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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Parts 59, 61, 78, 79, 80, 201, and 206

Docket ID FEMA-2006-0010

RIN 1660-AA36

FLOOD MITIGATION GRANTS AND HAZARD MITIGATION PLANNING

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Interim rule.

SUMMARY: This interim rule implements certain provisions of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004 to provide new incentives for States and communities to mitigate the effects of flood damage to severe repetitive loss properties by creating the Severe Repetitive Loss program, and through reduced cost-share requirements in the existing Flood Mitigation Assistance program (FMA). In addition, the rule ensures that the FMA planning requirements are consistent with applicable regulations, and streamlines the planning requirements for Indian tribal governments. This interim rule also makes technical changes to clarify current practices and implements conforming amendments to reflect current authorities, including the recent change to the standard amount of Hazard Mitigation Grant Program assistance available.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comment Date: Comments are due

(2) Be in conformance with part 9 of this chapter, Floodplain management and protection of wetlands, part 10 of this chapter, Environmental considerations, §60.3 of this subchapter, Flood plain management criteria for flood-prone areas, and other applicable Federal, State, tribal, and local laws and regulations;

(3) Be technically feasible;

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

(5) Be cost-effective and reduce the risk of future flood damage;

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

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

§79.7 Offers and appeals under the SRL program.

(a) Consultation. States and communities shall consult, to the extent practicable, and in accordance with criteria determined by the Administrator, with owners of the severe repetitive loss properties to select the most appropriate eligible mitigation activity. These consultations shall be initiated in the early stages of the project development, and shall continue throughout the process. After FEMA awards the project grant, the

subgrantee shall continue to consult with the property owners to determine the specific conditions of the offer.

(b) Mitigation offer. After FEMA awards the grant and the subgrantee completes final consultations with the property owners, the subgrantee shall develop and present official offers to the property owners participating in the mitigation activities.

(1) The offer shall include all pertinent information regarding the mitigation activity, including a detailed description of the activity (e.g. acquisition, elevation), the responsibilities of and benefits to the property owner, a summary of the consultation process, timeframes, and the consequences of refusing such offer. For open space acquisitions, it will also include the market value of the property, the basis for the purchase offer, and the final offer amount. The offer will also clearly state that the property owner's participation in the SRL program is voluntary.

(2) The subgrantee will send the written offer to the property owner's current mailing address as a certified letter, along with a copy to the appropriate FEMA Regional Administrator. In addition, the subgrantee will notify each holder of a recorded interest on the property when such offer is extended, along with the identification of the mitigation assistance being offered.

(3) The property owner will have 45 days from the date of the letter to accept or refuse the offer of mitigation assistance in writing. Failure to respond in writing within this time period will be deemed a refusal of the offer.

(c) Insurance increases due to refusal of offer. In any case in which the property owner refuses an offer of mitigation assistance made through the SRL program, the

Administrator shall provide written notice that the chargeable insurance rates with respect to the property will increase effective on the next renewal of the policy.

(1) The chargeable insurance premium rate shall be increased to the amount equal to 150 percent of the chargeable rate for the property at the time that the offer was made, as adjusted by any other premium adjustments otherwise applicable to the property. Each time there is another claim against the property in excess of \$1,500, the chargeable premium rate for that property shall be the amount equal to 150 percent over the chargeable rate at the time of every such claim, as adjusted by any other premium adjustments otherwise applicable to the property. The increases shall end when the actuarial rate is reached.

(2) Upon each renewal or modification of the flood insurance coverage, the property owner will be able to accept the original mitigation offer, if the community, through the State, forwards the request to FEMA, and if sufficient funds are available.

(d) Appeals of insurance rate increases. Any owner of a severe repetitive loss property may appeal the decision to increase the chargeable insurance premium rate as described in paragraph (c) of this section by submitting a written appeal, including supporting documentation that is postmarked or delivered to the appropriate FEMA Regional Administrator within 90 days of the date of the notice of the insurance increase. The increase in the amount of chargeable premium rate for flood insurance coverage for the property will be suspended pending the outcome of the appeal.

(1) Appeals must be based upon one or more of the following grounds. The property owner must include documentation to support each ground serving as a basis for the appeal:

(i) The offered mitigation activity is an acquisition and the property owner would be unable to purchase a replacement of the primary residence that is of comparable value and that is functionally equivalent. The property owner must document the actions taken to locate such replacement dwelling and demonstrate that no such dwelling is available.

(ii) The amount of Federal funds offered for a mitigation activity, when combined with funds from the required non-Federal sources, would not cover the actual eligible costs of the mitigation activity contained in the mitigation offer, based on independent information. In the case of an acquisition, the purchase offer is not an accurate estimation of the market value of the property, based on independent information.

