was declared a wildfire, spreading to other Federal and non-Federal lands.<sup>1</sup> On April 19, 2022, the Calf Canyon Fire, also in San Miguel County, New Mexico, began burning on Federal land and was later identified as the result of a pile burn in January 2022 that remained dormant under the surface before reemerging.<sup>2</sup> The Hermit's Peak and Calf Canyon Fires merged on April 27, 2022, and both fires were reported as the Hermit's Peak Fire or the Hermit's Peak/Calf Canyon Fire. By May 2, 2022, the fire had grown, causing evacuations in multiple villages and communities in San Miguel County and Mora County, including the San Miguel County jail, the State's psychiatric hospital, the United World College, and New Mexico Highlands University.<sup>3</sup> At the request of

<sup>1</sup> Section 102(a)(1) and (2), Hermit's Peak/Calf Canyon Fire Assistance Act, Public Law 117-180, 136 Stat. 2114 (2022). See also "Las Dispensas Prescribed Burn Declared Wildfire," Apr. 6, 2022 found at <https://inciweb.nwcc.gov/incident/article/8049/68044/> (last accessed Sept. 15, 2022) and Theresa Davis, "How 'good fires' can turn into wildfires," *Albuquerque Journal*, Apr. 30, 2022 found at <https://www.alqjournal.com/2494692/how-good-fires-can-turn-into-wildfires.html> (last accessed Sept. 15, 2022).

<sup>2</sup> See Bill Gabbert, "Investigators determine Calf Canyon Fire caused by holdover from prescribed fire," *Wildfire Today*, May 27, 2022 found at [https://wildfiretoday.com/?s=calf+canyon+holdover&apbc\\_email\\_id\\_search\\_form\\_34270=](https://wildfiretoday.com/?s=calf+canyon+holdover&apbc_email_id_search_form_34270=) (last accessed Oct. 6, 2022).

<sup>3</sup> See Bill Gabbert, "Calf Canyon/Hermit's Peak Fire grows to more than 120,000 acres," *Wildfire*

New Mexico Governor Lujan Grisham, President Biden issued a major disaster declaration on May 4, 2022.<sup>4</sup> The Hermit's Peak/Calf Canyon Fire was not 100 percent contained until August 21, 2022.<sup>5</sup>

The Act provides compensation to injured persons impacted by the Fire. It requires FEMA to design and administer a claims program to compensate victims of the Fire, for injuries resulting from the fire and to provide for the expeditious consideration and settlement for those claims and injuries. The Act further directs FEMA to establish an arbitration process for disputes regarding claims.

This interim final rule establishes the procedures for the processing and payment of claims to those injured by the Fire sustaining property, business, and/or financial losses. FEMA's procedures in this interim final rule are generally consistent with prior processes established for claims associated with the Cerro Grande Fire Assistance Act.<sup>6</sup> Specific discussion and request for comment is provided where FEMA seeks to revise and/or modernize that process. As referenced above, FEMA plans to hold in-person public meetings during the 60-day comment period.

The first step in the claims process under this part is for the Claimant to file a Notice of Loss with the Office of Hermit's Peak/Calf Canyon Fire Claims ("Claims Office"). After receipt and acknowledgement by the Claims Office, a Claims Reviewer will contact the

Today, May 2, 2022 found at <https://wildfiretoday.com/2022/05/02/calf-canyon-hermits-peak-fire-grows-to-more-than-120000-acres/> (last accessed Sept. 15, 2022). See also Bryan Pietsch and Jason Samenow, "New Mexico blaze is now largest wildfire in state history," *The Washington Post*, May 17, 2022 found at <https://www.washingtonpost.com/nation/2022/05/17/calf-canyon-hermits-peak-fire-new-mexico/> (last accessed Sept. 15, 2022).

<sup>4</sup> 87 FR 33808 (June 3, 2022).

<sup>5</sup> "Hermit's Peak/Calf Canyon Fire 100 percent contained, fire officials say," *The New Mexican*, Aug. 21, 2022 found at [https://www.santafenewmexican.com/news/local\\_news/hermits-peak-calf-canyon-fire-100-percent-contained-fire-officials-say/articles\\_5ac054fc-21a1-11ed-9401-134e852ee0a8.html](https://www.santafenewmexican.com/news/local_news/hermits-peak-calf-canyon-fire-100-percent-contained-fire-officials-say/articles_5ac054fc-21a1-11ed-9401-134e852ee0a8.html) (last accessed Sept. 15, 2022).

<sup>6</sup> The Cerro Grande Fire Assistance Act (Pub. L. 106-246 (2001)) required FEMA to design and administer a program for fully compensating those who suffered injuries resulting from the Cerro Grande Fire. The Cerro Grande fire resulted from a prescribed fire ignited on May 4, 2000, by National Park Service fire personnel at the Bandelier National Monument, New Mexico under an approved prescribed fire plan. That fire burned approximately 47,750 acres and destroyed over 200 residential structures. The Cerro Grande Fire Assistance Act process is detailed in an Interim Final Rule (65 FR 52259 (Aug. 27, 2000)) and a Final Rule (66 FR 15847 (Mar. 21, 2001)) that is now codified at 44 CFR part 295.

claimant to review the claim and help the claimant formulate a strategy for obtaining any necessary supporting documentation to complete the Proof of Loss. After discussion of the claim with the Claims Reviewer, the claimant will review and sign a Proof of Loss and submit it to the Claims Office. The Claims Reviewer will submit a report to the Authorized Official for review to determine whether compensation is due to the claimant. The Authorized Official's written decision will be provided to the claimant. If satisfied with the decision, the claimant will receive payment after returning a completed Release and Certification Form. If the claimant is not satisfied with the decision, an Administrative Appeal may be filed with the Director of the Claims Office. If the claimant is not satisfied after appeal, the dispute may be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico. The specific proposals in this rule are more fully described below.

### III. Discussion of the Interim Final Rule

This interim final rule adds 44 CFR part 296 to establish the procedures for processing and payment of claims to those injured by the Fire sustaining property, business, and/or financial losses.

#### A. Subpart A—General

Subpart A provides a general introduction and overview of the process.

##### 1. Section 296.1 Purpose

This section provides for the purpose of the regulation, which is to establish the Office of Hermit's Peak/Calf Canyon Fire Claims to evaluate, process, and pay actual compensatory damages for injuries suffered from the Fire.

##### 2. Section 296.2 Policy

This section explains FEMA's policy to provide expeditious resolution of damage claims for those injured by the Fire. The policy requires sensitivity to claimants' situations in administering the process.

##### 3. Section 296.3 Information and assistance

This section provides information on the Claims Office and general information about assistance available as a result of the Fire.

##### 4. Section 296.4 Definitions

This section provides definitions for the relevant regulatory terms, consistent with the Act and terms defined in the Cerro Grande Fire Assistance process

found at 44 CFR part 295. FEMA is adding definitions for "Administrator," "Claims Office," and "Hermit's Peak/Calf Canyon Fire" consistent with the Act's definition of these terms. FEMA is including a definition of "Director" to mean the Independent Claims Manager appointed by the Administrator who will lead the Claims Office. FEMA is adding a definition of "Good Cause" to further explain when FEMA will allow claimants to extend the deadline for filing, supplementing claims, or reopening a claim for good cause. FEMA is incorporating a definition for "Injury" similar to the definition of "Loss" found in the Cerro Grande Fire Assistance process to reflect the terminology of the Act, and an updated definition of "Indian Tribe," "Notice of Loss," and "Proof of Loss" to reflect the definitions and updated requirements found in the Act. FEMA is also including a definition for "Individual Assistance" consistent with the definition found at 44 CFR 206.2. Finally, FEMA is including a definition for "Subrogee" to mean an insurer or other third party that has paid compensation to a claimant for injury and subrogated to any right the claimant has to receive payment under the Act.

##### 5. Section 296.5 Overview of the Claims Process

The claims process is generally described in this section and is generally consistent with the process established in the Cerro Grande Fire Assistance process at 44 CFR part 295. The claimant must first file a Notice of Loss with the Claims Office. A Claims Reviewer will then contact the claimant to review the claim and help the claimant formulate a strategy for obtaining any necessary supporting documentation. After discussion of the claim with the Claims Reviewer, the claimant will review and sign a Proof of Loss. The Proof of Loss will document all injuries and loss of property, business losses, and financial losses pursuant to the Act. The Claims Reviewer will fully evaluate the claim and submit a report to the Authorized Official for review to determine whether compensation is due to the claimant. The Authorized Official's written decision will be provided to the claimant. If the claimant is satisfied with the decision, payment will be received upon return of a completed Release and Certification Form. If the claimant is not satisfied with the decision, an Administrative Appeal may be filed with the Director of the Claims Office. If the claimant is not satisfied after appeal, the dispute may be resolved through binding arbitration or

heard in the United States District Court for the District of New Mexico.

#### B. Subpart B—Bringing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

Consistent with the Cerro Grande Fire Assistance claims process, subpart B explains the procedure for filing a claim under the Act.

##### 1. Section 296.10 Filing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

Any Injured Person can file a Notice of Loss to bring a claim under the Act which must include a brief description of each injury. FEMA will only accept a Notice of Loss form to bring a claim to ensure efficient and consistent processing of all claims associated with the Fire. FEMA reminds claimants in paragraph (a) that the Notice of Loss must contain a brief description of each injury, as defined in section 296.4. For the convenience of claimants, FEMA is offering the option for a single Notice of Loss submission for a household so long as all those injured are identified. Paragraph (c) explains the signature process for the Notice of Loss. If the claimant is an entity or individual who lacks the legal capacity to sign the Notice of Loss, then and only then can a duly authorized legal representative of the claimant sign the Notice of Loss. The same principle applies to affidavits submitted in support of claims, the Proof of Loss, and the Release and Certification Form. Public adjusters and attorneys may not sign documents filed under the Act on behalf of individual claimants who have the legal capacity to execute these documents.

Paragraph (e) modernizes the process by providing options to file the Notice of Loss by mail, electronically, or in person. Details regarding the filing process can be found at <http://www.fema.gov/hermits-peak>. FEMA seeks comment on whether this update will improve the overall claims process. Paragraph (f) clarifies that the Notice of Loss is deemed to be filed on the date received and acknowledged by the Claims Office if completed and properly signed.

##### 2. Section 296.11 Deadline for Notifying FEMA of Injuries

Pursuant to the Act, the deadline to file a Notice of Loss is two years after the date the interim final rule is promulgated or November 14, 2022. There is no ability to extend this deadline under the Act and section 296.11 provides clear instructions regarding the deadline to ensure claimants are informed of the timeline

by which to submit their Notice of Loss. FEMA cannot provide compensatory damages for an injury unless the claimant has reported it to FEMA by November 14, 2024. Sections 296.34 and 296.35 below establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. Whether a claimant tells FEMA about an injury in the initial Notice of Loss or an amendment under section 296.34, FEMA must know about the injury by November 14, 2024.

### 3. Section 296.12 Election of Remedies

The Act permits an Injured Person to seek compensation through one of three mechanisms: (1) the Act; or (2) the Federal Tort Claims Act; or (3) a civil lawsuit against the United States (if authorized by another law). The Act further provides that a claimant's choice of one of these three mechanisms becomes "final and conclusive on the Claimant . . . upon acceptance of an award." Therefore, in paragraph (a), FEMA clarifies that Injured Persons who accept an award under the Act waive the right to pursue any claims arising out of or relating to the same subject matter, whether through the Federal Tort Claims Act or a civil lawsuit. Under paragraph (b), any person or entity who accepts an award on a claim under the Federal Tort Claims Act or a civil action against the United States, or any employee, officer, or agency of the United States for fire-related claims waives the right to pursue any claims for injuries arising out of or relating to the same subject matter. FEMA seeks comment on the best means of implementing the Act's election of remedies provision.

### 4. Section 296.13 Subrogation

Section 296.13 describes the procedures to be used by insurers (or other third parties with the rights of a Subrogee) for submitting subrogation claims. This section is generally consistent with the Cerro Grande Fire Assistance process. The procedures described in paragraphs (c) through (f) of section 295.10 apply with equal vigor to subrogation claims, including the requirement that the Notice of Loss be received by November 14, 2024. No subrogation claim will be considered unless the Subrogee elects the Act as its exclusive mechanism for seeking compensation from the United States for all Hermit's Peak/Calf Canyon Fire-related subrogation claims and any other Hermit's Peak/Calf Canyon Fire-related injuries. FEMA will reject a subrogation claim to recover payments until the Subrogee has paid the insured everything that the Subrogee believes

that the Injured Person is entitled to receive under the policy. A Notice of Loss may be filed if there is a dispute between the Injured Person and the Subrogee, which is pending before a third party (e.g., appraiser, arbitrator, or court), provided that the insurer has made the final payment that it believes that the insured is entitled to receive under the policy.

