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: Final rule.

SUMMARY: The Federal Emergency Management Agency finalizes the interim regulations that implemented the Severe Repetitive Loss program and clarified provisions of the existing Flood Mitigation Assistance program. In addition, this rule finalizes interim requirements for the acquisition of property for open space with mitigation funds and clarifies mitigation planning requirements for Indian Tribal governments. This rule is intended to encourage hazard mitigation, reduce the number of repetitive loss properties, and improve FEMA's mitigation programs.

DATES: This rule is effective October 16, 2009.

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SUPPLEMENTARY INFORMATION:

I. Background

On October 31, 2007 (72 FR 61720), the Federal Emergency Management Agency (FEMA) published an Interim Rule (IR). The IR implemented provisions of the Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Public Law 108–264, 118 Stat. 714, found at 42 U.S.C. 4102a, which amended the National Flood Insurance Act of 1968 (NFIA) to provide new programs and incentives for States and communities to mitigate flood damage to severe repetitive loss properties. Using this new authority, the IR added a new 44 CFR part 79 that established the new Severe Repetitive Loss (SRL) program. The SRL program is intended to eliminate or reduce the risk of additional flood damage to the subset of properties that have the largest claims paid from the National Flood Insurance Program (NFIP). It is also intended to reduce losses to the National Flood Insurance Fund (NFIF). The SRL program provides mitigation offers for NFIP insured properties that have experienced four or more separate flood claims payments each exceeding $5,000 and cumulative payments exceeding $20,000; or at least two separate claims payments cumulatively exceeding the market value of the building. Claims made within 10 days of each other are counted as one claim, and at least two of the claims must be within 10 years of each other. If the offer of mitigation assistance is refused the property owners' insurance rates may be increased.

In addition, the IR amended the existing Flood Mitigation Assistance (FMA) program by updating the FMA regulations to reflect changes to the non-Federal cost share as a result of the amendments to the NFIA, changes to FEMA policy, and adding a new 44 CFR part 79. The IR also codified, at new 44 CFR part 80, procedures and requirements for the acquisition of property for open space. Although FEMA previously had procedures in place for open space acquisition, the new part expanded the scope of FEMA's prior regulations to address the use of all types of mitigation funds, including SRL and FMA, and consolidated them in one location. FEMA also modified the mitigation planning regulations at 44 CFR part 201 to reduce the non-Federal cost share for mitigation projects under the FMA and SRL programs for grantees with State mitigation plans that address repetitive loss strategies. This change is intended to minimize the burden on State, local, and Indian Tribal governments; to streamline the flood mitigation planning process; and to ensure consistency in the local planning requirements that apply to FEMA's mitigation grant programs. Recognizing the unique needs of Indian Tribal governments, who may act as grantees or subgrantees and may have different organizational structures than State or local governments, the IR also established the Tribal Mitigation Plan in 44 CFR 201.7.

The rule also implemented amendments to section 1308 of the NFIA to charge the full actuarial insurance premium rates for property leased from the Federal Government ''located on the river-facing side of any dike, levee, or other riverine flood control structure, or seaward of any seawall or other coastal flood control structure.'' (42 U.S.C. 4015(c)(2)) Finally, effective October 4, 2006, section 684 of the Post-Katrina Emergency Management Reform Act of 2006, Public Law 109–295, amended the amount of Hazard Mitigation Grant Program (HMGP) assistance available to States with an approved Standard State Mitigation Plan from 7.5 percent to 15 percent and established a sliding scale for HMGP assistance. The IR revised FEMA's regulations to align with this change. (44 CFR 206.432(b)(1).)

II. Discussion of Final Rule

This final rule adopts the regulations established by the October 31, 2007 IR. It addresses the comments received from the public in response to the IR, makes changes to correct errors identified in public comments, makes technical corrections, and finalizes the interim regulations contained in 44 CFR parts 59, 61, 78, 79, 80, 201, and 206. The following is a summary of these regulatory changes:

A. 44 CFR Part 79

FEMA revised ''Alaskan native village'' in paragraph 79.2(c)(1) to ''Alaska Native village'' so that the term is consistent with its use under the definition of ''local government'' in the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended (42 U.S.C. 5122). FEMA also inserted a definition of ''Indian Tribal Government'' at new paragraph 79.2(e) so that 44 CFR part 79 is consistent with 44 CFR parts 201 and 206 where ''Indian Tribal government'' is currently defined. Throughout paragraph 79.4(c), FEMA removed the word ''State'' and revised the text to recognize that per 44 CFR 206.202(f)(1), Indian Tribal governments may also apply directly to FEMA for grant assistance. These changes are intended to correct an unintentional omission in the language of the IR. A technical correction has also been made to paragraph 79.6(b)(1) to add a more specific reference to Tribal mitigation planning requirements. Finally, paragraph 79.6(c)(2)(ii) of the IR inadvertently listed demolition or relocation of structures to areas outside of the floodplain as an eligible activity, rather than as a component of paragraph 79.6(c)(2)(i). To correct this error, paragraph 79.6(c)(2)(ii) has been removed and its substance has been incorporated into the language of paragraph 79.6(c)(2)(i).

