

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV, part 488 as set forth below:

#### **PART 488—SURVEY, CERTIFICATION, AND ENFORCEMENT PROCEDURES**

■ 1. The authority citation for part 488 is revised to read as follows:

**Authority:** Secs. 1102 and 1871 of the Social Security Act, unless otherwise noted (42 U.S.C. 1302 and 1395(hh)); Pub. L. 110–92, H. J. Res. 52 §§ 101 & 106 (2007).

(Catalog of Federal Domestic Assistance Program No. 93.778, Medical Assistance Program)

(Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: October 11, 2007.

**Kerry Weems,**

*Acting Administrator, Centers for Medicare & Medicaid Services.*

Approved: October 25, 2007.

**Michael O. Leavitt,**

*Secretary.*

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## **DEPARTMENT OF HOMELAND SECURITY**

### **Federal Emergency Management Agency**

#### **44 CFR Part 78**

[Docket ID FEMA–2007–0003]

RIN 1660–AA00

#### **Flood Mitigation Assistance**

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

**ACTION:** Final rule.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is adopting as final, without substantive change, an interim rule that implements sections 553 and 554 of the National Flood Insurance Reform Act of 1994. Section 553 authorizes a flood mitigation assistance program through which FEMA is authorized to provide grants to States and communities for planning assistance and for mitigation projects that reduce the risk of flood damage to structures covered under contracts for flood insurance. Section 554 establishes the National Flood Mitigation Fund to fund assistance provided under section 553.

**DATES:** Effective Date: November 30, 2007.

#### **FOR FURTHER INFORMATION CONTACT:**

Cecelia Rosenberg, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (phone) 202–646–3321, (facsimile) 202–646–2719, or (e-mail) [cecilia.rosenberg@dhs.gov](mailto:cecilia.rosenberg@dhs.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Sections 553 and 554 of the National Flood Insurance Reform Act of 1994 (NFIRA) (Pub. L. 103–325, enacted September 23, 1994) (also known as Title V of the Riegle Community Development and Regulatory Improvement Act of 1994) amended the National Flood Insurance Act of 1968 (42 U.S.C. 4101 *et seq.*). Specifically, section 553 authorized the Director (now Administrator) of the Federal Emergency Management Agency (FEMA) to carry out a flood mitigation assistance program, known as the Flood Mitigation Assistance Program (FMA). Through the FMA Program, FEMA is authorized to provide grants to States and communities for planning assistance and mitigation projects that reduce the risk of flood damage to structures covered under contracts for flood insurance. Section 554 required FEMA to establish the National Flood Mitigation Fund (NFMF) to provide funds for flood mitigation program assistance described in section 553. On March 20, 1997 (62 FR 13346), FEMA published an interim rule implementing section 553 and 554 of the National Flood Insurance Reform Act.

This final rule adopts, without substantive change, the regulations established by the March 20, 1997 interim rule. It addresses the comments received from the public in response to the interim rule, and finalizes the regulations contained in 44 CFR part 78.

##### **Records Management**

The Regulation Identifier Number (RIN) listed in the March 20, 1997 interim final rule was 3067–AC45. Since FEMA became a component of the Department of Homeland Security (DHS), FEMA's RINs were renumbered and 3067–AC45 became 1660–AA00.

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

FEMA received seven public comments on the interim rule. The seven commenters included five States, one local government, and one association. The comments received, together with FEMA's responses, are set forth below.

*The Community Rating System.* One commenter wrote that while it is good that the Community Rating System (CRS) criterion may be a basis for a

floodplain management plan, CRS communities with repetitive loss or floodplain management plans developed prior to the publishing of 44 CFR part 78 in March 1997 may not realize that their plans will require modification to meet the new criteria of 44 CFR 78.5, and States and regions should be counseled to closely review these older plans. The commenter wrote that the CRS plan reviewer for the Insurance Services Organization (ISO) should be consulted before any FEMA region approves any CRS plans developed prior to 1997 for the purpose of receiving FMA project funds unless the region or State carefully reviews them to see that they meet FMA criteria. The commenter wrote that the States and regions should accept nothing less than plan adoption by resolution of the community's governing board. The commenter also wanted FEMA not to accept as evidence of adoption a letter from the Mayor stating that the community will follow the plan since the CRS criterion requires full adoption by the governing board. The commenter thought that FMA should be consistent with the CRS plan adoption process and require that all local elected officials see the proposed plan and ratify it.

*FEMA's Response:* The CRS program is a voluntary program that predates these regulations and creates an incentive for communities that participate in the National Flood Insurance Program (NFIP) to implement floodplain management practices that exceed NFIP minimum requirements. The CRS program, which was established in 1993, provides credit for communities in the form of lower flood insurance premium rates for property owners. The CRS has been and is currently operated by FEMA through an agreement with ISO. The schedule of creditable activities is described in its reference guide, the *CRS Coordinator's Manual* available through <http://www.fema.gov/business/nfip/intnfip.shtm>. One of the approved CRS activities that communities may receive credit for is to develop a flood mitigation or repetitive flood loss plan.

FEMA has addressed CRS plans developed prior to 1997 by coordinating with CRS staff to ensure that all review criteria are consistent with FMA and CRS plans. As a result, FEMA has accepted CRS plans based on guidance provided in FEMA Publication No. 299: The FMA Program Guidance (August 1997), as meeting the requirements of § 78.5 as approvable local Flood Mitigation Plans. Further, ISO continues to review CRS plans submitted by local communities against the requirements of § 78.5 if requested by a local

community. Such plans would then be forwarded to the State and FEMA for approval as FMA plans.