### 5. Section 296.14 Assignments

Consistent with the Cerro Grande Fire Assistance process, this section prohibits assignment of claims. It also prohibits assignment of the right to receive payment for claims. FEMA intends to make the Act's compensation payments only to the injured claimant.

#### *C. Subpart C—Compensation Available Under the Hermit's Peak/Calf Canyon Fire Assistance Act*

Subpart C describes the compensation available under the Act. Section 104(c)(3) of the Act limits payments under the Act to "actual compensatory damages measured by injuries suffered" and shall not include "interest before settlement or payment of a claim; or punitive damages." Consistent with the Cerro Grande Fire Assistance process, FEMA views the terms "compensation," "damages," and "compensatory damages" under the Act as synonyms and uses them interchangeably in this interim final rule. FEMA may only compensate claimants for damages that resulted from the Fire. Each claim will be reviewed on its unique facts and merits. Claimants should not assume that an injury resulting from the Fire is not compensable simply because the regulation fails to address it specifically. Claimants should include all injuries resulting from the Fire on the Notice of Loss. Generally speaking, FEMA will determine compensatory damages in accordance with the laws of the State of New Mexico, except where the Act is more generous. If FEMA denies a claim, an explanation of the reasons for doing so will be provided.

#### 1. Section 296.20 Prerequisite to Compensation

Consistent with the Cerro Grande Fire Assistance process, a claimant must be an Injured Person who suffered an injury as a result of the Fire and sustained damages to receive compensation under the Act.

#### 2. Section 296.21 Allowable Damages

As required by the Act, FEMA will provide for payment of actual compensatory damages under paragraph

(a). Consistent with the Act<sup>7</sup> and Cerro Grande Fire Assistance process, FEMA will apply the laws of the State of New Mexico to the calculation of damages. Damages must be reasonable in amount. To reduce complexity in the process, FEMA has eliminated language referencing reasonable steps to reduce damages.

Consistent with the Act and the Cerro Grande Fire Assistance process, paragraph (b) provides that FEMA will not reimburse claimants for attorneys' fees or agents' fees. Our treatment of attorney and agent fees is consistent with the Act. Section 104(j) of the Act limits the fees that an attorney or agent may charge a client. It does not provide that FEMA will reimburse claimants for attorneys' or agents' fees and this exclusion applies to attorney and agent fees incurred in the prosecution of a claim under the Act. FEMA also notes that the Act does not regard attorneys' fees as compensatory damages. Attorneys' fees are not considered compensatory damages in tort actions under New Mexico law.<sup>8</sup> Further, the statutory damages under New Mexico law<sup>9</sup> may not be recovered as Congress did not authorize FEMA to pay statutory damages in the Act.

Paragraphs (c) through (e) explain how FEMA plans to approach the types of claims the agency expects to encounter most frequently. FEMA addressed all three categories of damages allowed under the Act—property, business, and/or financial losses—but made a deliberate choice not to address all the examples of such categories enumerated under the Act. There is no intention to limit the right of claimants in this section. Claimants may recover all damages allowable under section 104(d)(4) of the Act.

Consistent with the approach taken in the Act, paragraph (c) sets out FEMA's approach to compensating for property losses. Paragraph (c)(1) explains FEMA's approach to loss of real property and contents. FEMA will provide compensatory damages for the damage or destruction of a property and its contents, including the reasonable cost of reconstruction of a structure comparable in design, construction materials, size, and improvements. FEMA will calculate these costs using post-fire construction costs in the locality that a damaged or destroyed structure existed before the Fire. FEMA will compensate property owners to

<sup>7</sup> Section 104(c)(2), Hermit's Peak/Calf Canyon Fire Assistance Act, Public Law 117–180, 136 Stat. 2114, 2168 (2022).

<sup>8</sup> See *New Mexico Right to Choose/NARAL v. Johnson*, 127 N.M. 654 (1999).

<sup>9</sup> See NM Stat. Ann. § 30–21–4.

rebuild their structures in accordance with the building codes and standards applicable at the time that their claim is processed, regardless of whether the destroyed structure complied with codes and standards before the Fire. To process claims within a timely manner, FEMA may be required to estimate a property owner's costs well before construction is completed. Property owners who decide to rebuild and later find that their actual costs exceeded FEMA's estimate may supplement or reopen their claims under Sections 296.34 and 296.35 of this interim final rule.

In paragraph (c)(2), FEMA is limiting compensation for trees and other landscaping to 25 percent of the pre-fire value of the structure and lot. This approach is generally consistent with the approach taken in the Cerro Grande Fire Assistance process. Under New Mexico tort law, damages are awarded for destroyed or damaged trees based on the value of the trees destroyed or the difference in value of the real estate with and without the trees.<sup>10</sup> This 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under section 296.21(d). The New Mexico tort law formula is a less generous formula than the replacement cost calculation FEMA implemented in the Cerro Grande Fire Assistance process. FEMA is implementing the same formula as the Cerro Grande Fire Assistance process now.

Paragraph (c)(3) is intended to implement section 104(d)(4)(A)(ii) of the Act, which authorizes FEMA to pay "otherwise uncompensated damages resulting from the Hermit's Peak/Calf Canyon Fire for . . . a decrease in the value of real property." Consistent with the Cerro Grande Fire Assistance process, paragraph (c)(3) allows FEMA to compensate for realized losses in the value of real property, *i.e.*, land and structure, to the extent that such losses have not been fully compensated either through compensation under paragraph (c)(1) or otherwise. To be awarded compensatory damages, paragraph (c)(3) requires the claimant to either sell the real property in a good faith arm's length transaction that closes no later than November 14, 2024 and the claimant realizes a loss in the pre-fire value (see paragraph (c)(1)); or the claimant can establish that the real property value was permanently diminished as a result of the Fire (see paragraph (c)(2)). Losses involving the

value of commercial real estate will be evaluated on a case-by-case basis.

Paragraph (c)(4) addresses compensation to Injured Persons for Subsistence Resources losses. FEMA is generally mirroring the Cerro Grande Fire Assistance process for subsistence in this section, but consistent with section 104(d)(4)(A)(iv) of the Act, FEMA is not limiting compensation to Indian Tribes, Tribal entities, Tribal Members, or Households including Tribal Members but rather allowing this compensation for all Injured Persons that have sustained Subsistence Resource losses. Reimbursement is available for the reasonable cost of replacing Subsistence Resources used by a claimant prior to the start of the Fire, but that are no longer available to the claimant as a result of the Fire. Claimants may receive either compensatory damages for the increased cost of obtaining subsistence resources from lands not damaged by the Fire or for the cost of procuring substitute Subsistence Resources in the cash economy. Compensatory damages will be paid for the period between April 6, 2022, and the date when subsistence resources can reasonably be expected to return to the level of availability that existed before the Fire. Long-term damages for subsistence resources will be made in the form of lump sum cash payments to eligible claimants.

In paragraph (d), FEMA addresses business losses. Consistent with the Act, FEMA will award compensatory damages for damage to tangible assets or inventory, including timber, crops, and other natural resources; business interruption losses; overhead costs; employee wages for work not performed; loss of business net income; and any other loss that the Administrator determines to be appropriate for inclusion as a business loss.

Paragraph (e) discusses financial losses. Consistent with the Act, these losses include increased mortgage interest costs, insurance deductibles, temporary or relocation expenses, lost wages or personal income, emergency staffing expenses, debris removal and other cleanup costs, costs of reasonable heightened risk reduction, premiums for flood insurance, and any other loss that the Administrator determines to be appropriate for inclusion as a financial loss. Paragraph (e)(1) addresses recovery loans and provides for reimbursement of loans, including Small Business Administration (SBA) disaster loans obtained after April 6, 2022, for damages resulting from the Fire. Consistent with the Cerro Grande Fire Assistance process, FEMA will

reimburse interest for the period beginning on the date the loan was taken out and ending on the date when the claimant receives a compensation award (other than partial payment). Claimants are required to use the proceeds of their compensation awards to repay the SBA disaster loans and FEMA will coordinate with the SBA to formulate procedures for assuring repayment contemporaneously with the compensation award receipt.

Paragraph (e)(2) addresses the requirement from the Act that claimants be eligible for compensation for flood insurance premiums. Consistent with the Act, claimants that were not required by law to maintain flood insurance before the Fire and did not have such insurance before the Fire may receive reimbursement for the cost of reasonable flood insurance premiums for a two-year period for their owned or leased real property if required to purchase flood insurance. Because there has not been sufficient time to revise flood zone maps since the Fire, some claimants who may have legitimate reasons for concern may not be required to maintain flood insurance. FEMA is exercising the discretion in section 104(d)(4)(C)(x) to allow compensation for flood insurance premiums if the claimant purchased flood insurance after the Fire due to the fear of heightened flood risk. FEMA may also provide flood insurance directly through a group or blanket policy.

Consistent with the Cerro Grande Fire Assistance process, paragraph (e)(3) states that FEMA may reimburse claimants for reasonable out of pocket treatment costs for mental health conditions resulting from the Fire. FEMA is offering reimbursement for treatment received between April 6, 2022 and April 6, 2024. Damages for mental health conditions are not recoverable under New Mexico law, except in a very limited class of cases. While FEMA will reimburse claimants for these expenses, given the limitation of New Mexico law FEMA will not entertain subrogation claims for mental health treatment unless those expenses could be recovered in a tort action under New Mexico law.

During the fire and its immediate aftermath, many individuals, charitable organizations, businesses, and other entities made voluntary donations of cash, goods, and services to assist the fire fighting and fire recovery effort and to help those affected by the Fire. Consistent with the Cerro Grande Fire Assistance process, in paragraph (e)(4) FEMA will compensate claimants for the cost of merchandise, use of equipment, or other non-personal

<sup>10</sup> See *Mogollon Gold & Copper Co. v. Stout*, 14 NW 245 (1907).

services, directly or indirectly donated to survivors of the Fire, if donated no later than September 20, 2022. Given the scope of the Fire, FEMA believes a 30-day period after containment of the Fire constitutes an appropriate time frame for these donations to be reimbursable; however, the agency seeks comment on whether this time period is sufficient. Donations will be valued at cost. FEMA is removing compensation for discounts as provided in the Cerro Grande Fire Assistance process, as the agency currently lacks information about whether such discounts were provided in the wake of the Fire. However, FEMA seeks comment on whether claimants should be able to seek compensation for discounts on goods and services offered to fire survivors as well as on the method for calculating such compensation should FEMA amend its regulations to authorize compensation for discounts on goods or services offered to fire survivors.

Section 104(d)(4)(C)(vii) of the Act grants FEMA the authority to compensate claimants for reasonable efforts to reduce an increased risk to their property from wildfires, floods, or other natural disasters. Consistent with the Act and with the Cerro Grande Fire Assistance process, paragraph (e)(5) provides that FEMA will reimburse claimants for reasonable efforts to reduce risk back to levels prevailing before the Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars in an amount not to exceed 25 percent of the higher of compensation from all sources, (*i.e.*, the Act, insurance, and FEMA assistance under the Stafford Act), for damage to the structure and lot, or the pre-fire value of the structure and lot. Claimants seeking compensation under paragraph (e)(5) must include the claim in a Notice of Loss filed not later than November 14, 2024 or an amended Notice of Loss filed not later than November 14, 2025. This is the deadline provided by section 104(d)(4)(C)(vii) of the Act. Claimants should take into account current building codes and standards and consider nature-based solutions<sup>11</sup> to reduce their heightened risk. Claimants must complete the risk reduction project for which they receive compensation. FEMA believes paragraph (e)(5) clarifies the process for obtaining compensation for heightened risk reduction losses, regardless of the

type of structure the claimant owns. FEMA is increasing the total compensation available for risk reduction projects given the general increase in costs of such projects since the Cerro Grande Fire Assistance process was implemented and to encourage claimants to consider implementing nature-based solutions to reduce the heightened risks to their property as a result of the Fire.<sup>12</sup> FEMA seeks comment on whether the compensation is sufficient to reduce the heightened risk and whether nature-based solutions should be considered in risk reduction projects.