Finally, on April 3, 2009, FEMA published a technical amendment that updated the agency's titles to reflect its current organization (74 FR 15328). Among other things, the technical amendment changed the terms ''Director'' to ''Administrator'' and ''Regional Director'' to ''Regional Administrator'' throughout Title 44 of the Code of Federal Regulations, and

removed the agency organization and delegations of authority from 44 CFR part 2. The IR had inserted definitions for ''Administrator'' and ''Regional Administrator'' at 44 CFR parts 79, 80, and 201 to reflect the agency organization; however, it did so in a way that referenced the old terms ''Director'' and ''Regional Director'' as defined in 44 CFR part 2. To ensure this final rule conforms to the changes made in the technical amendment, the definitions for ''Administrator'' and ''Regional Administrator'' are revised in newly designated paragraphs 79.2(l) and (m), paragraphs 80.3(l) and (m), and also revised in § 201.2.

B. 44 CFR Part 80

FEMA revised paragraph 80.11(d) to clarify that the subapplicant must acquire or retain fee title (full property interest), except for encumbrances FEMA determines are compatible with open space uses, consistent with paragraph 80.17(b). In response to a comment, FEMA reviewed the provisions for verifying that a property owner is a National of the United States or qualified alien and therefore eligible to be offered pre-event market value for the property in an acquisition instead of current market value. To correct an inconsistency confirmed in that review, FEMA revised paragraphs 80.13(a)(6) and 80.17(c)(4) to require the subapplicant to certify that the property owner is a U.S. National or qualified alien before the grant award.

C. 44 CFR Part 201

The final rule makes technical corrections throughout this part. In the definition of the term ''Indian Tribal government'' in § 201.2, the word ''Indian'' was inadvertently omitted in the reference to the Federally Recognized Indian Tribe List Act of 1994, but has been added in this final rule. The final rule removes paragraph 201.3(c)(7) to eliminate reference to a paragraph of the regulation that no longer exists, as it was transitional in nature. In paragraphs 201.3(e)(1), 201.7(a)(2) and 201.7(c)(3)(vi), FEMA inadvertently failed to reference that Indian Tribal governments, like States, must apply to FEMA as a grantee to receive the reduced cost share for the FMA and SRL programs when addressing severe repetitive loss properties in their plans. This requirement appeared in paragraph 201.3(e) before 44 CFR part 201 was changed by the IR; therefore, these changes are nonsubstantive.

FEMA has revised paragraph 201.7(a)(3) by replacing local with Tribal to reflect the appropriate mitigation plan required for Tribal governments. Additionally, FEMA added a sentence to the end of paragraph 201.7(a)(3) to reference the extraordinary circumstances in which a Regional Administrator may grant Tribal governments an exception to the plan requirement. This exception appeared in FEMA's regulations before the IR at paragraph 201.6(a)(3) and was unintentionally omitted from the new language specifically addressing Tribal governments in the IR.

Finally, in paragraph 201.6(c)(2)(ii)(B), an incorrect cross-reference has been revised from (c)(2)(i)(A) to (c)(2)(ii)(A). In paragraph 201.6(c)(3)(iii), an incorrect cross-reference has been revised from (c)(2)(ii) to (c)(3)(ii). In paragraph 201.7(c)(2)(ii)(B), an incorrect cross-reference has been revised from (c)(2)(i)(A) to (c)(2)(ii)(A) and in paragraph 201.7(c)(3)(iii), an incorrect cross-reference has been revised from (c)(2)(ii) to (c)(3)(ii).

D. 44 CFR Part 206

This final rule makes two technical corrections to § 206.432. The first technical correction is to paragraph 206.432(b) and removes the reference to 42 U.S.C. 5178 since 42 U.S.C. 5178, section 411 of the Stafford Act was repealed. The second technical correction is to paragraph 206.432(b)(2) to clarify that for States with an Enhanced State Mitigation Plan, the total amount of Federal contribution under the HMGP for a major disaster may not exceed 20 percent of $35.333 billion. This technical correction is non-discretionary and makes the paragraph consistent with the statute (sections 322 and 404 of the Stafford Act, as amended, 42 U.S.C. 5165 and 5170c).

This final rule also corrects inadvertent errors and omissions to reflect the Tribal Mitigation Plan established by the IR. The rule adds the word ''Indian'' to the definition of ''Indian Tribal government'' in § 206.431 and ''or Tribal'' to paragraphs 206.434(b)(1) and 206.434(c)(1), deletes the words ''or Indian Tribal'' from the definition of Local Mitigation Plan in § 206.431, and adds a definition of the term ''Tribal Mitigation Plan'' to § 206.431.

In paragraph 206.434(b)(1), the final rule expands the reference to 44 CFR 201.6 and revises it to include the entirety of 44 CFR part 201 so that it includes both Local and Tribal Mitigation Plans. In that paragraph, the final rule also removes the reference to disasters declared on or after November 1, 2004, and the requirements for plans approved before that date. This change is a conforming amendment because the provisions are no longer applicable. Additionally, the final rule revises the cross-reference in § 206.401 to correctly direct readers to paragraph 206.226(d). Paragraph 206.226(b) is revised to include the Tribal Mitigation Plan established by the IR. As FEMA treats Tribal Mitigation Plans in the same manner that it treats State Mitigation Plans, this section should have been amended in the IR to reflect the new form of planning document. These changes are intended to correct that omission and conform this section to the requirements and authorities contained in other sections.