Further, § 201.6(c)(5) states that the planning process shall include, documentation “that the plan has been formally adopted by the governing body of the jurisdiction requesting approval of the plan (e.g. City Council, County Commissioner, Tribal Council).” FEMA has provided implementation procedures in the Multi-Hazard Mitigation Planning Guidance under DMA2000 (Disaster Mitigation Act of 2000) located at <http://www.fema.gov/plan/mitplanning/index.shtml>, which describes how local executives and governing bodies can facilitate plan approval according to local laws and procedures consistent with § 201.6(c)(5).

*Insurable structures.* One commenter wrote that § 78.1(b) discusses assisting State and local governments in funding cost-effective actions on “insurable” structures, while § 78.12 discusses eligible types of projects as being “insured structures.” The commenter asked whether the regulation covers “insurable” structures or “insured” structures. Another commenter wrote that since the State plan must be in place to address insurable structures, this limits the State’s eligibility for project money for State agencies who do not have public buildings to protect or whose mission does not involve the protection of private structures. A third commenter asked if States that participate in the self-insurance program are eligible for FMA project monies that affect State owned facilities insured under their program.

*FEMA’s Response:* The terms “insurable” and “insured” were used in part 78 interchangeably. FEMA realizes it made a technical error in using insurable and insured interchangeably as the two terms have different definitions. FEMA intended to mean “any structure covered by an insurance policy underwritten by the NFIP.” FEMA has revised § 78.1(b) in this final rule by replacing “insurable” with “insured.”

The authorized purpose for the FMA program is to reduce the risk of flood damage to structures covered under contracts for flood insurance. Furthermore, activities funded under FMA must be cost-beneficial to the NFMF. Thus, self-insured structures within States participating in the self-insurance program are not eligible to receive FMA project funds.

*Use of Planning Grants.* One commenter wrote that under § 78.1(b), planning grants can be used to “assess the flood risk and identify actions to reduce that risk” but the supplementary

information section of the interim rule on planning grants states that the “purposes of the planning grants is to develop or update a Flood Mitigation Plan.” The commenter asked if the State or the community could receive a planning grant without actually developing a Flood Mitigation Plan.

*FEMA’s Response:* FEMA will only fund planning activities that will result in a completed project, which in this case is a FEMA-approved State or local flood mitigation plan. The language in § 78.1(b) states that FMA planning grants are intended to help State and local communities assess the flood risk and identify actions to reduce risk. The local mitigation plan is the process FEMA uses for the community to assess flood risk and identify actions to reduce flood risk. Sections 78.4 and 78.5 define eligible planning grant activities. States may only use FMA planning funds to develop State and local Flood Mitigation Plans, which must be adopted by the governing body of the jurisdiction.

*Definition of the term “community.”* One commenter wrote that as written, § 78.2’s definition of “community” could be interpreted to mean that any jurisdiction, city, or county that does not have the authority to adopt a building code or require zoning, even if that jurisdiction, city, or county has a good floodplain management program would not be eligible for participation in FMA. The commenter wrote that numerous States do not give ordinance-making authority to county level government. For example, in Texas, counties can participate in the NFIP, and some have very strong floodplain management programs, but without the ability to adopt building codes or regulate land use through zoning, would this exclude them from FMA participation? Additionally, the City of Houston has an active floodplain management program with over 45,000 flood policyholders who pay over \$16.5 million annually in premiums; however, the city has no zoning (although they have adopted a building code). Does a literal interpretation of the regulation exclude the City of Houston from FMA eligibility?

One commenter wrote that although no one has explicitly included regional agencies (e.g., regional planning commissions, urban drainage districts, metropolitan sewer or sanitary districts, and similar agencies) within the definition of “communities,” regional agencies often manage sizable floodplain management programs and have their own mitigation programs; thus, FEMA should consider regional agencies as eligible applicants for grant

funds. The commenter wrote that regional agencies can also provide a great deal of planning and technical assistance support to eligible communities.

*FEMA’s Response:* FEMA has historically been flexible in providing FMA planning and project subgrants to local flood control districts that have the capacity to plan for and implement mitigation measures but that may not have the delegated authority from the State to adopt a building code or zoning ordinances. Local flood control districts acting on behalf of one or more local communities would meet the requirements of § 78.3(b)(2) for the purpose of receiving FMA subgrants. Further, FEMA would consider plans developed by local flood control districts to be multi-jurisdictional plans. Section 201.6(c) requires that multi-jurisdictional plans include: (1) Identifiable action items specific to each jurisdiction requesting FEMA approval or credit for the plan, and (2) documentation that the plan has been formally adopted by a governing body representing each jurisdiction such as a City Council, County Commissioner, or Tribal Council.

*Planning Grant Approval.* One commenter wrote that § 78.3(b)(2) says that the State point of contact can award the planning grants, but that it is unclear whether FEMA approves the planning grants, because § 78.3(a)(2) states that the Director of the FEMA Region will approve the Flood Mitigation Plans.