Paragraph (f) addresses insurance and other benefits. The Act allows FEMA to provide compensation only if damages have not been paid or will not be paid by insurance, a third party, or through another FEMA program. Claimants are not required to submit their claims to their insurance company nor are they required to pursue a settlement from their insurance company after filing a claim under the Act. FEMA encourages claimants to continue to pursue their insurance claims because this may expedite the process of reconstructing documentation that will be helpful to the claims process under the Act. If a claimant has received or expects to receive a payment from an insurance company, the actual or anticipated payment must be disclosed. If a claimant has not settled with the insurance company by the time FEMA is prepared to make a partial payment on the claim, FEMA will examine the insurance policy and determine what the agency reasonably expects the insurance company to pay. FEMA will review the issues again in the Authorized Official's determination. If the insurance company has not paid all that FEMA anticipated, FEMA can award the difference at the time that the Authorized Official's determination is made. FEMA notes that the State of New Mexico generally requires insurance companies to settle catastrophic claims brought by policyholders within 90 days of the date that the claim was reported to the insurer.<sup>13</sup> FEMA expects that

<sup>12</sup> FEMA seeks to encourage Claimants to consider nature-based solutions consistent with Executive Order 14072 "Strengthening the Nation's Forests, Communities, and Local Economies," 87 FR 24851, Apr. 22, 2022.

<sup>13</sup> See New Mexico Statutes Annotated Chapter 59A–16–20 (2021) found at [https://nmonesource.com/nmos/nmsa/en/item/4438/index.do#!fragment/zoupio-\\_Toc110333083/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvvBRABwEtsBaAfX2zgEYOAGAZn+4AOXgEoANMmylCEAIqjCuAj7QA5KrERCYXAnmKVqraVIAbQgAIAgDkAlheR1khUko1adCAMP5SAIRUAFQBRABkQgDVbAGEQsVIwACNoT10QEREGa](https://nmonesource.com/nmos/nmsa/en/item/4438/index.do#!fragment/zoupio-_Toc110333083/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvvBRABwEtsBaAfX2zgEYOAGAZn+4AOXgEoANMmylCEAIqjCuAj7QA5KrERCYXAnmKVqraVIAbQgAIAgDkAlheR1khUko1adCAMP5SAIRUAFQBRABkQgDVbAGEQsVIwACNoT10QEREGa) (last accessed Sept. 27, 2022).

most, if not all, insurance claims will be paid before the Authorized Official's determination is issued. However, in the event that the insurance claim is resolved after the Authorized Official's determination is issued and as a result the claimant is due additional compensation under the Act, the claimant should ask the Claims Office to reconsider the matter under sections 296.34 or 296.35.

Those Injured Persons eligible for disaster assistance under the Public Assistance Program are expected to apply for all available assistance, and compensation will not be awarded for specific costs or losses that are eligible under that program. Consistent with the Act, FEMA clarifies that the Federal share of costs for Public Assistance projects is 100 percent. Similarly, compensation under the Act will not be awarded for losses or costs that have been reimbursed under the Federal Assistance to Individual and Households Program. Those individuals that obtain assistance under the Individuals and Households Program are not precluded from filing a claim under the Act. Claimants may seek compensation for losses or costs that exceed the amount provided under the Individuals and Households Program. FEMA encourages all Injured Persons to seek assistance under the FEMA programs for which they are eligible. Those individuals suffering injuries that are compensable under State or Federal worker's compensation laws must apply for all benefits under such laws. Note that gifts or donations made to claimants by non-governmental organizations and individuals, other than wages paid by the claimant's employer or insurance payments, will be disregarded in evaluating claims and need not be disclosed by claimants.

#### D. Subpart D—Claims Evaluation

Subpart D explains the process after the claim is filed, including how claims are documented and how claimants can obtain payment if they agree with FEMA's evaluation.

##### 1. Section 296.30 Establishing Injuries and Damages

Section 296.30 explains FEMA's approach to documentation of injuries which is generally consistent with the Cerro Grande Fire Assistance process. This section explains who has the burden of proof, the forms needed when going through the claims process and who has the authority to settle claims. FEMA expects that claimants will provide whatever documentation is reasonably available to support their claim.

<sup>11</sup> See <https://www.fema.gov/emergency-managers/risk-management/nature-based-solutions> (last accessed Oct. 31, 2022).

Once a claimant has begun the process set out in section 296.30, the claims office assigns a Claims Reviewer to the claim. The Claims Reviewer will review, investigate, and objectively evaluate the claim for the Claims Office. Claims Reviewers cannot function as agents or representatives of the claimant. Claims Reviewers will be proactive in helping claimants identify injuries and in formulating a strategy for proving them and in assisting claimants in locating documentation that may be available from third-party sources. Claimants may be asked to sign release forms authorizing FEMA's Claims Reviewers to obtain information and documentation from third-party sources.

Section 295.30(a) states that the claimant bears the burden of proof for establishing all elements of the injury and compensatory damages. This paragraph also provides claimants the opportunity to make a record supporting the claim by submitting any information or documentation that they deem relevant. The responsibility for making this record rests with the claimant, not the Claims Reviewer. As FEMA must support compensation decisions with evidence, the agency expects claimants will provide whatever evidence is reasonably available to corroborate the nature, extent, and value of their losses. If documentation or substantiating evidence of an injury or damage is not reasonably available (e.g., it burned in the fire), the Claims Office may determine that the claimant's statement alone will be sufficient to substantiate the injury or damage based on the unique circumstances presented by each case, taking into consideration potential alternative sources of substantiation and documentation. Paragraph (a) authorizes the Claims Office to ask claimants to provide affidavits to support the claim. FEMA is, however, sensitive to privacy concerns of claimants. Where FEMA believes an affidavit from a close associate of the claimant will strengthen the claim, the agency may suggest that the claimant obtain one. FEMA will not automatically reject the claim if the claimant declines to provide the affidavit. FEMA will consider all evidence in the record, including an alternative substantiation offered by the claimant, in making a decision. Paragraph (a) also reminds claimants that FEMA may require an inspection of real property as part of the claims process and their establishment of injuries and damages. FEMA is advising claimants who have suffered business losses that they may expedite resolution of their claim if they voluntarily provide copies of their income tax returns.

Claimants who decline to submit their income tax return voluntarily during the claims review process must sign an affidavit agreeing to produce the returns if requested by the Department of Homeland Security's Office of the Inspector General (DHS OIG) or the General Accounting Office (GAO) in the course of an audit.

Under paragraph (b), claimants are required to attest to the nature and extent of each injury of which compensation is sought in the Proof of Loss. Before the Authorized Official's determination can be issued, the claimant must sign the Proof of Loss. This Proof of Loss must be signed under penalty of perjury by the claimant or the claimant's legal representative in specific circumstances. Paragraph (b) also sets forth the deadline by which a Proof of Loss must be submitted after a Notice of Loss and allows discretion for good cause to extend that deadline. For example, a claimant, through no fault of their own, may not be able to access needed documentation in time to submit a claim and the Director of the Claims Office may consider those circumstances as good cause to extend the deadline. It is in both the claimant's interest and FEMA's interest that claims be expeditiously resolved. The intent of the Act is to compensate fire survivors as quickly as possible. Congress entrusted FEMA with administering an orderly compensation process. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed. It is impossible for FEMA to fulfill this mandate if claimants are unwilling to provide specific details about their injuries by signing the Proof of Loss. While FEMA believes that Congress intended for the agency to have the flexibility to provide claimants with extra time document their injuries in appropriate cases, nothing in the Act suggests that claimants should be able to keep their claims open for an extended period of time. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress. To provide a claims process that is orderly for all and to meet the agency's obligation to be good stewards of the Federal funds provided by Congress for administration of the program, Claimants must comply with

the timeframes for signing a Proof of Loss set forth in this paragraph. Section 104(d)(1)(A)(i) of the Act assumes that the claimant will fully cooperate with FEMA in the adjudication of the claim to ensure a timely determination. FEMA will try to process claims in less than 180 days but may require the full 180-day period in many cases. Partial payments are intended to ease the burden on the claimant during this period.

There is flexibility built into the process for claimants to tell FEMA about injuries and damages that they could not have discovered or did not remember when they signed the Proof of Loss. Sections 296.34 and 296.35 explain this flexibility. If a claimant is not prepared to sign a Proof of Loss, for good cause, an extension may be requested from the Director of the Claims Office. Extensions will not be granted automatically, but only on consideration of the equities in the request. Alternatively, the claimant may withdraw the claim and re-file the claim once before November 14, 2024, when the injuries are better defined. If a claimant does not complete the Proof of Loss within the timeframes specified in this paragraph or fails to obtain an extension, the Claims Office may administratively close the claim.

Paragraph (c) requires claimants who receive compensation to sign and return a Release and Certification Form, including for partial payments under section 296.33. The Release and Certification Form must be received before the Claims Office provides payment on the claim. FEMA is simplifying the process from the Cerro Grande Fire Assistance process to eliminate specific timelines and would rather tie the return of the form to payment. Section 104(e) of the Act provides that at the end of the process, the United States and all employees, officers, and agencies of the United States are released from all claims related to the Fire and the compensation settlement is conclusive for the claimant. The Act does not bar the United States from recovering payments made to the claimant after the return of the Release and Certification Form. The Act was intended to provide a more expeditious and less adversarial process for compensation than is available under the Federal Tort Claims Act. Paragraph (c) provides that the United States will not attempt to recover monies paid to claimants completing this process, except in the case of fraud or misrepresentation by the claimant or the claimant's representative, failure of the claimant to cooperate with an audit as required by section 296.36, or a

material mistake by FEMA. The Act generally obligates FEMA to attempt to recover payments where there is evidence of civil or criminal fraud, misrepresentation, presentation of a false claim or where a claimant was not eligible for a partial payment received pursuant to the Act.<sup>14</sup> FEMA may also recover overpayments where the agency made a material mistake in calculation of the damages owed to the claimant and in other appropriate cases.

Paragraph (d) authorizes the Director of the Claims Office to offer claimants an opportunity to settle or compromise a claim in whole or in part at any time during the process. This authority allows flexibility in the process to help claimants recover more efficiently and is consistent with the Cerro Grande Fire Assistance process.

#### 2. Section 296.31 Reimbursement of Claim Expenses

Early in the process, claimants should also discuss with the Claims Reviewer whether FEMA will require an appraisal or other third-party opinion of value to evaluate a claim. FEMA may order appraisals and third-party opinions directly or request the claimant to obtain them. Section 296.31 provides that if FEMA requests the claimant provide an appraisal or other third-party opinion, FEMA will reimburse the claimant for the reasonable cost of obtaining it. Paragraph (a) addresses the circumstances in which FEMA will reimburse a claimant for reasonable costs of third-party opinions obtained by the claimant. It provides that FEMA will do so only if the agency requests that the claimant procure the opinion. It is the claimant's responsibility to develop and submit whatever evidence they think is appropriate to support the claim. Claims preparation expenses are not regarded as compensatory damages under New Mexico law or under the Federal Tort Claims Act. Similarly, they are not recoverable under the Act. If FEMA requests that a claimant obtain a third-party opinion and the expert selected by the claimant believes they must consult with other experts to render the opinion, the claimant should notify the Claims Reviewer and provide an estimate of the total cost. FEMA will not reimburse the claimant for the cost of these other experts unless the Claims Office has expressly approved their use.

Compensatory damages for time spent in claims preparation are not available under New Mexico law or the Federal Tort Claims Act. Moreover, there is no evidence Congress intended that

claimants be compensated for the value of their time in preparing a claim. Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. However, as with the Cerro Grande Fire Assistance process, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. Subrogation claimants and claimants whose only Fire-related loss is the cost of a flood insurance premium are not eligible for the lump sum payment. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed \$25,000. The minimum lump sum payment is \$150.<sup>15</sup> The payment amounts for these miscellaneous and incidental expenses are based upon the Cerro Grande Fire Assistance process and have been updated to reflect inflationary increases since that rule was published.<sup>16</sup> FEMA believes that paragraph (b) represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible. The lump sum payment under paragraph (b) will be made after a properly executed Release and Certification Form is returned to the Claims Office and cannot be obtained through partial payment.

#### 3. Section 296.32 Determination of Compensation Due to Claimant

Section 296.32 explains how FEMA will evaluate claims. Claims Reviewers do not have the authority to determine whether a claim is eligible for compensation or how much compensation will be paid. Their role is to work with the claimant to obtain relevant evidence, analyze the evidence, and make a recommendation to an Authorized Official. Each claim will be

<sup>15</sup> The Cerro Grande Fire Assistance regulations at 44 CFR 295.31(b) provided for a lump sum payment of \$100 or 5% of the compensatory damages, not to exceed \$15,000.

<sup>16</sup> Inflationary adjustments have been made based on the Consumer Price Index for All Urban Consumers as published by the U.S. Department of Labor. See generally [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm).

assigned to an Authorized Official, and only Authorized Officials have the authority to decide claims.