Finally, the introductory text to paragraph 206.434(e) has been restated in this rule. As previously noted, on April 3, 2009, FEMA published a technical amendment that updated the agency's titles and organization (74 FR 15328). That rule changed ''Regional Director'' to ''Regional Administrator'' in this paragraph. To ensure this final rule does not undo that change, the language of the IR is repeated to incorporate the change from the technical amendment.

III. Discussion of Public Comments

FEMA received five public comments regarding the IR published on October 31, 2007. The comments on the IR were submitted by three State emergency management agencies, the Association of State Floodplain Managers, and an individual citizen. The comments received, together with FEMA's response, are set forth below. Many of the public comments contained general supportive statements or positive responses to specific regulatory changes. Although FEMA appreciates the public support for this rulemaking, and took those statements into consideration when drafting this final rule, FEMA has no specific response to those comments and they are not represented in this discussion. Additionally, the comments regarding river flow and impervious surfaces in New Jersey were outside the scope of this rulemaking. Therefore, FEMA has no specific response to those comments. All previously published rulemaking documents, as well as all comments received are available in the public docket for this rulemaking. The public docket for this rulemaking is available online at the Federal e-Rulemaking Portal at *http://www.regulations.gov* under Docket ID FEMA–2006–0010.

44 CFR Part 78

44 CFR part 78 provides information on the actions, procedures, and requirements for the administration of

the FMA program. The FMA program is designed to assist States and local governments in funding cost effective actions that result in the greatest cost savings to the NFIF. One commenter noted that paragraph 78.12(f), which allows for other activities that bring an insured structure into compliance with NFIP minimum standards, and paragraph 78.12(h), that allows for beach nourishment activities, are now excluded in the new rule at 44 CFR part 79. The commenter had no concerns with these changes. This change was incorporated into the IR to implement a policy change, and has not been modified in this final rule. Eligible projects that now can be funded under FMA are limited to acquisition/demolition, relocation, elevation, floodproofing, and minor localized flood reduction projects.

44 CFR Part 79

General

44 CFR part 79 implements certain amendments to the NFIA that provide incentives for States and communities to mitigate the effects of flood damage to severe repetitive loss properties by creating the SRL program and by reducing the cost share requirements in the existing FMA program for SRL properties. One commenter noted that §§ 79.8 and 79.9 replace § 78.13 and add language that is consistent with how the FMA program is currently being implemented. Another commenter indicated that this rulemaking illustrates how cumbersome the SRL program is as a result of complexity in the statute, and as a result the SRL program when implemented will be difficult.

FEMA acknowledges that the rule is consistent with the statutory language as required by the amendments to the NFIA and that many details of the SRL program reflect the statute. FEMA acknowledges that implementation of the program poses some challenges. As a result of carrying out the Fiscal Year 08 and 09 programs, FEMA is working to identify and address critical implementation issues in order to streamline, where possible, the delivery of assistance to mitigate SRL properties.

Section 79.3 (Responsibilities/Reallocation)

Section 79.3 outlines FEMA's, States', Tribes', and communities' roles and responsibilities in implementing the FMA and SRL programs. These responsibilities include administering and providing oversight to FEMA-related hazard mitigation programs and grants by issuing program guidance and procedures, allocating funds to States for the FMA and SRL programs, awarding all grants to the grantee, and providing technical assistance and training to State, local, and Indian Tribal governments.

One commenter noted that changes to the Federal responsibilities section of the IR eliminated FEMA regional office authority to award grants, and transferred that authority to FEMA headquarters. The commenter also acknowledged FEMA's recent procedural change that no longer allows for a regional reallocation of FMA funds; rather, all unallocated funds now must return to FEMA headquarters and be reallocated through a national competition. The commenter prefers FEMA's previous procedure that allows for a regional reallocation followed by a national reallocation.

Although the Region is no longer specified in the new § 79.3 (which replaces paragraph 78.3(a)) regarding responsibility for the administration of funds awarded under the FMA program, FEMA disagrees that this has the effect of transferring authority to award grants from the Region to FEMA Headquarters. Rather, the provision allows FEMA increased flexibility in determining how to implement allocation, award, and reallocation to more efficiently make grant assistance available to eligible applicants and to more equitably distribute the FMA funds nationally in the event that eligible applications exceed available dollars.

Section 79.4 (Availability of Funding)

Section 79.4 provides information regarding the availability of funding and provides guidelines regarding the allocation process. Two commenters noted that the allocation formula for the SRL program is reasonable, but one indicated that the IR eliminates the base amount of per State funding for FMA which had been $10,000 for planning and $100,000 for projects. The rule does remove the base amounts of funding. The FMA allocation formula as described at § 79.4 is based on the number of NFIP policies and repetitive loss structures in each State, in addition to criteria described at § 79.6, eligibility. This provides FEMA with increased flexibility, which ensures that as many eligible projects as possible are funded.