*FEMA’s Response:* FEMA approves all eligible FMA planning grant applications submitted by the State. The State in turn awards funds to local communities as subgrants. Once the local community has completed the plan, it is forwarded to the State for review and submission to FEMA for approval in order for the local community to become eligible to receive FMA project subgrants.

*Procedures for forwarding planning documents to FEMA.* One commenter wrote that § 78.3(b), which refers to alternative procedures outlined in § 78.14 that allow the community to coordinate planning document directly with FEMA, seems to imply that these alternative procedures have been formulated. The commenter believes that it is vital that the procedures be finalized and published as soon as possible.

*FEMA’s Response.* The alternative application procedures provided at § 78.3(b) have been seldom utilized by local communities applying for FMA project and planning grants. However, procedures on alternative application

procedures were described in more detail in the FEMA 299 ("Flood Mitigation Assistance Guidance,") the original FMA implementation document.

*Eligibility for Technical Assistance.*

One commenter wrote that under § 78.4(a), the State is eligible to apply for Technical Assistance grants, and that FEMA Region VII has stated that the State can pass the TA funds through to the local level (*i.e.*, Council of Governments) to administer the TA. Does this mean that local jurisdictions are not eligible to directly apply for the TA funds?

*FEMA's Response:* States have been permitted to pass FMA technical assistance funds through to the local level under §§ 78.4(b) and 78.8(c) as long as that amount does not exceed 10 percent of the local community's project allocation from the State.

*Increase Project Grant funds.* One commenter wrote that the base amount of \$100,000 awarded to each State for Project Grants is insufficient to perform any meaningful flood mitigation planning projects. The commenter cited the project category of land acquisition of insured structures and underlying real property, where, in many cases, the cost of acquiring a single real property site may exceed \$50,000. As a result, the base amount of \$100,000 awarded to a State for Project Grants will only allow a State to do very small and inexpensive projects that may not significantly impact a State's long term goal to advance its flood mitigation program within the State.

*FEMA's Response:* FEMA agrees with the commenter, and will consider removing the \$100,000 base limitation in a future rulemaking.

*The 5 year grant allocation of \$150,000.* One commenter asked if, under § 78.8(b), the State can apply once every 5 years for a single planning subgrant of \$150,000, and then carry over any unobligated planning grant dollars to the next fiscal year until the 5-year period expires. The commenter also asked if the State can submit an application for a \$150,000 planning grant and have FEMA make separate subgrant awards in phases over 5 years, as long as the total amount does not exceed \$150,000 in 5 years. Another commenter wrote that, per § 78.9, if the maximum performance period for a planning grant is 3 years, why does a State or community have to wait for 5 years to apply for another planning grant. Another commenter wrote that since planning grants can only be issued to States once every 5 years for an amount up to \$150,000, the allocations presented to the States will preclude

most States from reaching the \$150,000 ceiling if they chose to accept the planning grant allocation in the interim final rule. The commenter felt that the emphasis seems to be the issuance of one grant, not the maximum of \$150,000.

*FEMA's Response:* The State may apply for the full 5-year statutory limit of \$150,000 in one grant application if FEMA allocates that amount to the State based on the formula provided in § 78.8(a). Further, the State may apply for multiple applications that total \$150,000 over any 5-year period. FEMA believes that the 3-year performance period on planning grants is sufficient for completing and gaining FEMA approval on an FMA plan, and this statutory requirement is not related directly to the 5-year cycle on limits for FMA planning funds. Finally, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c) does not require that each State receive the maximum \$150,000 over any 5-year period.

*Limits on FMA funds.* One commenter asked if, under § 78.8, TA dollars are included in the \$20 million maximum for project grants. Can the \$20 million be spread over 5 years? Do the awarded funds also have to actually be spent within the 5 years? Another commenter wrote that although he understood funding for the FMA project grant funding was limited to \$3,300,000 to any community over 5 years, setting arbitrary limits on States or communities will only serve to stifle the overall effectiveness of the program, and establishing such a low limit puts an unnecessary restraint on the commenter's potential program.

*FEMA's Response:* The National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c) lists the statutory limits on FMA project funds at \$20,000,000. Since the FMA technical assistance allocation is currently 10 percent of the project grant, all technical assistance funds must be counted as part of the 5 year \$20,000,000 for States. FEMA does consider waivers of these statutory funding limits during major disasters or emergencies declared by the President as a result of flood conditions consistent with the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c).

*Eligibility of mapping projects.* One commenter wrote that the limitation regarding planning grants and floodplain map updates in § 78.9 is a concern. The commenter stated that current floodplain maps and the provision of map information in digital format are fundamental in estimating the population and structures at risk. The commenter felt that flood

mitigation plans will suffer without the eligibility of funding updated floodplain maps to write them. The commenter asked that FEMA reconsider mapping projects as eligible for FMA planning grants.

*FEMA's Response:* FEMA is actively engaged in the development and update of floodplain maps under a separate authority of the NFIP (42 U.S.C. 4101), and receives separate appropriations to digitize maps under the Map Modernization program for use by States and local communities in their floodplain management and mitigation planning activities. FEMA determined that mapping activities under FMA to be a duplication of programs; therefore, mapping activities are not included in part 78. States and local communities receive funds for flood mapping activities under the Cooperating Technical Partners Program (CTP). The CTP is an innovative approach to creating partnerships between FEMA and participating NFIP communities, regional agencies, and State agencies that have the interest and capability to become more active participants in the FEMA Flood Hazard Mapping Program. Also, FEMA provides States and local communities with access to flood hazards data including Flood Insurance Rate Maps (FIRMs), Letters of Map Changes, and other technical documents through its Map Service Center at <http://msc.fema.gov/webapp/wcs/stores/servlet/FemaWelcomeView?storeId=10001&catalogId=10001&langId=-1>.