When the Authorized Official has decided a claim, they will send a written notification to the claimant's address as it appears in the Claims Office records. The date that appears on this notification starts a 120-day clock during which a claimant must either accept the finding or appeal it. The procedure for appealing an Authorized Official's determination is explained in section 295.41. If the claimant has not acted at the end of this period, they may forfeit further rights to an Administrative Appeal. The Director of the Claims Office may modify the 120-day deadline if good cause exists.

#### 4. Section 296.33 Partial Payments

This section explains the partial payment process. Section 104(d)(2) of the Act authorizes FEMA to make partial payments at the request of the claimant. As in the Cerro Grande Fire Assistance process, the Claims Office may make one or more partial payments to the claimant if there is a reasonable basis to estimate the claimant's damages. FEMA believes this section offers sufficient discretion to the agency to make partial payments of any amount and to expedite payments where it is appropriate to do so. The amount of a partial payment in any particular case will depend on the nature of the claim and in some cases, how well the claim is supported. FEMA encourages claimants who require expedited payments to discuss the matter with a Claims Reviewer. FEMA is updating the Cerro Grande Fire Assistance process by requiring claimants to sign a Release and Certification Form as part of the partial payment process. This change simplifies the requirement that the Form be submitted to receive any payment. While the Claims Office's decision to provide a partial payment cannot be appealed, acceptance of a partial payment does not affect the claimant's ability to pursue an appeal, arbitration, or other options under the Act with respect to any portion of a claim for which a Release and Certification Form is not executed.

#### 5. Section 296.34 Supplementing Claims

Section 104(d)(1)(A)(i) of the Act requires FEMA to determine and fix the amount to be paid for a claim within 180 days after the claim is submitted. To meet this deadline, FEMA may ask claimants to sign the Proof of Loss and require that the Authorized Officials render a definitive determination more expeditiously than some claimants

<sup>14</sup> See Section 104(l), Public Law 117-180, 136 Stat. 2114, 2168.



would prefer. Section 296.34 provides claimants with the flexibility to make additional claims after submitting a Proof of Loss and before submission of the Release and Certification Form. Before signing the Proof of Loss, the claimant may amend the Notice of Loss to seek compensation for injuries not referenced in the Notice of Loss. Claimants who wish to amend the Notice of Loss should contact the Claims Reviewer. The additional injuries will be noted on the Proof of Loss and will be adjudicated in the Authorized Official's determination. Once the claimant has signed the Proof of Loss, they may request permission from the Director of the Claims Office to amend the Notice of Loss for consideration of one or more injuries not addressed in the Proof of Loss. The claimant should consult with the Claims Reviewer about the procedure for obtaining permission of the Director of the Claims Office. The Director of the Claims Office will grant the request if it is supported by good cause. If the request is granted, the Director will determine whether compensation is due for the additional injury under the Administrative Appeal procedures described in subpart E of part 296. The additional injury will not be considered until after the Authorized Official's determination is issued on the remainder of the claim. If the claimant decides to appeal the Authorized Official's determination on other injuries, the Director of the Claims Office will decide both matters in a single appeal proceeding. Claimants are reminded that they must put the Claims Office on notice of any injury not mentioned in the initial Notice of Loss not later than the deadline for filing an Administrative Appeal under section 296.41 or November 14, 2024, whichever is earlier. A written request for permission to amend a Notice of Loss after the Proof of Loss is signed must be on file with the Director of the Claims Office no later than the deadline for filing an Administrative Appeal under section 296.41 or November 14, 2024, whichever is earlier.

#### 6. Section 296.35 Reopening a Claim

Section 296.35 provides for reopening a claim after the claimant has submitted a Release and Certification Form again with the goal to allow claimants an opportunity to request damages in excess of those previously awarded. In appropriate cases, the claimant can use the reopening provision of this section to seek compensation for an injury not previously reported to FEMA. Specifically, claimants may request to reopen if, not later than November 14,

2025, the claimant desires heightened risk reduction compensation under section 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for a decrease in the value of the real property under section 296.21(c)(3); or the claimant has incurred additional losses under section 296.21(c)(1) as part of a reconstruction in excess of those previously awarded. Requests to reopen for good cause will only be granted in the Director's discretion. The Director's decision to reopen or not reopen a claim is not subject to review under the arbitration provisions of Subpart E of this part. Reopened claims will not be decided by the Director of the Claims Office but by an Authorized Official, after considering the recommendation of the Claims Reviewer. Claimants who are dissatisfied with the Authorized Official's determination on the reopened claim may appeal to the Director of the Claims Office pursuant to subpart E of part 296.

#### 7. Section 296.36 Access to Records

Claimants are required to grant the DHS OIG and the Comptroller General of the United States access to the subject property and to records and information in their control that are relevant to their claims for purposes of audit and investigation. These records include, but are not limited to, any relevant tax records. The Act requires that the GAO, a legislative branch agency, audit claims and payments made under the Act. The DHS OIG is responsible for investigating charges of fraud and abuse and auditing FEMA's programs.

#### 8. Section 296.37 Confidentiality of Information

The Privacy Act protects the confidentiality of information provided by individual claimants. This information may only be disclosed with the consent of the claimant or pursuant to a routine use, which has been disclosed to the public. Confidential, proprietary, and trade secret information provided by entities, such as business, Indian Tribes, Tribal entities, and government agencies, are not eligible for Privacy Act protection, but may be exempt from disclosure under the Freedom of Information Act. Non-individual claimants are encouraged to discuss the need to protect confidential information from disclosure with FEMA before the information is submitted. FEMA may not be able to prevent the disclosure of this information without awareness of its confidential nature.

#### E. Subpart E—Dispute Resolution

Subpart E discusses a claimant's rights if they disagree with FEMA's evaluation of the claim.

##### 1. Section 296.40 Scope

Claimants are afforded a right to appeal the initial determination to the Director of the Claims Office. This is referred to as an Administrative Appeal. If the claimant is dissatisfied with the Administrative Appeal decision, they may put the matter to binding arbitration or seek judicial review in federal court.

##### 2. Section 296.41 Administrative Appeal

Section 296.41 describes the Administrative Appeal process. Consistent with the Cerro Grande Fire Assistance process, claimants disagreeing with the conclusions of FEMA's Authorized Official under section 296.32 must pursue an Administrative Appeal before initiating arbitration or seeking judicial review in federal court. An Administrative Appeal decision constitutes the final decision of the Director of the Claims Office. Pursuant to paragraph (a), a written request for an Administrative Appeal must be postmarked or electronically stamped within 120 days after the date of the Authorized Official's determination.

FEMA requests that claimants provide the Claims Reviewer with all relevant evidence supporting the claim. The goal of the process is to render equitable compensation decisions the first time, not to encourage Administrative Appeals or further proceedings. However, paragraphs (c) and (d) allow for the claimant to submit supplemental filings and to present any relevant factual evidence concerning the issues under appeal, even if it was not presented earlier in the process to ensure claimants are fully heard. Claimants who wish to raise new claims or damage theories after submitting a Proof of Loss should ask the Director of the Claims Office to supplement their claim under section 296.34 of this part.

Under section 296.41, the Director of the Claims Office may request additional information, may schedule a conference, or may convene a hearing under paragraphs (e), (f), and (g) respectively. To ensure effective, efficient resolution of claims, FEMA is updating the process to allow claimants to request a mediator to facilitate a conference during the Administrative Appeal. This allows claimants to request a facilitator earlier in the process as part of the Administrative

Appeal at a conference in paragraph (f) instead of at the later arbitration stage of the process. FEMA believes this change will resolve claims faster consistent with the Act's purpose to expeditiously consider and settle claims. FEMA seeks comment on this update. Following the Administrative Appeal decision, if the claimant does not initiate arbitration or seek judicial review in the prescribed timelines, their concurrence with the decision will be conclusively presumed under paragraph (i). If the claimant concurs with the Director's decision, any additional damages will be paid upon receipt of a properly executed Release and Certification Form.

### 3. Sections 296.42 Arbitration

Section 104(h)(3)(A) of the Act requires FEMA establish procedures under which a dispute regarding a claim may be settled by arbitration. Section 296.42 establishes these procedures. Consistent with the Cerro Grande Fire Assistance arbitration process, any issue decided in an Administrative Appeal may be referred to binding arbitration. Paragraph (a) requires the written request for arbitration be electronically stamped or postmarked no later than 60 days after the Administrative Appeal decision date. FEMA is updating the process to allow for electronic submission of arbitration requests and seeks comment on this update. Evidence not previously entered into the Administrative Record will not be considered during arbitration under paragraph (b). A claimant cannot arbitrate an issue unless it was raised and decided in the Administrative Appeal.

As explained above, FEMA is updating the process to allow claimants to request a mediator to facilitate a conference during the Administrative Appeal in 296.41(f). FEMA believes this change will resolve claims faster consistent with the Act's purpose to expeditiously consider and settle claims. FEMA seeks comment on this update.

Based on FEMA's experience with the arbitration process for the Cerro Grande Fire Assistance, the agency is updating paragraph (c) regarding arbitrator selection. Specifically, FEMA is changing the arbitrator selection process to a random drawing from a list of qualified arbitrators who have agreed to serve, rather than allowing the claimant to select an arbitrator from such a list for claims at or below a certain amount. This change would improve efficiency in the process and would not result in any inequity to claimants, as the selection would be from a random drawing. FEMA believes this change

will result in a faster assignment of arbitrator to resolve the claim more efficiently consistent with the Act's goal to expeditiously consider and settle claims for injuries resulting from the Fire. FEMA seeks comment on this process. FEMA is also increasing the thresholds associated with the assignment of either one arbitrator or a panel of three arbitrators to reflect inflationary increases since the Cerro Grande regulation was published.<sup>17</sup> Amounts in dispute of \$500,000 or less will be decided by one arbitrator while a panel of three arbitrators will decide amounts in dispute exceeding \$500,000.<sup>18</sup> FEMA seeks comment on the increased thresholds.

In paragraph (d), FEMA seeks to modernize the arbitration process by generally offering virtual arbitration hearings to promote efficiency in the process. Additionally, given the scope of the Fire, FEMA is not providing a specific location for any in-person hearing, but rather allowing the Arbitration Administrator the flexibility to select a location in New Mexico for those limited circumstances in which an in-person hearing is held. Decisions will be in writing and provided to the Arbitration Administrator, the claimant, and the Director of the Claims Office under paragraph (e). FEMA seeks comment on these provisions.

Consistent with the Cerro Grande Fire Assistance process, decisions will be rendered no later than 10 days after a hearing is concluded, although the Arbitration Administrator may extend the decision timeline with notice to both the claimant and the Director of the Claims Office. Written arbitration decisions will establish the compensation due to a claimant, if any, and the corresponding rationale. Consistent with the Cerro Grande Fire Assistance arbitration process, the Arbitration Administrator will forward a Release and Certification Form to the claimant with the written decision. Any additional compensation that is awarded as a result of the arbitration will be paid after the signed Release and Certification Form is received.

Paragraphs (f) and (g) are generally consistent with the Cerro Grande Fire Assistance process. If additional compensation is awarded at arbitration, the Arbitration Administrator will forward the decision to the claimant with a Release and Certification Form.

<sup>17</sup> Inflationary adjustments have been made based on the Consumer Price Index for All Urban Consumers as published by the U.S. Department of Labor. See generally [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm).

<sup>18</sup> The Cerro Grande Fire Assistance regulations at 44 CFR 295.42(d) set the threshold at \$300,000.

Such compensation will be paid to the claimant after the signed Form is received by the Arbitration Administrator. FEMA reiterates in paragraph (g) that arbitration decisions are not subject to any further appeal or review and are binding on the claimant and on FEMA. Paragraph (i) includes a provision that while the Arbitration Administrator will pay all fees and expenses of the arbitrator or arbitrators assigned, claimants are responsible for any expenses they incur as a result of the arbitration, including travel costs. This update to the Cerro Grande Fire Assistance process ensures fairness by eliminating the provision to allow the parties to jointly agree to pay such fees. FEMA seeks comment on this provision.

### 4. Section 296.43 Judicial Review

Section 296.43 discusses judicial review of the Administrative Appeal decision, which remains consistent with the Cerro Grande Fire Assistance process and the provisions of the Act. Claimants may seek judicial review in lieu of arbitration if dissatisfied with the outcome of the Administrative Appeal decision. The suit must be filed in the United States District Court for the District of New Mexico within 60 days of a final decision of the Administrator under the Act. Only evidence in the administrative record will be considered by the court. Claimants should be aware that section 104(i)(3) of the Act requires that the court uphold the Administrative Appeals decision if it is supported by substantial evidence on the record considered as a whole.