Management Costs

One commenter was opposed to the elimination of paragraph 78.8(c) which specifies that a maximum of 10 percent of FMA funds will be available for Technical Assistance grants because there is no equivalent language in the IR to provide for costs incurred by the State in administering this program. The commenter suggested that this change indicates that FEMA intends to reduce management costs by policy instead of a rule change.

FEMA does not intend for this rule to reduce the amount of assistance provided to administer the FMA and SRL programs. In the IR, paragraph 79.8(a)(1) contains language that allows for eligible management costs. For the purposes of clarity, the term management costs in the IR replaces the term Technical Assistance grants as used in 44 CFR part 78. Management costs as described in the IR provide for costs incurred by the State in administering the FMA and SRL programs with the same 10 percent cap. Thus, there is equivalent language in the IR to provide for such costs.

FMA Cap

One commenter noted that the community and State cap on FMA funding will pose an obstacle in some areas. Although this cap may limit the funding of potential FMA projects for some communities, it is a requirement imposed by the statute that authorized the FMA program (42 U.S.C. 4104c). Although FEMA has no discretionary authority to remove the cap, the statute gives FEMA the discretion to waive the caps for any 5-year period when a major disaster or emergency for flooding is declared under the Stafford Act in that community or State, respectively. This provision is implemented at § 79.4 of the rule.

In-Kind Match Limit

One comment notes that up to half of the local match to a FMA project can be an in-kind match and that FMA is the only FEMA mitigation program with the in-kind restriction. FEMA agrees that there is a restriction on the use of in-kind matching of FMA projects to meet the required non-Federal contribution. This is a requirement from the legislation that authorized the FMA program (42 U.S.C. 4104c(g)(1)) which requires that in-kind contributions by any State or community shall not exceed one-half of the amount of non-Federal funds contributed by the State or community.

Requirement of an SRL Non-Federal Match

One commenter noted that the SRL program requires a non-Federal match unlike the Repetitive Flood Claims (RFC) program. The commenter adds that many communities find it difficult to promote mitigation buyouts when the property will be deed restricted and there is a loss of tax base. With respect

to the SRL non-Federal match, the regulation mirrors the language of the authorizing statute. (42 U.S.C. 4102a(d)) The authorizing language for the RFC program does not contain a similar match requirement and FEMA has not implemented one. FEMA has interpreted that the intent of the RFC is to provide mitigation assistance for States and communities that cannot meet the requirements of the FMA program, including the ability to provide a non-Federal match.

Section 79.6 (Eligibility)

Section 79.6 provides information on eligible applicants, subapplicants, State mitigation plan requirements, eligible activities, and minimum project criteria. One commenter noted that elevation, flood-proofing, demolition, and rebuilding will occur at least to the Base Flood Elevation (BFE) level or higher, if required by FEMA or State or local ordinance. Another commenter added that its particular jurisdiction requires the lowest enclosed level to be the BFE plus 2 feet for both FMA and HMGP flood mitigation projects. The commenter noted that this requirement is pursuant to its grant administrative discretion and its responsibility to prepare and adopt its State Standard Mitigation Plan, not because of local ordinance or State statute. The commenter requested that FEMA change the IR by adding statements which recognize that State administrative provisions and mitigation plans may also require an elevation higher than the BFE.

FEMA has worked closely with its State and local partners to robustly implement mitigation planning as part of their decision-making. FEMA encourages, as part of an overall mitigation strategy, that States and local communities identify the particular hazard or hazards in their areas. Upon identification and prioritization of those hazards, State and local decision-makers are encouraged to develop prudent mitigation measures to address those risks and vulnerabilities. FEMA encourages States to establish more stringent requirements as part of their State administrative provisions or State mitigation plan. FEMA's guidelines for floodplain management under the NFIP are a minimum standard; however, States are afforded the flexibility to adopt and implement more restrictive requirements, which may include provisions specific to mitigation. The IR was not intended to limit States from implementing their own administrative requirements that can serve as a basis for State-level ordinance or local regulatory changes to go above and beyond FEMA's minimum standards.

SRL Benefit Cost Analysis Requirements

Two commenters noted that a benefit cost analysis for SRL projects is required, although mitigation of some structures may not be cost effective because they are not located in special flood hazard areas. One of those commenters requested that the SRL and repetitive loss properties automatically be considered cost effective.

FEMA determined that the intent of the legislation that authorized the SRL program is to fund projects that reduce flood damages to SRL properties and that reduce losses to the NFIF. The statutory text does not specify that the projects must be cost effective; however, FEMA recognizes that determining cost-effectiveness ensures compliance with these statutory program purposes, as well as provides a means of implementing the SRL program's legislative requirement of providing assistance that will result in the greatest amount of savings to the NFIF. FEMA continues to evaluate the various approaches to determining cost-effectiveness in terms of creating savings to the NFIF.

SRL Property Relocation

One commenter indicated that paragraph 79.6(c)(2)(ii) lists the demolition or relocation of structures to areas outside of the floodplain as an eligible project without placing limitations on the future use of the flood prone property. The commenter indicates that this change in the IR creates a potential for misuse as it would be possible to use mitigation funding to purchase a property under the SRL program, have it demolished or relocated, and then build a new structure on the same flood prone site. FEMA notes that paragraph 79.6(c)(2)(ii) is a component of the eligible activity identified in paragraph 79.6(c)(2)(i). To correct the error, paragraph 79.6(c)(2)(ii) has been removed and its substance has been incorporated into the language of paragraph 79.6(c)(2)(i), which contains a requirement that the property be converted to open space.