*Delay caused by FEMA final approval.* One commenter wrote that under § 78.10, the project grant approval process, project applications will be forwarded to FEMA for final approval, and FEMA will provide funding on a project-by-project basis through a supplement to the annual Cooperative Agreement (CA). The concern is that project-by-project approval through the regional offices can be very time sensitive and not conducive to accessing the FEMA dollars within the performance period. Does project-by-project approval delay State access to any of the 10 percent TA dollars associated with the project dollars?

*FEMA's Response:* FEMA currently awards FMA grants to States using an e-Grant system, rather than through a CA. In 1997, FEMA opted to award most non-disaster grant funds to States under the combined Emergency Management Performance Grant (EMPG). However, FMA and other FEMA non-disaster mitigation grants did not fit under the EMPG structure. This is because the EMPG process was designed for awarding and tracking non-construction

grants, and most mitigation grants, including FMA grants, are awarded and tracked as construction grants. Therefore, FEMA developed a Mitigation e-Grant system which grantees must use to apply for FMA and Pre-Disaster Mitigation Grant Program grants, as required by the E-Government Act of 2002 (Pub. L. 107-347) and the Federal Financial Assistance Management Improvement Act of 1999 (Pub. L. 106-107). States receive one FMA grant award each fiscal year that includes project, planning, and technical assistance subgrants. Each time a new subgrant is awarded, the annual State grant is automatically amended in the e-Grant system. States are awarded technical assistance funds based on the total dollar amount of eligible FMA project applications. The e-Grant system has facilitated the receipt of all FMA funds, including technical assistance funds to States, in a timelier basis than at the inception of the program.

*Eligible types of projects.* One commenter stated that a strict interpretation of what encompasses an eligible structure under § 78.12(a) could have a harmful effect on a community's Flood Mitigation Plan. The commenter suggested program flexibility to allow communities the ability to complete their plans; the commenter also suggested a requirement that 90 percent of the properties have flood insurance. Three commenters wrote that the phrase "minor physical flood mitigation" in § 78.12(g) needs a better definition. The term "minor" is subject to a great deal of interpretation. Commenters suggested that FEMA establish a dollar cap (\$100,000), determine a scope of work limitation on this category of project, or further define the term "minor" to clarify the type of project that is eligible for funding. One commenter wrote that the term "Beach nourishment activities" in § 78.12 needs a better definition. The commenter stated that more specific guidelines will reduce or prevent abuses of FMA intent. Another commenter felt that the acquisition of insured structures and the demolition and removal of insured structures on acquired property per § 78.12 should be considered as one type of project in its entirety.

*FEMA's Response:* FEMA agrees that a strict interpretation of what encompasses an eligible structure could be detrimental, and FEMA does not dictate the definition of eligible structure. In fact, FEMA allows local communities to conduct their own risk assessments in the process of developing their local mitigation plans; these risk assessments can include identifying eligible insured and non-

insured properties for future hazard mitigation projects. In response to the comment regarding a 90 percent flood insurance requirement, if a local community chooses to apply for an FMA project grant, all properties included in the application must have an NFIP insurance policy in force at the time of application. The local community can encourage an uninsured property owner to become NFIP-insured in order to participate in an FMA mitigation project that is otherwise cost beneficial to NFIP. In response to the comment that "minor physical flood mitigation" be better defined, the phrase is derived from the eligible mitigation activities as stated in the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c):

Minor physical mitigation efforts that do not duplicate the flood prevention activities of other Federal agencies and that lessen the frequency or severity of flooding and decrease predicted flood damages, which shall not include major flood control projects such as dikes, levees, seawalls, groins, and jetties unless the Director specifically determines in approving a mitigation plan that such activities are the most cost-effective mitigation activities for the National Flood Mitigation Fund.

FEMA does not place a funding limit on the amount a local community may apply for an individual minor localized structural flood control project, since the only limit provided by the statute is the 5-year-statutory-funding limit of \$3,300,000 on FMA projects funds for local communities. FEMA expects to address the issue of beach nourishment as well as the acquisition of real property and demolition or relocation of buildings for open space in a future rulemaking.

*Grant administration.* Three commenters wrote that § 78.13 makes no mention about administrative costs incurred by grantees and subgrantees as grant program participants. The commenters wrote that this section is unclear as to whether or not State and local governments are expected to bear these administrative costs (which can be considerable) on their own or as part of the grant program. One commenter recommended that this section be rewritten to state that the administrative costs incurred by State and local governments can be considered to be part of the non-Federal 25 percent cost share for an eligible grant. Another commenter asked if the States received administrative allowance funds to administer the FMA dollars, as States do with the Hazard Mitigation Grant Program (HMGP). A commenter stated that § 78.13(a) penalizes States that may be willing to contribute a Full Time

Employee (FTE) dedicated to providing technical assistance to other State agencies and communities. The requirement of a cash contribution from States may prohibit many States from participating, especially with the limited amount of funding available; the commenter also opposes the 12.5 percent limit on in-kind contributions. One commenter asked if time extensions are awarded under § 78.13(c).