## IV. Regulatory Analysis

### A. Administrative Procedure Act (APA)

For the reasons that follow, FEMA is issuing this rule as an interim final rule pursuant to statutory authority under the Act. Specifically, section 104(f)(1) requires FEMA to publish "interim final regulations for the processing and payment of claims under this Act." Further, these regulations must be published "not later than 45 days after the date of enactment." Given Congress' specific authority to issue an interim final rule, the agency is proceeding without advance notice and comment as required under the APA. See 5 U.S.C. 553(b) and (c).

The APA also provides an exception to prior notice and comment for rules of agency organization, procedures, or practice. 5 U.S.C. 553(b)(A). This interim final rule implements the Hermit's Peak/Calf Canyon Fire Assistance Act by detailing how FEMA will process and pay claims under the Act. The majority of the provisions in

this interim final rule are procedural because they create the procedural framework through which FEMA is able to efficiently implement a claims process to compensate victims of the Fire. The rule details how a claimant may seek compensation through a claims process with the Office of Hermit's Peak/Calf Canyon Fire Claims ("Claims Office") from initiating a claim with a Notice of Loss through appeal and arbitration or judicial review of an Authorized Official's determination of the claim. This interim final rule provides the voluntary process by which an Injured Party may file a claim under the Act. Injured Persons may seek compensation through the Federal Tort Claims Act or a civil action in lieu of filing a claim under the Act. This interim final rule sets out the agency's procedure for how to voluntarily file a claim. Since this rule is procedural in nature, it is excepted from the notice and comment requirements under 5 U.S.C. 553(b)(A).

Consistent with Congress' direction in section 104(f)(1) of the Act that FEMA publish "interim final regulations for the processing and payment of claims under [the] Act," good cause exists pursuant to 5 U.S.C. 553(b)(B) as it would be impracticable and contrary to the public interest to require notice and comment rulemaking in this instance. Potential claimants are currently without (and awaiting) compensation for injuries they suffered due to a massive wildfire. They need to rebuild as soon as possible to regain normalcy, reduce erosion, and restore land health.<sup>19</sup> The sooner the federal government can compensate them, the sooner they can begin the process of rebuilding and recovery. And so FEMA must establish the relevant regulatory framework without delay, so as to be able to respond expeditiously and without unnecessary confusion regarding the applicable procedures for claimants under the Act. Section 102(b)(2) lists as one of the two purposes of the Act to "provide for the expeditious consideration and settlement of claims" for the injuries suffered as a result of the Fire. The Fire constitutes the largest wildfire in New Mexico history.<sup>20</sup> Over 340,000 acres of

forest burned during the Fire and over half of the land impacted by the Fire consisted of privately-owned land, with just under 200,000 total acres burned.<sup>21</sup> At least 160 homes and a total of over 900 structures were destroyed during the Fire.<sup>22</sup> Despite containment, the impact of the Fire continues to be felt in the impacted areas, causing flooding and setting off a drinking water crisis.<sup>23</sup> The higher burn severity of soil on private lands increases the likelihood of flooding and mudslide impacts on those areas. Residents in the areas of the Fire have already suffered significant damage from flooding, including washed out roads and buildings, drowned pastures, and burned debris moved downstream.<sup>24</sup> In addition, as noted above, Congress explicitly mandated in section 104(f)(1) of the Act that FEMA promulgate these regulations expeditiously as interim final regulations, a factor that supports a finding of "good cause." Pursuant to section 104(f)(1) of the Act, consistent with 5 U.S.C. 553(b)(B), and for the reasons stated above, FEMA therefore will dispense with prior public notice and the opportunity to comment on this rule before finalizing this rule and to make this interim final rule effective immediately upon publication.

Based on the discussion above, FEMA further finds there is good cause, under 5 U.S.C. 553(d)(3), not to require a 30-day delayed effective date for this rulemaking because delaying implementation of the rule by 30 days is contrary to the goal of the statutory requirement to issue an interim final rule within 45 days after the Act's enactment, and delay would further negatively impact claimants seeking compensation through the Act. While

05/17/calf-canyon-hermits-peak-fire-new-mexico/ (last accessed Sept. 15, 2022).

<sup>21</sup> See New Mexico Forest and Watershed Restoration Institute, "Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts" Aug. 24, 2022 found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Sept. 27, 2022).

<sup>22</sup> *Id.*

<sup>23</sup> See Jordan Honeycutt, "Rain brings flash flooding to Hermits Peak Calf Canyon burn scar," KRQE, July 13, 2022 found at <https://www.krqe.com/news/new-mexico/rain-brings-flash-flooding-to-hermits-peak-calf-canyon-burn-scar/> (last accessed Sept. 27, 2022), and Simon Romero, "How New Mexico's Largest Wildfire Set Off a Drinking Water Crisis," The New York Times, Sept. 26, 2022 found at <https://www.nytimes.com/2022/09/26/us/new-mexico-las-vegas-fire-water.html> (last accessed Sept. 27, 2022).

<sup>24</sup> See New Mexico Forest and Watershed Restoration Institute, "Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts" Aug. 24, 2022 found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Sept. 27, 2022).

FEMA believes the agency has the statutory authority pursuant to section 104(f)(1) of the Act and 5 U.S.C. 553(b)(A), 553(b)(B), and 553(d)(3) to issue the rule without advance notice and comment and with an immediate effective date, FEMA is interested in the views of the public and requests comment on all aspects of the interim final rule.

#### *B. Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review*

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 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. This rule has been designated a "significant regulatory action" that is economically significant, under section 3(f)(1) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

In this rule, FEMA is establishing the process by which claimants who were injured as a result of the Fire may apply for compensation under the Act. Affected State, local, and Tribal governments, private sector businesses, not-for-profit organizations, and individuals and households will be eligible to apply for compensation. This rule will result in costs to claimants for time to apply for and substantiate a claim, and for FEMA to process and adjudicate claims. Claimants will submit a Notice of Loss to FEMA, meet with a FEMA Claims Reviewer, obtain the documentation needed to substantiate claims, sign a Proof of Loss, and complete and return a Release and Certification Form. Additionally, affected insurance companies can submit a subrogation notice of loss for possible compensation under the Act. Claimants who disagree with FEMA's evaluation of the claim may also incur costs to appeal the determination. FEMA estimates over 57,000 claimants will seek compensation under the Act, totaling between 1.3 and 1.6 million burden hours over the two-year period,

<sup>19</sup> See New Mexico Forest and Watershed Restoration Institute, "Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts" Aug. 24, 2022 found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Sept. 27, 2022).

<sup>20</sup> See Bryan Pietsch and Jason Samenow, "New Mexico blaze is now largest wildfire in state history," The Washington Post, May 17, 2022 found at <https://www.washingtonpost.com/nation/2022/>

depending on if all applicants submit all forms.<sup>25</sup>

The rule will result in additional transfer payments from FEMA to victims for the settlement of claims for injuries resulting from the Fire. Injuries may include property, business and/or financial losses. Congress appropriated \$2.5 billion to provide for the expeditious consideration and settlement of these claims.<sup>26</sup> The maximum total economic impact of this rule, therefore, is \$2.5 billion (assuming that all funds awarded will be expended). These funds are for the settlement of actual compensatory damages measured by injuries suffered, FEMA's administration of the program, and DHS OIG oversight.<sup>27</sup> However, without knowing the dollar amount of claims that will be filed for these injuries, it is impossible to predict the amount of the economic impact of this rule with any precision.

The Act requires claims must be submitted no later than two years after publication of this interim final rule or November 14, 2024.<sup>28</sup> The Act requires that FEMA determine and fix the amount to be paid for a claim within 180 days after a claim is submitted.<sup>29</sup> Although the impact of the rule could be spread over multiple years as claims are received, processed, and paid, the total economic effects of a specific payment would only occur once, rather than annually.

This rule will provide distributional benefits to victims of the Fire. FEMA has provided immediate assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act to those eligible for public and individual assistance pursuant to the President's declaration of a major disaster on May 4, 2022. The additional compensation from the Act will more fully compensate victims and allow affected State, local and Tribal governments, businesses, organizations, and individuals to rebuild.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed

previously, FEMA is not issuing a notice of proposed rulemaking. Accordingly, the RFA's requirements do not apply.

### D. Unfunded Mandates Reform Act of 1995

FEMA has not issued a notice of proposed rulemaking for this regulatory action; therefore, the written statement provisions of the Unfunded Mandates Reform Act of 1995, as amended, do not apply to this regulatory action.

### E. Paperwork Reduction Act of 1995

This rule contains information collections necessary to support FEMA's implementation of the Act. The Notice of Loss and Proof of Loss forms are a new collection (OMB Control Number 1660–NW162) submitted under OMB's emergency clearance procedures to allow FEMA to begin accepting claims immediately after publication of this interim final rule. Additionally, FEMA will seek public comments on the collection through the normal clearance process.

### F. Privacy Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a 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.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this rule. DHS has determined that this rulemaking does not affect the 1660–NW162 OMB Control Number's compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. Specifically, DHS has concluded that the 1660–NW162 OMB Control Number is covered by the DHS/FEMA/PIA–044 National Fire Incident Reporting Systems (NFIRS) Privacy Impact Assessment (PIA) and the DHS/

FEMA/PIA–049 Individual Assistance (IA) Program PIA. Additionally, DHS has decided that the 1660–NW162 OMB Control Number is covered by DHS/FEMA–008 Disaster Recovery Assistance Files, 87 FR 7852 (Feb. 10, 2022), DHS/ALL–004 General Information Technology Access Account Records System, 77 FR 70792 (Nov. 27, 2012), and DHS/ALL–013 Department of Homeland Security Claims Records, 73 FR 63987 (Oct. 28, 2008) System of Records Notices (SORNs).

### 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.

FEMA has reviewed this interim final rule under Executive Order 13175 and has determined that this interim final rule may 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. FEMA will enter into consultation with the Indian Tribes that have been impacted by the Fire and whose Tribal entities or Tribal members have been impacted by the Fire during the public comment period of this rulemaking.

### 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

<sup>25</sup> Not all Claimants will submit a Mitigation Assistance or a Subrogation Notice and Proof of Loss Form. FEMA estimates that 57,450 applicants will incur between 22.75 and 27.75 burden hours, depending on the Forms they submit.

<sup>26</sup> Division A of Public Law 117–180, 136 Stat. 2144 (2022).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Division G of Public Law 117–180, 136 Stat. 2114 (2022).

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 determined that this rulemaking does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, and therefore does not have federalism implications as defined by the Executive Order. FEMA, however, seeks comment on this determination from any States that have been impacted by the Fire and who seek assistance pursuant to the Act.

#### *I. 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 or environmental impact statement 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 environmental assessment or environmental impact statement.

Rulemaking is a major Federal action subject to NEPA. 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 interim final rule meets Categorical Exclusion A3(a), “[t]hose of a strictly administrative or procedural nature,” and A3(b), “[t]hose that implement, without substantive change, statutory or regulatory requirements.” FEMA has determined that there are no extraordinary circumstances that prevent the use of this categorical exclusion for this rulemaking action.

#### *J. Executive Order 12898 Environmental Justice*

Under Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 FR 7629 (Feb. 16, 1994), as amended by Executive Order 12948, 60 FR 6381, (Feb. 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 would not have a disproportionately high or adverse effect on human health or the environment, nor would it exclude persons from participation in FEMA programs, deny persons the benefits of FEMA programs, or subject persons to discrimination because of race, color, or national origin.

#### *K. Congressional Review of Agency Rulemaking*

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

FEMA has submitted this rule to the Congress and to GAO pursuant to the CRA. The Office of Management and Budget has determined that this rule is “economically significant,” but FEMA believes this rule is not a “major rule” within the meaning of the CRA. FEMA believes this interim final rule is not subject to the additional review requirements under the CRA given the statutory mandate to issue this interim final rule within 45 days of the Act’s enactment under section 104(f) of the Act. This interim final rule is a procedural rule and does not confer any substantive rights, benefits, or obligations but rather only sets out the agency’s procedure for how to voluntarily file a claim under the Act.

As such, this interim final rule is a “rule of agency organization, procedure, or practice that does not substantially affect the rights or obligation of non-agency parties” pursuant to 5 U.S.C. 804(3)(C). Finally, even if this interim final rule is considered a “rule” under the CRA, FEMA finds there is good cause to dispense with notice and public comment under 5 U.S.C. 808(2). Notice and public comment are impracticable and contrary to public interest given the Act’s requirement for the agency to publish an interim final rule within 45 days of enactment and the Act’s purpose to provide expeditious consideration and settlement of claims for victims of the Fire as explained above. Therefore, there is no delay in its effective date under the CRA.