Section 79.7 (Offers and Appeals Under the SRL Program)

Section 79.7 provides information on mitigation offers and appeals under the SRL program. The section provides guidance on the consultation process, the voluntary mitigation offer, likely insurance increases due to refusal of a mitigation offer, and the appeals process for insurance rate increases. One commenter noted that there is no appeals process for the market value determination on an SRL property. The commenter indicated that the lack of an appeals process will likely cause problems in the implementation of the program.

Contrary to the commenter's claim, FEMA asserts that throughout the SRL process there are several opportunities for property owners to formally or informally consult with the State and local community regarding the purchase offer for their property. Under the SRL program, the purchase offer must be at least equal to the greatest amount offered through one of the three alternatives, specified in § 80.17. The local community is required, through a formal SRL consultation process, to take all necessary steps to ensure that the property owner is fully informed of the SRL program requirements, and that proper consultation and offer procedures were followed. In the event that the property owner does not accept a mitigation offer, the property owner may submit an appeal of the likely insurance premium rate increase (under certain circumstances). Specifically, with respect to an issue of property value, paragraph 79.7(d)(1)(ii)(A) allows the property owner to appeal an increase in insurance rate premium resulting from declining the offer of assistance (mitigation offer) if the purchase offer amount can be documented and verified as an inaccurate estimate of the property's market value. Also, pursuant to paragraph 79.7(d)(1)(i), the property owner may appeal if he or she cannot find a replacement property of comparable value that is functionally equivalent to the property being replaced. Finally, paragraph 80.5(c)(5) describes the responsibility of the subapplicant/subgrantee to include resolving property owner disputes regarding mitigation offers for the purchase of property.

Request for Statutory Amendments for SRL

A commenter posed several comments that focus on the authorizing statute with the intent to propose legislative changes to the SRL program. The commenter raised the following six issues: (1) There is no requirement for a State/community to participate in the SRL; (2) The offer process is unique and will be difficult to administer; (3) The entire appeals process is cumbersome and unnecessary; (4) SRL is the only mitigation program with consequences for refusal to mitigate; (5) SRL has a cost share that, compared to RFC for example, puts the program at a competitive disadvantage; and (6)

Benefit cost analysis is used to determine whether a project will be funded or not. These comments pertain directly to the authorizing statute and do not directly address FEMA's interpretation of that statute in this regulation. Although FEMA notes the commenter's concerns, FEMA must adhere to the statutory requirements.

44 CFR Part 80

44 CFR part 80 provides, in a single source, the requirements for the administration of FEMA mitigation assistance to acquire property for open space under all FEMA Hazard Mitigation Assistance (HMA) programs. 44 CFR part 80 also provides information on the eligibility and procedures for acquisition and relocation of vulnerable structures away from hazardous areas. Subsequently, the cleared property is to be maintained as open space in perpetuity.

Paragraph 80.5(b)(7)—Enforcement

Section 80.5 provides information on the roles and responsibilities of FEMA, the State, the subapplicant, and the participating property owners in the context of creating open space. Paragraph 80.5(b)(7) outlines the State's roles and responsibilities to enforce the open space deed restrictions to ensure that a property purchased with mitigation funds remains as open space in perpetuity.

One commenter noted that the term ''enforcing'' implies an assumption that States have a statutory and regulatory authority to force jurisdictions to uphold open space deed restrictions. The commenter added that various States may or may not have this authority to enforce the open space deed restrictions, depending upon which agency implements the various mitigation grant programs.

By virtue of receiving the HMA funds for open space projects, States and local communities are accountable for compliance with the terms of the grant agreement and its requirements for the use of those funds. Upon receiving FEMA funds for an open space acquisition project, the grantee and subgrantee assume stewardship, including ensuring that the deed restrictions are recorded, that there is a clear title to the property, that all incompatible easements or encumbrances are extinguished, that the vacant land is clean of hazardous materials, that the intended and future use of the property complies with the legally imposed use restrictions, and that the State and the local community jointly monitor and inspect the deed-restricted properties at regular intervals to ensure that the property continues to be used for open space purposes. All parties to the grant/subgrant award assume these responsibilities by receiving HMA funds. The authority to enforce these restrictions lies with the State in its role as grantee. Therefore, just as the grant condition continues in perpetuity pursuant to Federal law, the responsibility to ensure compliance with that condition continues in perpetuity. FEMA notes that these responsibilities have always applied to grantees and subgrantees for open space acquisition and relocation projects under all of FEMA hazard mitigation grant programs as necessary to ensure the long-term purpose of the Federal funds for this particular project type is met.

Section 80.9 (Eligible and Ineligible Costs)

One commenter indicated that the language in paragraph 80.9(c) allows for reducing a grant award for Duplication of Benefits (DOB) which could mean that a full DOB analysis would have to be completed before a project is approved by FEMA. The commenter indicated that the DOB should not be deducted until the local project manager has met with each owner during the offer presentation process and credited back temporary living expenses and/or receipted repairs using insurance or grant funds. Also, the commenter noted that the language appears to be confusing the concept of DOB and Duplication of Programs (DOP).