*FEMA's Response:* Currently, States are eligible to apply for FMA technical assistance funds to pay State Program Manager salaries as long as those amounts are directly allocable to the FMA program and do not duplicate costs allowed under a State's indirect cost agreement. Any amount reimbursed for salaries requires a 25 percent non-Federal cost share, half of which must be provided as cash. The FMA cost-share requirement for planning and project activities and management costs remains consistent with current statutory requirements under the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c):

The Director may not provide mitigation assistance under this section to a State or community in an amount exceeding 3 times the amount that the State or community certifies, as the Director shall require, that the State or community will contribute from non-Federal funds to develop a mitigation plan under subsection (c) and to carry out mitigation activities under the approved mitigation plan. In no case shall any in-kind contribution by any State or community exceed one-half of the amount of non-Federal funds contributed by the State or community.

FMA grant performance periods may be extended consistent with the guidelines provided in § 13.23(b) and implemented in annual program guidance at <http://www.fema.gov/government/grant/fma/index.shtml> and consistent with statutory time limitations on FMA planning grants provided in the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4104c). Generally, the performance period of FMA project grants may be extended twice if work is in progress and if financial and programmatic progress reports are current. FMA planning grants may be extended one time within the maximum statutory 3-year performance if work is in progress and if financial and programmatic progress reports are current.

*Fund rollover.* One commenter requested additional information regarding the appropriations rollover for FMA dollars to the next fiscal year.

*FEMA's Response:* If Congress appropriates funds, States are awarded FMA grants annually based upon State

target allocations. Congress historically has appropriated FMA funds with a 2-year period of availability. FEMA will carryover FMA funds, including technical assistance funds, once during the 2-year period of availability, if the State has eligible projects that require further benefit cost, engineering, or environmental review and that could not be obligated during the first fiscal year. Eligible project, planning, and technical assistance grants must be obligated within the 2-year period of availability. The maximum recommended performance period for FMA project and technical assistance grants is 4 years, and the maximum statutory performance period for FMA planning grants is 3 years.

*The Catalog of Federal Domestic Assistance number.* A commenter asked for the Catalog of Federal Domestic Assistance (CFDA) number.

*FEMA's Response:* The current CFDA number for FMA grants awarded under part 78 is 97.029. The FEMA Assistance Officers and their State counterparts are notified of the current CFDA number through annual program guidance at <http://www.fema.gov/government/grant/fma/index.shtm>.

*Plan revisions.* A commenter asked if a community has to follow the same procedure for developing and adopting the initial flood mitigation assistance plan in order to submit a revision to the plan. One commenter asked if an administrative revision to the local plan would require public participation. Another commenter asked if the State can approve a revision to the local plan or if FEMA must approve the revision.

*FEMA's Response:* Under part 78, revisions to flood mitigation plans are not required after initial approval of the plan. Further, there is no FEMA requirement for public participation in administrative revisions to flood mitigation plans. However, States may establish their own policies and procedures on requiring and approving local plan updates and/or administrative revisions.

*Communities that have pre-existing plans.* A commenter asked whether communities that already have developed a flood mitigation plan can obtain a planning grant to update or revise its flood mitigation plan to fit FMA requirements.

*FEMA's Response:* States and local communities can apply for FMA planning funds every 5 years for the purpose of plan updates and can reapply for funds during the same 5-year period if the State or local community has not exceeded the State limit of \$150,000 or the local limit of \$50,000.

*Approval time.* One commenter asked for the amount of time that the FEMA has to approve a revision to the plan.

*FEMA's Response:* Under the terms of the National Flood Insurance Act of 1968 as amended, (42 U.S.C. 4104c), FEMA has 120 days to approve any revisions or updates to the original FEMA-approved plan if such revisions or updates are funded with FMA program funds.

*The scope of mitigation planning.* One commenter wrote that all flood mitigation projects are, in fact, local projects, and that the interim final rule places too much emphasis on community flood mitigation planning as opposed to planning on an entire watershed basis. The commenter wrote that the flood mitigation program should encourage the development of a flood mitigation planning approach that will take into consideration all relevant flood mitigation factors and impacts within a watershed. The commenter wrote that FEMA can take the lead in promoting a much more comprehensive solution to the nation's flood mitigation problems.

*FEMA's Response:* Flood mitigation plans developed to meet the FMA planning requirements may be multi-jurisdictional, such as a watershed-based approach. Multi-jurisdictional plans include local planning objectives submitted from each community or jurisdiction that would have its local governing body adopt the plan for the purpose of receiving FMA project funds.

*State distribution of grant funds.* One commenter wrote that States should not have full discretion for determining the distribution of available grant funding unless FEMA establishes and enforces clear, specific, and objective criteria for rating and prioritizing the grant applications, and that criteria is available to potential grant applicants prior to development of their mitigation plans. In addition, the commenter wrote that eligible jurisdictions turned down for a grant by their State should be given the opportunity to appeal the decision to FEMA and/or submit the application directly to FEMA for consideration.