#### **List of Subjects in 44 CFR Part 296**

Administrative practice and procedure, Claims, Disaster assistance, Federally affected areas, Indians, Indians—lands, Indians—Tribal government, Organization and functions (Government agencies), Public lands, Reporting and recordkeeping requirements, State and local governments.

For the reasons discussed in the preamble, the Federal Emergency Management Agency (FEMA) amends subchapter E of title 44 of the Code of Federal Regulations by revising the subchapter heading and adding part 296 to read as follows:

#### **SUBCHAPTER E—FIRE ASSISTANCE**

##### **PART 296—HERMIT’S PEAK/CALF CANYON FIRE ASSISTANCE**

Sec.

##### **Subpart A—General**

- 296.1 Purpose of this part.
- 296.2 Policy.
- 296.3 Information and assistance.
- 296.4 Definitions.
- 296.5 Overview of the claims process.
- 296.6–296.9 [Reserved]

##### **Subpart B—Bringing a Claim Under the Hermit’s Peak/Calf Canyon Fire Assistance Act**

- 296.10 Filing a claim under the Hermit’s Peak/Calf Canyon Fire Assistance Act.
- 296.11 Deadline for notifying FEMA of injuries.
- 296.12 Election of remedies.
- 296.13 Subrogation.
- 296.14 Assignments.
- 296.15–296.19 [Reserved]

##### **Subpart C—Compensation Available Under the Hermit’s Peak/Calf Canyon Fire Assistance Act**

- 296.20 Prerequisite to compensation.
- 296.21 Allowable damages.
- 296.22–296.29 [Reserved]

**Subpart D—Claims Evaluation**

- 296.30 Establishing injuries and damages.  
 296.31 Reimbursement of claim expenses.  
 296.32 Determination of compensation due to claimant.  
 296.33 Partial payments.  
 296.34 Supplementing claims.  
 296.35 Reopening a claim.  
 296.36 Access to records.  
 296.37 Confidentiality of information.  
 296.38–296.39 [Reserved]

**Subpart E—Dispute Resolution**

- 296.40 Scope.  
 296.41 Administrative appeal.  
 296.42 Arbitration.  
 296.43 Judicial review.

**Authority:** Pub. L. 117–180, 136 Stat. 2114, 2168; Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.*

**Subpart A—General****§ 296.1 Purpose.**

This part implements the Hermit's Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit's Peak/Calf Canyon Fire Claims ("Claims Office") to receive, evaluate, process, and pay actual compensatory damages for injuries suffered from the Hermit's Peak/Calf Canyon Fire.

**§ 296.2 Policy.**

It is our policy to provide for the expeditious resolution of damage claims through a process that is administered with sensitivity to the burdens placed upon claimants by the Hermit's Peak/Calf Canyon Fire.

**§ 296.3 Information and assistance.**

Information and assistance concerning the Act is available from the Claims Office, Federal Emergency Management Agency online at <http://www.fema.gov/hermits-peak>.

**§ 296.4 Definitions.**

*Administrative Appeal* means an appeal of the Authorized Official's Determination to the Director of the Claims Office in accordance with the provisions of Subpart E of this part.

*Administrative Record* means all information submitted by the claimant and all information collected by FEMA concerning the claim, which is used to evaluate the claim and to formulate the Authorized Official's Determination. It also means all information that is submitted by the claimant or FEMA in an Administrative Appeal and the decision of the Administrative Appeal. It excludes the opinions, memoranda and work papers of FEMA attorneys and

drafts of documents prepared by Claims Office personnel and contractors.

*Administrator* means the Administrator of the Federal Emergency Management Agency.

*Arbitration Administrator* means the FEMA official responsible for administering arbitration procedures to resolve disputes regarding a claim. Contact information for the Arbitration Administrator can be found online at <http://www.fema.gov/hermits-peak>.

*Authorized Official* means an employee of the United States who is delegated with authority by the Director of the Claims Office to render binding determinations on claims and to determine compensation due to claimants under the Act.

*Authorized Official's Determination* means a report signed by an Authorized Official and mailed to the claimant evaluating each element of the claim as stated in the Proof of Loss and determining the compensation, if any, due to the claimant.

*Claimant* means a person who has filed a Notice of Loss under the Act.

*Claims Office* means the Office of Hermit's Peak/Calf Canyon Fire Claims.

*Claims Reviewer* means an employee of the United States or a Claims Office contractor or subcontractor who is authorized by the Director of the Claims Office to review and evaluate claims submitted under the Act.

*Days* means calendar days, including weekends and holidays.

*Director* means an Independent Claims Manager appointed by the Administrator who will serve as the Director of the Claims Office.

*Good Cause*, for purposes of extending the deadline for filing, supplementing a claim, or reopening a claim includes, but is not limited to: instances where a claimant, through no fault of their own, may not be able to access needed documentation in time to submit a claim or transmit relevant information or data; or where damage is found after a claim has been submitted; or other instances in which the Director of the Claims Office, in their discretion, determines that an undue hardship or change in circumstances on the claimant warrants an extension of a deadline or the supplementation or reopening of existing claims.

*Hermit's Peak/Calf Canyon Fire* means

(1) The fire resulting from the initiation by the U.S. Forest Service of a prescribed burn in the Santa Fe National Forest in San Miguel County, New Mexico on April 6, 2022;

(2) The pile burn holdover resulting from the prescribed burn by the U.S.

Forest Services which reemerged on April 19, 2022; and

(3) The merger of the two fires described in paragraphs (1) and (2) of this definition, reported as the Hermit's Peak Fire or the Hermit's Peak Fire/Calf Canyon Fire.

*Household* means a group of people, related or unrelated, who live together on a continuous basis and does not include members of an extended family who do not regularly and continuously cohabit.

*Household Including Tribal Members* means a Household that existed on April 6, 2022, which included one or more Tribal Members as continuous residents.

*Indian Tribe* means the recognized governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or components reservation individually identified (including parenthetically) in the list published most recently as of September 30, 2022, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994.

*Individual Assistance* means the FEMA program established under Subchapter IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121, *et seq.*, which provides assistance to individuals and families adversely affected by a major disaster or an emergency.

*Injured Person* means an individual, regardless of citizenship or alien status; or an Indian Tribe, Tribal corporation, corporation, partnership, company, association, county, township, city, State, school district, or other non-Federal entity that suffered injury resulting from the Hermit's Peak/Calf Canyon Fire. The term Injured Person includes an Indian Tribe with respect to any claim relating to property or natural resources held in trust for the Indian Tribe by the United States. Lenders holding mortgages or security interests on property affected by the Hermit's Peak/Calf Canyon Fire and lien holders are not an "Injured Person" for purposes of the Act.

*Injury* means "injury or loss of property, or personal injury or death," as used in the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1).

*Notice of Loss* means a form supplied by the Claims Office through which an Injured Person or Subrogee makes a claim for possible compensation under the Act.

*Proof of Loss* means a statement attesting to the nature and extent of the claimant's injuries.

*Public Assistance Program* means the FEMA program established under

Subchapter IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121, *et seq.*, which provides grants to States, local governments, Indian Tribes and private nonprofit organizations for emergency measures and repair, restoration, and replacement of damaged facilities.

*Release and Certification Form* means a document in the manner prescribed by section 104(e) of the Act that all claimants who have received or are awarded compensatory damages under the Act must execute and return to the Claims Office as required by § 296.30(c).

*Subsistence Resources* means food and other items obtained through hunting, fishing, firewood gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.

*Subrogee* means an insurer or other third party that has paid to a claimant compensation for Injury and is subrogated to any right that the claimant has to receive payment under the Act.

*Tribal Member* means an enrolled member of an Indian Tribe.

#### § 296.5 Overview of the claims process.

(a) The Act is intended to provide persons who suffered Injury from the Hermit's Peak/Calf Canyon Fire with a simple, expedited process to seek compensation from the United States. This section provides a brief explanation of the claims process for claims other than subrogation claims. It is not intended to supersede the more specific regulations that follow and explain the claims process in greater detail. To obtain compensation under the Act, an Injured Person must submit all Hermit's Peak/Calf Canyon Fire related claims against the United States or any employee, officer, or agency of the United States to the FEMA Claims Office. An Injured Person who elects to accept an award under the Act is barred from accepting an award pursuant to a claim under the Federal Tort Claims Act or a civil action against the United States or any employee, officer, or agency of the United States arising out of or relating to the same subject matter. Judicial review of FEMA decisions under the Act is available.

(b) The first step in the process is to file a Notice of Loss with the Claims Office. The Claims Office will provide the claimant with a written acknowledgement that the claim has been filed and a claim number.

(c) Shortly thereafter, a Claims Reviewer will contact the claimant to review the claim. Claims Reviewer will

help the claimant formulate a strategy for obtaining any necessary documentation or other support. This assistance does not relieve the claimant of their responsibility for establishing all elements of the injuries and the compensatory damages that are sought, including that the Hermit's Peak/Calf Canyon Fire caused the injuries. After the claimant has had an opportunity to discuss the claim with the Claims Reviewer, a Proof of Loss will be presented to the claimant for signature. After any necessary documentation has been obtained and the claim has been fully evaluated, the Claims Reviewer will submit a report to the Authorized Official. The Claims Reviewer is responsible for providing an objective evaluation of the claim to the Authorized Official.

(d) The Authorized Official will review the report and determine whether compensation is due to the claimant. The claimant will be notified in writing of the Authorized Official's determination. If the claimant is satisfied with the decision, payment will be made after the claimant returns a completed Release and Certification Form. If the claimant is dissatisfied with the Authorized Official's determination, an administrative appeal may be filed with the Director of the Claims Office. If the claimant remains dissatisfied after the appeal is decided, the dispute may be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico.

#### Subpart B—Bringing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

##### § 296.10 Filing a claim under the Hermit's Peak/Calf Canyon Fire Assistance Act.

(a) Any Injured Person may bring a claim under the Act by filing a Notice of Loss. A claim submitted on any form other than a Notice of Loss will not be accepted. The claimant must provide a brief description of each injury on the Notice of Loss.

(b) A single Notice of Loss may be submitted on behalf of a household containing Injured Persons provided that all Injured Persons on whose behalf the claim is presented are identified.

(c) The Notice of Loss must be signed by each claimant, if the claimant is an individual, or by a duly authorized legal representative of each claimant, if the claimant is an entity or an individual who lacks the legal capacity to sign the Notice of Loss. If one is signing a Notice of Loss as the legal representative of a claimant, the signer must disclose their relationship to the claimant. FEMA may

require a legal representative to submit evidence of their authority to act.

(d) The Claims Office will provide Notice of Loss forms through the mail, electronically, in person at the Claims Office or by telephone request. The Notice of Loss form can also be downloaded from the internet at <http://www.fema.gov/hermits-peak>.

(e) A Notice of Loss may be filed with the Claims Office by mail, electronically, or in person. Details regarding the filing process can be found at <http://www.fema.gov/hermits-peak>.

(f) A Notice of Loss that is completed and properly signed is deemed to be filed on the date it is received and acknowledged by the Claims Office.

##### § 296.11 Deadline for notifying FEMA of injuries.

The deadline for filing a Notice of Loss is November 14, 2024. Except as provided in § 296.35 with respect to a request to reopen a claim, an injury that has not been described: on a Notice of Loss, on a supplement to a Notice of Loss or a request to supplement a Notice of Loss under § 296.34 received by the Claims Office on or before November 14, 2024 cannot be compensated under the Act. The Act establishes this deadline and does not provide any extensions of the filing deadline.

##### § 296.12 Election of remedies.

(a) An Injured Person who accepts an award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.

(b) An Injured Person who accepts an award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.

##### § 296.13 Subrogation.

An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all

payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office.

#### § 296.14 Assignments.

Assignment of claims and the right to receive compensation for claims under the Act is prohibited and will not be recognized by FEMA.

### Subpart C—Compensation Available Under the Hermit's Peak/Calf Canyon Fire Assistance Act

#### § 296.20 Prerequisite to compensation.

In order to receive compensation under the Act, a claimant must be an Injured Person who suffered an injury as a result of the Hermit's Peak/Calf Canyon Fire and sustained damages.

#### § 296.21 Allowable damages.

(a) *Allowable damages.* The Act provides for the payment of actual compensatory damages for Injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.

(b) *Exclusions.* Punitive damages, statutory damages under section 30–32–4 of the New Mexico Statutes Annotated (2019), interest on claims, attorney's fees and agents' fees incurred in prosecuting a claim under the Act or an insurance policy, and adjusting costs incurred by an insurer or other third party with the rights of a subrogee that may be owed by a claimant as a consequence of receiving an award are not recoverable from FEMA. The cost to a claimant of prosecuting a claim under the Act does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 296.31(b).