For a mitigation activity other than acquisition, the property owner must submit independent estimates from professional engineers or registered architects to support this claim. For an acquisition, the property owner must submit an appraisal from a qualified appraiser to support this claim, and valuations will be considered by a review appraiser.

(iii) The offered mitigation activity would diminish the integrity of a historic district, site, building, or object's significant historic characteristics to the extent where the historic resource would lose its status as listed or eligible for inclusion on the National Register of Historic Places. The property owner must submit appropriate documentation from the State Historic Preservation Officer/Tribal Historic Preservation Officer to support this claim.

(iv) For a multifamily property: each of the flood insurance claims payments that served as the basis for its designation as a severe repetitive loss property must have resulted directly from the actions of a third party in violation of Federal, State, or local

law, ordinance, or regulation. The property owner(s) must submit appropriate evidence, documentation, or data to support this claim.

(v) The property owner relied upon FEMA Flood Insurance Rate Maps (FIRMs) that were current at the time the property was purchased, and the effective FIRM and associated Flood Insurance Study (FIS) did not indicate that the property was located in an area having special flood hazards. The property owner must produce the dated FIRM and FIS in effect at the time the property was purchased to support this claim.

(vi) An alternative mitigation activity would be at least as cost effective as the offered mitigation activity. The property owner must submit documentation of the costs for a technically feasible and eligible alternative mitigation activity based on estimates from qualified appraisers, professional engineers, or registered architects, and information and documentation demonstrating the cost effectiveness using a FEMA approved methodology to support this claim.

(2) The FEMA Regional Administrator will conduct an initial review of each appeal that is filed on a timely basis to determine if the appeal complies with this section and includes sufficient documentation to be evaluated. The Regional Administrator may reject an appeal on initial review if it is made on a basis other than those listed in paragraph (d)(1) of this section; if the property owner does not provide sufficient documentation, including, if applicable, supplemental information requested by the Regional Administrator by the deadline established by the Regional Administrator, which shall not exceed the timeframe described in paragraph (d) of this section; or if the appeal otherwise fails to comply with this section.

(3) If, upon initial review, the Regional Administrator determines that the basis for the offered mitigation activity was erroneous on its face and the appeal can be resolved in favor of the property owner, the appeal will be closed and no insurance increase will apply to the property. All other cases will be referred to the Administrator for assignment to an independent third party for review. The independent third party shall make a final determination on each appeal within 90 days of the date on which FEMA receives the appeal. As a low cost option, the property owner may request that the Administrator substitute a reviewer from FEMA's Alternative Dispute Resolution Office for the independent third party.

(4) A property owner who brings an appeal will be responsible for paying his/her attorneys' fees and costs to gather the necessary documentation and data to demonstrate the ground(s) for the appeal. Attorneys' fees and costs cannot be awarded by the independent third party.

(5) If the property owner prevails on appeal, the independent third party shall require the Administrator to charge the risk premium rate for flood insurance coverage of the property at the amount paid prior to the mitigation offer, as adjusted by any other premium adjustments otherwise applicable to the property. If the independent third party hearing the appeal is compensated for such service, the NFIF shall bear the costs of such compensation.

(6) If the property owner loses the appeal, the Administrator shall promptly increase the chargeable risk premium rate for flood insurance coverage of the property to the amount established pursuant to paragraph (c) of this section, and shall collect from the property owner the amount necessary to cover the stay of the applicability of such

increased rates while the appeal was pending. If FEMA does not receive the additional premium by the date it is due, the amount of coverage will be reduced to match the amount of premium payment received. If the independent third party hearing the appeal is compensated for such service, the property owner shall bear the costs of such compensation.

§79.8 Allowable costs.

(a) **General.** General policies for determining allowable costs are addressed in §§13.4, 13.6, and 13.22 of this chapter. Allowable costs are explained in this paragraph.

(1) **Eligible Management Costs.**

(i) **Grantee.** States are eligible to receive management costs consisting of a maximum of 10 percent of the planning and project activities awarded to the State, each fiscal year under FMA and SRL, respectively. These costs must be included in the application to FEMA. An Indian tribal government applying directly to FEMA is eligible for management costs consisting of a maximum of 10 percent of grants awarded for planning and project activities under the SRL and FMA programs respectively.

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

(2) **Indirect costs.** Indirect costs of administering the FMA and SRL programs are eligible as part of the 10 percent management costs for the grantee or the 5 percent management costs of the subgrantee, but in no case do they make the recipient eligible for additional management costs that exceed the caps identified in paragraph (a)(1) of this