*FEMA's Response:* FMA is a State-administered program, meaning that States work with local communities to identify, select, and forward to FEMA projects and planning activities that will reduce the risk of flood damage to NFIP-insured structures based on detailed annual program guidance provided at <http://www.fema.gov/government/grant/fma/index.shtm>. Further, FEMA regional offices oversee the adherence of States to the annual program guidance when awarding grants to communities. FEMA does not use an appeals process

for local communities whose FMA subgrant applications are declined by their State. However, if a State requests that FEMA review an FMA grant determination, FEMA would re-examine prior planning grant decisions made by the State. Furthermore, local communities are able to resubmit, the next fiscal year, subgrant applications that have been declined.

*Cost-effective mitigation measures.* One commenter wrote that the interim rule limited certain structure retrofitting that can be employed as part of cost-effective mitigation measures. For example, examinations of flood insurance claims histories for repetitive loss structures may suggest minimal retrofitting efforts such as elevating the electrical panel may remove repetitive loss and be more cost effective and practical than elevating the entire structure.

*FEMA's Response:* FMA project grants may only be used to fund cost-effective mitigation measures for individual properties, such as acquisition or elevation, which provide a 100-year level of flood protection. FEMA has determined that mitigation actions not resulting in a 100-year level of flood protection for individual properties are inconsistent with the requirements of the FEMA floodplain management regulations provided in § 60.3. Therefore, elevation and dry-floodproofing activities, such as minimal retrofits for repetitive loss properties recommended by the commenter, are not considered eligible for FMA project funds if they do not result in a 100-year flood protection for residential and non-residential properties.

*Premiums.* One commenter asked whether insurance premiums would be reimbursable under the FMA program, as they are under the Hazard Mitigation Grant Program. The commenter stated that reimbursed insurance premiums were perceived as an incentive for maintaining insurance during the acquisition program after the 1993 floods in order to get property owners to accept FEMA buyouts.

*FEMA's Response:* Insurance premiums are not reimbursable under the FMA program. For acquisition projects, HMGP provides States with the opportunity to allow local communities to reimburse flood insurance premium amounts to property owners. However, States and local communities are not allowed to reimburse flood insurance premiums amounts to participants in FMA acquisition projects because the flood insurance policy is a requirement for program participation.

*Tracking repetitive loss structures.* One commenter wrote that the Federal Insurance Administration should establish a method to track acquisition of repetitive loss structures so that FEMA can adjust allocation formulas to reflect the actual number of structures at risk. The commenter wanted to ensure that FEMA is both tracking the number of new repetitive loss properties as well as the number of mitigated properties, so that target allocation amounts are computed in a fair manner.

*FEMA's Response:* Since the inception of the Community Rating System in 1990, FEMA has been tracking both new and mitigated repetitive loss properties present in NFIP participating communities. New repetitive loss properties are added through the FEMA insurance databases which track claims data on all NFIP insured structures. Repetitive loss properties are mitigated by several means including acquisition, elevation, floodproofing, and structural flood control projects. FEMA tracks these mitigated properties through the Bureau and Statistical Agent (BSA) developed by the NFIP within its data mainframe to capture and record both the reported mitigation action and the reported funding sources used to achieve that mitigation action. As of June 30, 2007, 13,477 repetitive loss properties have been identified as mitigated in some manner by the use of local, State, and Federal funds. This number includes 1,372 mitigated properties which were partially or completely demolished by fire, wind, flood, or other natural disasters for which FEMA or another local, State, or Federal agency provided funds in order to complete the removal of the original structure. FEMA tracks mitigated and demolished repetitive loss properties in order to ensure an accurate count of the remaining repetitive loss properties in need of mitigation. Previously mitigated structures are not counted when determining the need for future mitigation activities. FEMA uses the most current data available on unmitigated repetitive loss structures in order to determine FMA target allocations each fiscal year for States and territories.

### III. Regulatory Requirements

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

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. OMB has determined that this rule is not a significant regulatory action. OMB has not reviewed this rule. Under Executive Order 12866, a

significant regulatory action is subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

The interim rule published on March 20, 1997 at 62 FR 13346 established the regulations that this document makes final. FEMA calculates the annual economic impact of the interim rule to be approximately \$40,000,000. As this final rule makes no significant change to the interim rule, FEMA is adopting the \$40,000,000 annual economic impact estimate of the interim rule as the annual economic impact of this final rule. The following paragraphs provide a more detailed explanation of the economic impact of the rulemaking.

This rulemaking establishes the FMA grant system. States receive one FMA grant award each fiscal year that includes three types of subgrants: Project, Planning, and Technical Assistance subgrants. FMA Project Grants are available to States, and NFIP-participating communities and Indian tribal governments, to implement measures to reduce flood losses. Up to 10 percent of the Project Grant may be given to States as a Technical Assistance Grant. These funds may be used to help administer the program. FMA Planning Grants are available to States, and NFIP-participating communities and Indian tribal governments, to prepare Flood Mitigation Plans.

The development of community flood mitigation plans is required as a condition of receiving FMA project grants under Section 553 of the National Flood Insurance Reform Act of 1994, Title V, (Pub. L. 103-325). Section 553 mandates that FEMA approve plans before awarding any project grants to a community or State applicant. The purpose of the planning requirement is to encourage communities and States to

evaluate the flood hazards in their jurisdiction(s) and devise a feasible mitigation strategy to reduce the impacts of the hazard. As communities implement these strategies, fewer flood losses to insured structures will occur, resulting in reduced costs to the National Flood Insurance Fund. There is no renewal requirement with respect to FMA plans, and only communities are required to have approved FMA plans. There is no such requirement for States.