(c) *Loss of property.* Compensatory damages may be awarded for an uninsured or underinsured property loss, a decrease in the value of real property, damage to physical infrastructure, cost resulting from lost subsistence, cost of reforestation or revegetation not covered by any other

Federal program, and any other loss that the Administrator determines to be appropriate for inclusion as a loss of property.

(1) *Real property and contents.* Compensatory damages for the damage or destruction of real property and its contents may include the reasonable cost of reconstruction of a structure comparable in design, construction materials, size, and improvements, taking into account post-fire construction costs in the community in which the structure existed before the fire and current building codes and standards. Compensatory damages may also include the cost of removing debris and burned trees, including hazardous materials or soils, stabilizing the land, replacing contents, and compensation for any decrease in the value of land on which the structure sat pursuant to paragraph (c)(3) of this section.

(2) *Reforestation and revegetation.* Compensation for the replacement of destroyed trees and other landscaping will not exceed 25 percent of the pre-fire value of the structure and lot.

(3) *Decrease in the value of real property.* Compensatory damages may be awarded for a decrease in the value of real property that a claimant owned before the Hermit's Peak/Calf Canyon Fire if:

(i) The claimant sells the real property in a good faith, arm's length transaction that is closed no later than November 14, 2024 and realizes a loss in the pre-fire value; or

(ii) The claimant can establish that the value of the real property was permanently diminished as a result of the Hermit's Peak/Calf Canyon Fire.

(4) *Subsistence.* Compensatory damages will be awarded for lost Subsistence Resources.

(i) FEMA may reimburse an injured party for the reasonable cost of replacing Subsistence Resources customarily and traditionally used by the claimant on or before April 6, 2022, but no longer available to the claimant as a result of the Hermit's Peak/Calf Canyon Fire. For each category of Subsistence Resources, the claimant must elect to receive compensatory damages either for the increased cost of obtaining Subsistence Resources from lands not damaged by the Hermit's Peak/Calf Canyon Fire or for the cost of procuring substitute resources in the cash economy.

(ii) FEMA may consider evidence submitted by claimants, Indian Tribes, and other knowledgeable sources in determining the nature and extent of a claimant's subsistence uses.

(iii) Compensatory damages for subsistence losses will be paid for the period between April 6, 2022 and the

date when Subsistence Resources can reasonably be expected to return to the level of availability that existed before the Hermit's Peak/Calf Canyon Fire. FEMA may rely upon the advice of experts in making this determination.

(iv) Long-term damage awards for subsistence resources will be made to claimants in the form of lump sum cash payments.

(d) *Business loss.* Compensatory damages may be awarded for damage to tangible assets or inventory, including timber, crops, and other natural resources; business interruption losses; overhead costs; employee wages for work not performed; loss of business net income; and any other loss that the Administrator determines to be appropriate for inclusion as a business loss.

(e) *Financial loss.* Compensatory damages may be awarded for increased mortgage interest costs, insurance deductibles, temporary living or relocation expenses, lost wages or personal income, emergency staffing expenses, debris removal and other cleanup costs, costs of reasonable heightened risk reduction, premiums for flood insurance, and any other loss that the Administrator determines to be appropriate for inclusion as financial loss.

(1) *Recovery loans.* FEMA will reimburse claimants awarded compensation under the Act for interest paid on loans, including Small Business Administration disaster loans obtained after April 6, 2022 for damages resulting from the Fire. Interest will be reimbursed for the period beginning on the date that the loan was taken out and ending on the date when the claimant receives a compensation award (other than a partial payment). Claimants are required to use the proceeds of their compensation award to repay Small Business Administration disaster loans. FEMA will cooperate with the Small Business Administration to formulate procedures for assuring that claimants repay Small Business Administration disaster loans contemporaneously with the receipt of their compensation award.

(2) *Flood insurance.* FEMA will reimburse claimants for flood insurance premiums to be paid on or before May 31, 2024 if, as a result of the Hermit's Peak/Calf Canyon Fire, a claimant who was not required to purchase flood insurance before the Hermit's Peak/Calf Canyon Fire is required to purchase flood insurance or the claimant did not maintain flood insurance before the Fire but purchased flood insurance after the Fire due to fear of heightened flood risk. Alternatively, FEMA may provide flood



insurance to such claimants directly through a group or blanket policy.

(3) *Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from the Hermit's Peak/Calf Canyon Fire. FEMA will not reimburse for treatment rendered after April 6, 2024.

(4) *Donations.* FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than September 20, 2022. Donations will be valued at cost.

(5) *Heightened Risk Reduction.* FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Compensation under this section may not exceed 25 percent of the higher of payments from all sources (*i.e.*, the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot, or the pre-fire value of the structure and lot. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.

(f) *Insurance and other benefits.* The Act allows FEMA to compensate Injured Persons only for damages not paid, or will not be paid, by insurance or other third-party payments or settlements.

(1) *Insurance.* Claimants who carry insurance will be required to disclose the name of the insurer(s) and the nature of the insurance and provide the Claims Office with such insurance documentation as the Claims Office reasonably requests.

(2) *Coordination with FEMA's Public Assistance Program.* Injured Persons eligible for disaster assistance under FEMA's Public Assistance Program are expected to apply for all available assistance. Pursuant to the Act, the Federal share of the costs for Public

Assistance projects is 100 percent. Compensation will not be awarded under the Act for injuries or costs that are eligible under the Public Assistance Program.

(3) *Benefits provided by FEMA's Individual Assistance program.* Compensation under the Act will not be awarded for injuries or costs that have been reimbursed under the Federal Assistance to Individual and Households Program or any other FEMA Individual Assistance Program.

(4) *Worker's compensation claims.* Individuals who have suffered injuries that are compensable under State or Federal worker's compensation laws must apply for all benefits available under such laws.

(5) *Benefits provided by non-governmental organizations and individuals.* Gifts or donations made to a claimant by a non-governmental organization or an individual, other than wages paid by the claimant's employer or insurance payments, will be disregarded in evaluating claims and need not be disclosed to the Claims Office by claimants.

#### Subpart D—Claims Evaluation

##### § 296.30 Establishing injuries and damages.

(a) *Burden of proof.* The burden of proving injuries and damages rests with the claimant. A claimant may submit for the Administrative Record a statement explaining why the claimant believes that the injuries and damages are compensable and any documentary evidence supporting the claim. Claimants will provide documentation, which is reasonably available, including photographs and video, to corroborate the nature, extent, and value of their injuries and/or to execute affidavits in a form established by the Claims Office. FEMA may compensate a claimant for an injury in the absence of supporting documentation, in its discretion, on the strength of an affidavit or Proof of Loss executed by the claimant, if documentary evidence substantiating the injury is not reasonably available. FEMA may also require an inspection of real property. FEMA may request that a business claimant execute an affidavit, which states that the claimant will provide documentary evidence, including but not limited to income tax returns, if requested by the DHS Office of the Inspector General or the Government Accountability Office during an audit of the claim.

(b) *Proof of Loss.* All claimants are required to attest to the nature and extent of each injury for which compensation is sought in the Proof of

Loss. The Proof of Loss, which will be in a form specified by the Claims Office, must be signed by the claimant or the claimant's legal representative if the claimant is not an individual or is an individual who lacks the legal capacity to execute the Proof of Loss. The Proof of Loss must be signed under penalty of perjury. Non-subrogation claimants should submit a signed Proof of Loss to the Claims Office not later than 150 days after the date when the Notice of Loss was submitted. This deadline may be extended at the discretion of the Director of the Claims Office for good cause. If a non-subrogation claimant fails to submit a signed Proof of Loss within the timeframes set forth in this section and does not obtain an extension from the Director of the Claims Office, the Claims Office may administratively close the claim and require the claimant to repay any partial payments made on the claim. Subrogation claimants will submit the Proof of Loss contemporaneously with filing the Notice of Loss.

(c) *Release and Certification Form.* All claimants who receive compensation under the Act are required to sign a Release and Certification Form, including for partial payments under § 296.33. The Release and Certification Form must be executed by the claimant or the claimant's legal representative if the claimant is an entity or lacks the legal capacity to execute the Release and Certification Form. A Release and Certification Form must be received by the Claims Office before the Claims Office provides payment on the claim. The United States will not attempt to recover compensatory damages paid to a claimant who has executed and returned a Release and Certification Form within the periods provided above, except in the case of fraud or misrepresentation by the claimant or the claimant's representative, failure of the claimant to cooperate with an audit as required by § 296.36 or a material mistake by FEMA.

(d) *Authority to settle or compromise claims.* Notwithstanding any other provision of this part, the Director of the Claims Office may extend an offer to settle or compromise a claim or any portion of a claim at any time during the process outlined in this part, which if accepted by the claimant will be binding on the claimant and on the United States, except that the United States may recover funds improperly paid to a claimant due to fraud or misrepresentation on the part of the claimant or the claimant's representative, a material mistake on FEMA's part or the claimant's failure to

cooperate in an audit as required by § 296.36.

**§ 296.31 Reimbursement of claim expenses.**

(a) FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, requested by the Claims Office. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not requested by the Claims Office.

(b) FEMA will provide a lump sum payment for incidental expenses incurred in claims preparation to claimants that are awarded compensatory damages under the Act after a properly executed Release and Certification Form has been returned to the Claims Office. The amount of the lump sum payment will be the greater of \$150 or 5% of the Act's compensatory damages and insurance proceeds recovered by the claimant for Hermit's Peak/Calf Canyon Fire related injuries (not including the lump sum payment or monies reimbursed under the Act for the purchase of flood insurance) but will not exceed \$25,000. Subrogation claimants and claimants whose only Hermit's Peak/Calf Canyon Fire related loss is for flood insurance premiums will not be eligible.

**§ 296.32 Determination of compensation due to claimant.**

(a) *Authorized Official's report.* After the Claims Office has evaluated all elements of a claim as stated in the Proof of Loss, the Authorized Official will issue, and provide the claimant with a copy of, the Authorized Official's determination.

(b) *Claimant's options upon issuance of the Authorized Official's determination.* Not later than 120 days after the date that appears on the Authorized Official's determination, the claimant must either accept the determination by submitting a Release and Certification Form to FEMA and/or initiate an Administrative Appeal in accordance with § 296.41. Claimants must sign the Release and Certification Form to receive payment on their claims (including for partial payments). The claimant will receive payment of compensation awarded by the Authorized Official after FEMA receives the completed Release and Certification Form. If the claimant does not either submit a Release and Certification Form to FEMA or initiate an Administrative Appeal no later than 120 days after the date that appears on the Authorized

Official's determination, the claimant will be conclusively presumed to have accepted the Authorized Official's determination. The Director of the Claims Office may modify the deadlines set forth in this subsection at the request of a claimant for good cause shown.

**§ 296.33 Partial payments.**

The Claims Office at the request of a claimant may make one or more partial payments on any aspect of a claim that is severable. Receipt by a claimant of a partial payment is contingent on the claimant signing a Release and Certification Form for the severable part of the claim for which partial payment is being made. Acceptance of a partial payment in no way affects a claimant's ability to pursue an Administrative Appeal of the Authorized Official's determination or to pursue other rights afforded by the Act with respect to any portion of a claim for which a Release and Certification Form has not been executed. The Claims Office decision on whether to provide a partial payment cannot be appealed.

**§ 296.34 Supplementing claims.**

A claimant may amend the Notice of Loss to include additional claims at any time before signing a Proof of Loss. After the claimant has submitted a Proof of Loss and before submission of a Release and Certification Form, a claimant may request that the Director of the Claims Office consider one or more injuries not addressed in the Proof of Loss. The request must be submitted in writing to the Director of the Claims Office and received not later than the deadline for filing an Administrative Appeal under § 296.32 or November 14, 2024, whichever is earlier. It must be supported by the claimant's explanation of why the injury was not previously reported. If good cause is found to consider the additional injury, the Director will determine whether compensation is due to the claimant for the Loss under the Administrative Appeal procedures described in § 296.41.

**§ 296.35 Reopening a claim.**

The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for decrease in the value of the real property under

§ 296.21(c)(3); the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded; or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause.

**§ 296.36 Access to records.**

For purpose of audit and investigation, a claimant will grant the DHS Office of the Inspector General and the Comptroller General of the United States access to any property that is the subject of a claim and to any and all books, documents, papers, and records (including any relevant tax records) maintained by a claimant or under the claimant's control pertaining or relevant to the claim.

**§ 296.37 Confidentiality of information.**

Confidential information submitted by individual claimants is protected from disclosure to the extent permitted by the Privacy Act. These protections are described in the Privacy Act Notice provided with the Notice of Loss. Other claimants should consult with FEMA concerning the availability of confidentiality protection under exemptions to the Freedom of Information Act and other applicable laws before submitting confidential, proprietary or trade secret information.