HMA funding must be reduced by the amounts reasonably available to a property owner (even if not sought or received) designated for the same purpose or loss. In this case, the purchase offer will be reduced by the duplicative amount. It is the subgrantee's responsibility to coordinate with the property owner and to disclose all potential deductions as a result of funds that were reasonably made available to the property owner. It is also the subgrantee's responsibility to make the appropriate deductions from the purchase offer before making a final mitigation offer to the property owner. Consequently, it is the property owner's responsibility to take all reasonable steps to recover funding he or she is eligible to receive. In developing a project budget, the subapplicant should take all reasonable steps to accurately identify all project costs. The information needed to determine a DOB is generally readily available and can impact the mitigation grant offer at any time. Therefore, it is preferable to identify all DOBs as early as possible in order to reduce the risk of having a cost overrun. However, amounts made available for the same purpose at any time, even after award or acquisition, constitute a DOB and will be treated as such. It should be noted that funds received by the property owner that were designated for the same purpose or loss will not be deducted from the final mitigation offer if the owner can document with receipts that those funds were expended on repairs or cleanup.

Finally, FEMA disagrees with the commenter's assertion that the language confuses the concept of DOB and DOP. DOP would occur when an activity is funded under one program, despite there being more specific authority to fund it under a different program. DOB occurs when HMA funds are used to fund a mitigation activity, but other funds for the same purpose, such as from insurance, are received by or available to the project participant.

Section 80.11 (Project Eligibility)

Section 80.11 provides information on project eligibility. This section includes a discussion of voluntary participation, acquisition of improved properties, subdivision restrictions, and open space restrictions. Paragraph 80.11(a) notes that a property owner who agrees to an acquisition must do so on a voluntary basis and that the grantee/subgrantee can not use their powers of eminent domain to acquire the property should negotiations fail.

One commenter notes that the term ''negotiations'' may be construed to mean that negotiations of offers are possible. The commenter suggests that the use of the term ''negotiations'' may be problematic in implementing an acquisition/demolition project regardless of the mitigation grant involved.

FEMA is required to implement the provisions of 49 CFR part 24, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs (URA). The term ''initiation of negotiations'' is defined as the delivery of the initial written offer of just compensation by the Agency to the owner or the owner's representative to purchase the real property for the project. (49 CFR 24.2(a)(15).) As such, the word ''negotiation'' is a term of art.

If the property owner can verify that the final mitigation offer is significantly below market value, or presents other convincing facts such that the offer should be adjusted, then there may be an increase of the purchase offer. Regardless, in all cases, FEMA, the State, and the local community will work to ensure that all property owners are treated fairly and are offered an equitable mitigation offer based on the

acceptable methods for determining purchase offers for acquisitions under FEMA HMA programs.

FEMA revised paragraph 80.11(d) to clarify that the subapplicant must acquire or retain fee title (full property interest), except for encumbrances FEMA determines are compatible with open space uses, consistent with paragraph 80.17(b). In response to a comment, FEMA reviewed the provisions for obtaining verification that a property owner is a National of the United States or qualified alien and therefore eligible to be offered pre-event market value for the property in an acquisition instead of current market value. To address any perceived inconsistency, FEMA revised paragraph 80.17(c)(4) to clarify that the subapplicant must certify that the property owner is a National of the United States or qualified alien during the application process.

Section 80.13 (Application Information)

Section 80.13 provides information on application requirements. Some of this required information includes: property information, deed restriction language consistent with FEMA's model deed restriction, a signed notice of voluntary interest, an assurance that there is no intention to use the acquired property for any public or private facility for a future use that is inconsistent with 44 CFR part 80, and certification that the property owner is a National of the United States or a qualified alien (if the owner is being offered pre-event market value).

One commenter indicated that the general requirements outlined in this section will significantly increase the paperwork burden on the subapplicants in the application process. In particular, the commenter indicates that prior to appraisal it is difficult to obtain signatures from property owners regarding the inclusion of their properties in the project, and notes that, as an applicant, the Voluntary Transaction Agreements signature is obtained after the grant is awarded to the local jurisdiction.

FEMA analyzed the anticipated paperwork burden associated with implementing these mitigation programs with respect to the Paperwork Reduction Act of 1995 (PRA) (5 CFR part 1320). As part of its PRA analysis in Section IV.E. of this rule, FEMA determined that the collection of information needed to develop a mitigation application package does not impose an additional undue burden on the States and local communities. Applicants and subapplicants have been submitting this information before FEMA published the IR. Regardless, FEMA reviewed 44 CFR 80.13 to ensure that the HMA application information requirements do not impose any additional undue burden in the development of HMA applications. Generally, 44 CFR part 80 reflects the information that has always been requested in program guidance as a condition for applying for assistance to enable FEMA to determine the project's eligibility and compliance with program requirements.