There are 660 communities with approved plans. There were approximately 60 approved per year from 1997-2005, with an annual increase to 120 in 2006 after Hurricanes Katrina and Rita. For the purpose of this analysis, FEMA is estimating that there will be 120 local plans that are developed and reviewed for approval each year. FEMA estimates that it takes an average of 2,080 hours per local plan to develop, resulting in 249,600 hours of work. The hours of work is calculated as follows:  $120 \times 2080$ . In addition, all States must review the local plans submitted. Assuming 120 local plans are submitted annually and it takes 8 hours to review each plan, the total annual burden for both States, local, and tribal governments would be 250,560 hours. Total annual burden is calculated as follows:  $((120 \times 8) + 249,600)$ . Using wage rates from the May 2004, U.S. Department of Labor, Bureau of Labor Statistics (BLS), Standard Occupation Classification (SOC) System, the median hourly wage for urban and regional planners (SOC Code Number 19-3051) is \$26.31 per hour. Adding 30 percent to the BLS figure to account for benefits, FEMA has calculated the burden using a wage rate of \$34.20 per hour. Therefore, the total cost to respondents to collect the information required in flood mitigation plans in this rule is \$8,569,152 annually. The total cost to respondents is calculated as follows:  $(250,560 \times \$34.20)$ .

The next cost implication of this rule is on the submission of FMA grant applications. There are over 18,000 communities participating the NFIP, however, the limited funding of the program will not permit approval of a large number of applicants. The number of respondents used to calculate the burden hours was, therefore, estimated to be 56 States and Territories  $\times$  4 subgrants per State = 224 + 56 States to review, coordinate and forward grant applications to FEMA for approval = 280 total respondents. Using wage rates from the May 2004, BLS SOC System, the median hourly wage for urban and regional planners (SOC Code Number 19-3051) is \$26.31 per hour. Adding 30 percent to the BLS figure to account for

benefits, FEMA has calculated the burden using a wage rate of \$34.20 per hour. Using the Paperwork Reduction Act calculations approved by OMB for “FEMA Emergency Preparedness and Response Directorate Grants Administration Forms” (OMB 1660–0025) and “Flood Mitigation Assistance (eGrants) and Grant Supplemental Information” (OMB 1660–0072), the burden hours for the collection of information for FMA grants with supplemental information are estimated at 6,642 hours. Therefore, the total cost to respondents to apply for Flood Mitigation Assistance is \$227,156 annually (6,642 × \$34.20).

The total Federal appropriations available for the FMA program, which establishes the annual award amounts, began at \$12,600,000 in FY 1997/1998 and has slowly risen to \$31,000,000 for FY 2007/2008. As the March 20, 1997 interim rule established the FMA program, FEMA is counting the \$31,000,000 awarded as an economic impact of this rule, as it represents a “transfer” from the Federal government. Therefore, the annual economic impact of this regulation, including the cost to prepare local plans, apply for grants, and the actual grant funds awarded is \$39,796,308, or approximately \$40,000,000. The economic impact is calculated as follows: (\$8,569,152 + \$227,156 + \$31,000,000).

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 857), FEMA is not required to prepare a final regulatory flexibility analysis for this final rule because the agency has not issued a notice of proposed rulemaking prior to this action.

#### C. National Environmental Policy Act

The National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) (NEPA) implementing regulations governing FEMA activities at 44 CFR 10.8(d)(2)(ii) categorically exclude the preparation, revision, and adoption of regulations from the preparation of an environmental assessment or environmental impact statement, where the rule relates to actions that qualify for categorical exclusions. Actions to be implemented under program regulations revised or adopted by this rulemaking include structural mitigation measures. These activities are categorically excluded under 44 CFR 10.8(d)(2)(xv) and (xvi). Thus, the preparation, revision, and adoption of regulations

related to these actions are also categorically excluded.

#### D. 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, published February 16, 1994), 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.

FEMA believes that no action under this rule will have a disproportionately high or adverse effect on human health or the environment. This rule is intended to provide grant funding to States and local communities to assist them with efforts to mitigate against flooding. This rulemaking is intended to assist States and local communities in reducing the adverse effects on human health or the environment from flooding. Accordingly, the requirements of Executive Order 12898 do not apply to this rule.

#### E. Congressional Review of Agency Rulemaking

FEMA has sent this final rule to the Congress and to the Government Accountability Office under the Congressional Review of Agency Rulemaking Act, (“Congressional Review Act,”) Public Law 104–121. This rule is not a “major rule” within the meaning of the Congressional Review Act. This rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. It will not have “significant adverse effects” on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. The rule is not an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, and any enforceable duties that FEMA imposes are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

#### F. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995, enacted as Public Law 104–4 on March 22, 1995, requires each Federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any Federal mandate in a proposed or final agency rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year.

The rule is not an unfunded Federal mandate as any enforceable duties that FEMA imposes are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

#### G. Executive Order 13132, Federalism

Executive Order 13132, entitled “Federalism,” (64 FR 43255, published 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, 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. This rulemaking creates an entirely voluntary grant program that may be used by States and local governments to receive Federal grants for mitigation projects, plans and technical assistance. States and local governments are not required to seek grant funding and this rulemaking does not limit the States’ policymaking discretion. This final rule involves no policies that have federalism implications under Executive Order 13132.