**Subpart E—Dispute Resolution**

**§ 296.40 Scope.**

This subpart describes a claimant's right to bring an Administrative Appeal in response to the Authorized Official's Determination. It also describes the claimant's right to pursue arbitration or seek judicial review following an Administrative Appeal.

**§ 296.41 Administrative appeal.**

(a) *Notice of appeal.* A claimant may request that the Director of the Claims Office review the Authorized Official's determination by written request to the Appeals Docket, Office of Hermit's Peak/Calf Canyon Claims, postmarked or delivered within 120 days after the date that appears on the Authorized Official's determination pursuant to § 296.32. The claimant will submit along with the notice of appeal a statement explaining why the Authorized Official's determination was incorrect. Information regarding where to file can be found at <http://www.fema.gov/hermits-peak>.

(b) *Acknowledgement of appeal.* The Claims Office will acknowledge receipt of an appeal. Following the receipt of a timely filed appeal, the Director of the Claims Office will obtain the Administrative Record from the

Authorized Official and transmit a copy to the claimant.

(c) *Supplemental filings.* The claimant may supplement their statement accompanying the appeal and provide any additional documentary evidence supporting the appeal within 60 days after the date when the appeal is filed. The Director of the Claims Office may extend these timeframes or authorize additional filings either on their own initiative or in response to a request by the claimant for good cause shown.

(d) *Admissible evidence.* The claimant may rely upon any relevant evidence to support the appeal, regardless of whether the evidence was previously submitted to the Claims Reviewer for consideration by the Authorized Official.

(e) *Obtaining evidence.* The Director of the Claims Office may request from the claimant or from the Authorized Official any additional information that is relevant to the issues posed by the appeal in their discretion.

(f) *Conferences.* The Director of the Claims Office may schedule a conference to gain a better understanding of the issues or to explore settlement or compromise possibilities. The claimant may also request a conference. Conferences will generally be conducted virtually. In limited circumstances, the Director may convene an in-person conference at a location in New Mexico designated by the Director. A claimant may request that the Director of the Claims Office appoint a mediator at FEMA's expense to facilitate such conferences.

(g) *Hearings.* The Director of the Claims Office may exercise the discretion to convene an informal hearing to receive oral testimony from witnesses or experts. The rules under which hearings will be conducted will be established by the Director of the Claims Office and provided to the claimant. Formal rules of evidence applicable to court proceedings will not be used in hearings under this subsection. Hearings will generally be conducted virtually, be transcribed, and the transcript will be entered in the Administrative Record. In limited circumstances, the Director may convene an in-person hearing at a location in New Mexico designated by the Director.

(h) *Decision on appeal.* After the allotted time for submission of evidence has passed, the Director of the Claims Office will close the Administrative Record and render a written decision on the Administrative Appeal. The Director of the Claims Office's decision on the Administrative Appeal will constitute

the final decision of the Administrator of FEMA under sections 104(d)(2)(B) and 104(i)(1) of the Act.

(i) *Claimant's options following appeal.* The claimant's concurrence with the decision in the Administrative Appeal will be conclusively presumed unless the claimant initiates arbitration in accordance with § 296.42 or seeks judicial review in accordance with § 296.43. If the claimant concurs with the Director's determination, payment of any additional damages awarded by the Director will be made to the claimant upon receipt of a properly executed Release and Certification Form.

#### § 296.42 Arbitration.

(a) *Initiating arbitration.* A claimant who is dissatisfied with the outcome of the Administrative Appeal may elect to submit the dispute to a binding arbitration process. A claimant may initiate arbitration by submitting a written request to the Arbitration Administrator for Hermit's Peak/Calf Canyon Claims. Additional information regarding how to submit a written arbitration request can be found at <http://www.fema.gov/hermits-peak>. The written request for arbitration must be electronically stamped or postmarked no later than 60 days after the date that appears on the Administrative Appeal decision.

(b) *Permissible claims.* A claimant may not arbitrate an issue unless it was raised and decided in the Administrative Appeal. Arbitration will be conducted on the evidence in the Administrative Record. Evidence not previously entered into the Administrative Record will not be considered.

(c) *Selection of arbitrator.* The Arbitration Administrator will maintain a list of qualified arbitrators who have agreed to serve. The arbitration will be decided by one arbitrator if the amount in dispute is \$500,000 or less and a panel of three arbitrators if the amount in dispute exceeds \$500,000. Arbitrators will be assigned by the Arbitration Administrator through a random drawing.

(d) *Conduct of arbitration.* Pursuant to guidelines from the Arbitration Administrator, which will be provided directly to claimants who have filed a request for arbitration, the arbitration process will include an arbitration hearing with consideration of the claimant's written request for arbitration, the Administrative Record, and oral testimony. Hearings will generally be conducted virtually. In limited circumstances, the arbitrator may convene an in-person hearing at a

location in New Mexico designated by the Arbitration Administrator.

(e) *Decision.* After a hearing and reviewing the evidence, the arbitrator(s) will render a written decision and will transmit the decision to the Arbitration Administrator, the claimant, and the Director of the Claims Office. If a panel of three arbitrators conducts the arbitration, at least two of the three arbitrators must sign the decision. The arbitrator(s) should render a decision no later than 10 Days after a hearing is concluded. The Arbitration Administrator may extend the time for a decision with notice to the claimant and the Director of the Claims Office. The decision will establish the compensation due to the claimant, if any, and the reasons therefor.

(f) *Action on arbitration decision.* The Arbitration Administrator will forward the arbitration decision to the claimant and, if additional compensation is awarded to the claimant, a Release and Certification Form. Additional compensation awarded in the arbitration will be paid to the claimant after the signed Release and Certification Form is received by the Arbitration Administrator.

(g) *Final decision.* The decision of the arbitrator(s) will be final and binding on all parties and will not be subject to any administrative or judicial review. The arbitrator(s) may correct clerical, typographical or computational errors as requested by the Arbitration Administrator.

(h) *Administration of arbitration.* The Arbitration Administrator oversees arbitration procedures and will resolve any procedural disputes arising in the course of the arbitration.

(i) *Expenses.* The Arbitration Administrator will pay all fees and expenses of the arbitrator(s). The claimant is responsible for any expenses they incur, including travel costs.

#### § 296.43 Judicial review.

As an alternative to arbitration, a claimant dissatisfied with the outcome of an Administrative Appeal may seek judicial review of the decision by bringing a civil lawsuit against FEMA in the United States District Court for the District of New Mexico. This lawsuit must be brought within 60 Days of the date that appears on the Administrative Appeal decision. Pursuant to section 104(i) of the Act, the court may only consider evidence in the Administrative Record. The court will uphold FEMA's decision if it is supported by substantial

evidence on the record considered as a whole.

**Deanne Criswell,**  
 Administrator, Federal Emergency  
 Management Agency.

[FR Doc. 2022-24728 Filed 11-10-22; 8:45 am]

BILLING CODE 9111-68-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

[Docket No. 221107-0236; RTID 0648-XC082]

**Atlantic Highly Migratory Species; 2023 Atlantic Shark Commercial Fishing Year**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** This final rule adjusts the quotas and retention limits and establishes the opening date for the 2023 fishing year for the Atlantic commercial shark fisheries. Quotas are adjusted as required or allowable based on underharvests from the 2022 fishing year. NMFS establishes the opening date and commercial retention limits to provide, to the extent practicable, fishing opportunities for commercial shark fishermen in all regions and areas. The final measures could affect fishing opportunities for commercial shark fishermen in the northwestern Atlantic Ocean, Gulf of Mexico, and Caribbean Sea.

**DATES:** This final rule is effective on January 1, 2023. The 2023 Atlantic shark commercial fishing year opens on January 1, 2023 for all species and regions.

**ADDRESSES:** Electronic copies of this final rule and supporting documents (including the annual Atlantic Highly Migratory Species (HMS) Stock Assessment and Fishery Evaluation Report and the Atlantic HMS Best Scientific Information Available Regional Framework (BSIA Regional

Framework)) are available from the Atlantic HMS Management Division website at <https://www.fisheries.noaa.gov/topic/atlantic-highly-migratory-species> or by contacting Ann Williamson at [ann.williamson@noaa.gov](mailto:ann.williamson@noaa.gov) or 301-427-8503.

**FOR FURTHER INFORMATION CONTACT:** Ann Williamson ([ann.williamson@noaa.gov](mailto:ann.williamson@noaa.gov)), Guy DuBeck ([guy.dubeck@noaa.gov](mailto:guy.dubeck@noaa.gov)), or Karyl Brewster-Geisz ([karyl.brewster-geisz@noaa.gov](mailto:karyl.brewster-geisz@noaa.gov)) at 301-427-8503.

**SUPPLEMENTARY INFORMATION:**

**Background**

Atlantic shark fisheries are managed primarily under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) and the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (2006 Consolidated HMS FMP) and its amendments are implemented by regulations at 50 CFR part 635.

For the Atlantic commercial shark fisheries, the 2006 Consolidated HMS FMP and its amendments established default commercial shark retention limits, quotas for species and management groups, and accountability measures for underharvests and overharvests. The retention limits, commercial quotas, and accountability measures can be found at 50 CFR 635.24(a), 635.27(b), and 635.28(b). Regulations also include provisions allowing flexible opening dates for the fishing year (§ 635.27(b)(3)) and inseason adjustments to shark trip limits (§ 635.24(a)(8)), which provide management flexibility in furtherance of equitable fishing opportunities, to the extent practicable, for commercial shark fishermen in all regions and areas. In addition, § 635.28(b)(4) lists species and management groups with quotas that are linked. If quotas are linked, when the specified quota threshold for one management group or species is reached and that management group or species is closed, the linked management group or species closes at the same time (§ 635.28(b)(3)). Lastly, pursuant to § 635.27(b)(2), any annual or inseason

adjustments to the base annual commercial overall, regional, or sub-regional quotas will be published in the **Federal Register**.

Background information about the need to adjust the quotas and retention limits and establish the opening date for the 2023 fishing year for the Atlantic commercial shark fisheries was provided in the proposed rule (87 FR 55379, September 9, 2022) and is not repeated here. The comment period for the proposed rule closed on October 11, 2022. NMFS received 99 written comments, the majority of which were form letter submissions. Summaries of the comments received, and our responses to those comments, are in the Response to Comments section. Similar comments are combined, where appropriate. After reviewing and considering all the public comments received on the proposed rule, NMFS is finalizing the rule as proposed.

**2023 Commercial Shark Quotas**

In this final rule, NMFS adjusts the quota levels for the various shark stocks and management groups for the 2023 Atlantic commercial shark fishing year (*i.e.*, January 1 through December 31, 2023) based on underharvests that occurred during the 2022 fishing year, consistent with existing regulations at § 635.27(b). Unharvested quota may be added to the quota for the next fishing year, but only for shark management groups that have shark stocks that are declared not overfished and not experiencing overfishing. No more than 50 percent of a base annual quota may be carried over from a previous fishing year.

Based on 2022 harvests that were reported by September 30, 2022, and after considering catch rates and landings from previous years, with this final rule, NMFS adjusts the 2023 quotas for certain management groups as shown in Table 1. NMFS anticipates that dealer reports received after that time will be used to adjust 2024 quotas, as appropriate, noting that, in some circumstances, NMFS re-adjusts quotas during the subject year. A description of the calculations for each stock and management group is provided in the proposed rule and is not repeated here.

**TABLE 1—2023 QUOTAS AND OPENING DATES FOR THE ATLANTIC SHARK MANAGEMENT GROUPS**

| Region or sub-region    | Management group                              | 2022 Annual quota<br>(A) | Preliminary 2022 landings <sup>1</sup><br>(B) | Adjustments <sup>2</sup><br>(C) | 2023 Base annual quota<br>(D) | 2023 Final annual quota<br>(D + C) | Season opening date |
|-------------------------|---|--------------------------|---|---------------------------------|-------------------------------|------------------------------------|---------------------|
| Western Gulf of Mexico. | Blacktip Sharks .....                         | 347.2 mt (765,392 lb)    | 220.1 mt (485,297 lb)                         | 115.7 mt (255,131 lb)           | 231.5 mt (510,261 lb)         | 347.2 mt (765,392 lb).             | January 1, 2023.    |
|                         | Aggregate Large Coastal Sharks <sup>3</sup> . | 72.0 mt (158,724 lb)     | 68.0 mt (149,951 lb)                          |                                 | 72.0 mt (158,724 lb)          | 72.0 mt (158,724 lb).              |                     |