With respect to the comment about obtaining project participants' signatures, FEMA wants to clarify that the timing for obtaining from the property owner the Statement of Voluntary Participation (formerly called Voluntary Transaction Agreement), which indicates the market value of the property and the owner's acknowledgment that they are voluntarily participating in the project, continues to occur post award. This is distinct from the Notice of Voluntary Interest, which simply documents during project development that potentially interested owners have received general notice from the subapplicant of the voluntary nature of the potential acquisition project, including that the subapplicant will not use its eminent domain authority for the purpose of open space. The Notice of Voluntary Interest may be as simple as having a group sign-in sheet at a neighborhood meeting about the possible project that includes a statement to this effect. For FEMA to ensure compliance with basic program requirements, this less formal documentation is provided to FEMA during the application process.

Another commenter noted that it is unclear how States will be required to indicate that there is no intention to use the property for any public or private facility in the future. Paragraph 80.13(a)(5) requires that the State provide assurances that the subject property to be acquired, deed restricted, and converted to open space has no future, intended, or planned use that is inconsistent with the requirements delineated in § 80.19 (land use and oversight). Compliance with this regulation is accomplished through a written statement submitted as part of the application.

Two commenters indicated that it is unclear why offering the pre-event value to a property owner requires that the subapplicant provide certification that the property owner is a National of the United States or a qualified alien. One commenter also notes that § 80.13, which indicates that this certification must be done as part of the application process, conflicts with § 80.17 which indicates that this certification must be done before offering pre-event market value for a property.

As established by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (42 U.S.C. 1305 note), an alien who is not a qualified alien (as defined in 8 U.S.C. 1641) is not eligible for any Federal public benefit. In this instance, such a Federal public benefit results from an offer of pre-event market value, which has the effect of compensating for the disaster loss beyond the current market value of the property. This benefit is reserved for property owners who owned the property during the event and who are Nationals of the United States or qualified aliens. The property value for other individuals must be based on current market value. To ensure compliance with the PRWORA, local communities offering pre-event market value must verify that the property owners are either Nationals of the United States or qualified aliens.

The term ''National of the United States'' is defined at 8 U.S.C. 1101 and means a citizen of the United States or a person who is not a citizen but who owes permanent allegiance to the United States. The term ''qualified alien'', as delineated in the Immigration and Nationality Act (the Act) at 8 U.S.C. 1641, is an individual who meets certain criteria contained in the Act at the time they apply for, receive, or attempt to receive a Federal public benefit.

In response to the commenter's view that there is an inconsistency between §§ 80.13 and 80.17, FEMA notes that it intended the language in paragraph 80.17(c)(4) to describe a pre-condition of offering pre-event value, not to address the timing of obtaining the information. Such information is relevant to the eligible costs of the project and is provided to FEMA during the application process. FEMA revised § 80.17 to clarify that the pre-event value is only available to a property owner that has certified during the application process as to being a National of the United States or a qualified alien.

Section 80.17 (Project Implementation)

Paragraph 80.17(c)(1) provides that the amount of a purchase offer is either the current market value of the property or the market value of the property immediately before the relevant event affecting the property. One commenter requested clarification of the term ''relevant event'' for Pre-Disaster Mitigation (PDM). The commenter indicated that this clarification will

make implementation of the program easier. As it relates to PDM, the regulation states that the relevant event is the most recent major disaster that affected the subject property. In the case where multiple disasters have affected the same property, this section indicates that the ''grantee and subgrantee shall determine which is the relevant event.'' Alternatively, if the project is not occurring in association with or will be more than 12 months after a disaster event, for example, the grantee and subgrantee may want to consider whether current market value may be more appropriate, per paragraph 80.17(c)(3).

One commenter indicated that the flexibility built into the SRL program affords market value determination of the greatest amount (*i.e.* current market value, pre-event market value, original purchase price paid, or outstanding amount of the loan on the property). The commenter indicated that in some instances the offer of the greatest amount would render the property not cost effective.

Paragraph 80.17(c)(2) notes that for acquisition of properties under SRL, the purchase offer is to be not less than the greatest of the following amounts: the current market value of the property or the pre-event market value of the property; the original purchase amount paid by the property owner holding the flood insurance policy as demonstrated by property closing documents; or the outstanding amount of any loan to the property owner, secured by a recorded interest in the property at the time of the purchase offer. It is legislatively mandated at 42 U.S.C. 4102a(g)(3) that FEMA use these values to determine the greatest amount on which to base a purchase offer. The statute also requires that the purchase price be the greatest of those amounts. FEMA acknowledges that as a result of this method, there may be instances where the project costs outweigh the project benefits; however, FEMA must follow the legislatively mandated direction.

Section 80.19 (Land Use and Oversight)

Section 80.19 provides guidance on open space requirements and land uses compatible with open space. One commenter noted the correlation between the requirement in paragraph 80.17(b) that any incompatible easements or other encumbrances to the property be extinguished before acquisition, and the requirement in paragraph 80.19(a)(1)(i) identifying ''below ground pumping and switching stations'' as not being compatible with open space uses. The commenter added that this requirement restricts the ability of the local jurisdiction to purchase a property because a utility company may be unwilling to nullify an easement.