#### H. Paperwork Reduction Act

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. This final rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act. The regulations finalized by this rule contain requirements for the submission of information contained in OMB-approved collection titled “Flood Mitigation Assistance—Flood Mitigation

Plan,” OMB approval number 1660–0075.

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

FEMA has reviewed this rule under Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, published November 9, 2000). In reviewing the portion of the rule which streamlines the mitigation planning requirements affecting Indian tribal governments, FEMA finds that, while it does have “tribal implications” as defined in Executive Order 13175, it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

*J. Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights*

FEMA has reviewed this rule under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights” (53 FR 8859, published March 18, 1988) as supplemented by Executive Order 13406, “Protecting the Property Rights of the American People” (71 FR 36973, published June 28, 2006). This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630.

*K. Executive Order 12988, Civil Justice Reform*

FEMA has reviewed this rule under Executive Order 12988, “Civil Justice Reform” (61 FR 4729, published February 7, 1996). This rule meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden.

**List of Subjects in 44 CFR Part 78**

Flood insurance, Grant programs.

■ Accordingly, for the reasons stated in the preamble, the interim rule amending 44 CFR part 78 which was published at 62 FR 13346 on March 20, 1997, is adopted as final, with the following changes:

**PART 78—FLOOD MITIGATION ASSISTANCE**

■ 1. The authority citation for part 78 is revised to read as follows:

**Authority:** 6 U.S.C. 101; 42 U.S.C. 4001 *et seq.*; 42 U.S.C. 4104c, 4104d; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978

Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

**§ 78.1 [Amended]**

■ 2. In § 78.1, paragraph (b), remove the word “insurable” and add, in its place, the word “insured”.

Dated: October 24, 2007.

**Harvey E. Johnson, Jr.,**

*Deputy Administrator/Chief Operating Officer, Federal Emergency Management Agency.*

[FR Doc. E7–21263 Filed 10–30–07; 8:45 am]

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**DEPARTMENT OF HOMELAND SECURITY**

**Federal Emergency Management Agency**

**44 CFR Parts 201, 204, and 206**

[Docket ID FEMA–2007–0004]

RIN 1660–AA17

**Hazard Mitigation Planning and Hazard Mitigation Grant Program**

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

**ACTION:** Final rule.

**SUMMARY:** The Federal Emergency Management Agency (FEMA) is adopting as final, without substantive changes, interim rules that establish requirements for hazard mitigation planning and the Hazard Mitigation Grant Program (HMGP) pursuant to sections 322 and 323 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

**DATES:** This final rule is effective November 30, 2007.

**FOR FURTHER INFORMATION CONTACT:**

Karen Helbrecht, Risk Analysis Division, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington DC, 20472, (phone) 202–646–3358, (facsimile) 202–646–3104, or (e-mail) [Karen.helbrecht@dhs.gov](mailto:Karen.helbrecht@dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This rulemaking finalizes, without substantive changes, interim rules implementing sections 322 and 323 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (42 U.S.C. 5165), enacted by section 104 of the Disaster Mitigation Act of 2000 (DMA 2000), (42 U.S.C. 5121 note). Section 322 requires, as a

condition of receipt of federal hazard mitigation grant assistance, hazard mitigation planning and is implemented in the Emergency Management and Assistance regulations at 44 CFR part 201 (Mitigation Planning). Section 323 requires, as a condition of receipt of disaster loans or grants distributed under the Hazard Mitigation Grant Program (HMGP) that minimum repair and construction codes, specifications, and standards are followed. Section 323 is implemented at 44 CFR part 206 (Federal Disaster Assistance for Disasters Declared On Or After November 23, 1988), Subpart N (Hazard Mitigation Grant Program).

Parts 201 and 206 outline mitigation planning and hazard mitigation grant requirements, respectively, for State, Indian tribal, and local entities. To be eligible for FEMA mitigation and public assistance grant funds (except for emergency assistance), State, local, or Indian tribal governments must have a FEMA-approved hazard mitigation plan. All hazard mitigation plans must be submitted to FEMA for final review and approval. FEMA will review and comment on the plan within 45 days, whenever possible. Once approved, local plans are to be revised and resubmitted to FEMA every 5 years, State plans are to be revised and resubmitted to FEMA every 3 years, and Indian tribal governments may either apply directly to FEMA, thereby assuming the responsibilities of a State, or may apply through a State, thereby assuming the responsibilities of a local government.

Additionally, for States that complete FEMA requirements for enhanced mitigation planning, the amount of HMGP funds available increases from 15 percent of the Federal share of disaster assistance for that event to 20 percent of the Federal share of disaster assistance for that event. Up to 7 percent of hazard mitigation grants may be used to develop State, tribal, and/or local mitigation planning activities outlined in 44 CFR part 201.

There have been four interim rules (IRs) and one correction published in this rulemaking action. On February 26, 2002, FEMA published an IR at 67 FR 8844 implementing section 322 of the Stafford Act. This first IR addressed State mitigation planning, identified new local mitigation planning grant requirements, authorized HMGP funds for planning activities, and increased the amount of HMGP funds available to States that develop a comprehensive, enhanced mitigation plan.

On October 1, 2002, FEMA published a second IR at 67 FR 61512. This IR amended the February 26, 2002, IR to