Above or below ground pumping stations or other uses that obstruct the natural and beneficial use of the floodplain are deemed as land uses that are incompatible with FEMA's open space requirements because they are detrimental to maintaining the beneficial functions of the floodplain. If, at the time of acquisition, a property is used for an incompatible open space use, then that property is no longer eligible for acquisition if the use cannot be discontinued. Similarly, if easements for the property allow for any incompatible use, such provisions must be nullified in order for the property to be acquired (provisions allowing for compatible uses may remain in effect). FEMA acknowledges that where incompatible uses will continue to be permitted on a property, the property is not eligible for FEMA HMA funds for an acquisition for open space purposes.

One commenter expressed concern with the monitoring and reporting requirements and the enforcement provisions of § 80.19. The commenter suggested a monitoring timeframe consistent with mitigation plans.

In an effort to ease the workload for monitoring, 44 CFR part 80 reduces the frequency of HMGP grant monitoring from once every 2 years to once every 3 years. This change makes all HMA programs consistent in their property acquisition land-use monitoring requirement. FEMA believes that further extending this timeframe would not provide sufficient monitoring to ensure ongoing compliance with the land use requirements. In addition, FEMA does not think it is appropriate to synchronize the open space monitoring timeframe with the completely unrelated timeframe for local mitigation plan updates, and notes that to do so could place additional distractions on local jurisdictions at a time when they need to focus instead on the mitigation planning process.

The same commenter also raised concerns about State responsibilities, including funds and authority to meet enforcement responsibilities, including taking legal action. Finally, the commenter identified concerns about improper consequences for State and subgrantee failure to enforce open space requirements, noting that it would be unfair for the State to lose HMA assistance if the subgrantee were non-compliant.

In response, it should be noted that 44 CFR part 80 does not substantially differ from previous open space project grant requirements, where the State has always played a vital role in the monitoring and enforcement of the open space restrictions. These provisions have been a requirement of FEMA property acquisition and relocation for open space projects almost since program inception. They have been reflected in the HMGP Desk Reference and the annual program guidance for the other HMA programs (*e.g.*, the PDM program), which also incorporated FEMA's model deed restriction language. The States, as grantees, and subgrantees agree to this language as a condition of receiving HMA funding, both by signing a statement of assurances acknowledging these conditions, and by accepting grant funds subject to the grant agreement. Unlike most NFIP-related programs and activities where the primary entity is the community, for HMA grant purposes the State is the grantee and is accountable for the use of funds and for assuring compliance with the terms of the grant award and the program. (*See, e.g.*, 44 CFR 206.433 and 13.3.) It also should be noted that FEMA is also accountable for ensuring that Federal awards are used for the intended purpose. The IR restated and codified previous HMA program requirements to ensure that States and FEMA carry out their fiscal responsibilities by taking appropriate actions to maintain consistency with Federal open space requirements. This action may or may not involve court action. The option of seeking specific performance in a court of law or equity is not ''a requirement,'' but is an available option when deemed appropriate.

Further, the options available to FEMA for enforcing the open space requirements are not new. FEMA has always retained the right to bring legal action against a State or local jurisdiction that fails to comply with the open space terms of the grant and deed restriction. In addition, as explained in the rule, the option of withholding HMA assistance is a reasonable response in the event that the State and subgrantee fail to make a good faith effort to enforce the deed restrictions they voluntarily agreed to enforce. These remedies for non-compliance are consistent with government-wide Federal grants management procedures. (*See, e.g.*, 44 CFR 13.43(a).) In the case of a State and/or local jurisdiction failing to comply with the grant terms and deed restrictions, taking such an action may be the most effective means of encouraging a continued commitment to the open space responsibilities. FEMA may withhold funds from a subgrantee for failure to demonstrate a

good faith effort to come into compliance with the terms of the grant. Because the grant relationship is between FEMA and the State as grantee, funds withheld from a subgrantee are also withheld from the grantee. This does not necessarily mean that FEMA will withhold all HMA funding from that State.

General Comment

One commenter expressed concern that FEMA's Flood Insurance Rate Map (FIRM) is antiquated and therefore does not provide the public with the most accurate and up-to-date risk mapping data. The commenter suggested that FEMA be proactive in stopping development in flood-prone areas.

While this comment is outside the scope of this rulemaking, FEMA notes that efforts have been made to update and digitize flood maps. Local communities and States work closely with FEMA to provide the most up-to-date data on flood risk. Any interested party may ask community officials to submit a map revision request to FEMA in accordance with 44 CFR part 65 of the NFIP regulations. Factors that influence when the maps are updated are: (1) When climatological or physical changes in watersheds occur, or (2) when mapping methodologies are improved.

IV. Regulatory Requirements

A. National Environmental Policy Act

FEMA has considered this rule in accordance with its implementing regulations for complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4365), which are found at 44 CFR part 10. The rulemaking addresses applicant planning requirements, as well as eligibility, funding increases, and cost sharing/funding incentives relating to certain disaster mitigation programs and does not change the type or nature of mitigation actions that may be funded. This rulemaking would neither individually nor cumulatively have a significant effect on the human environment and, therefore, neither an environmental assessment nor an environmental impact statement is required. This rulemaking is among the category of actions included in the Categorical Exclusions listed at paragraph 10.8(d)(2)(ii), which excludes 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. The related actions of the development of plans and administrative activities that are included in this rule are also categorically excluded under § 10.8 paragraphs (d)(2)(i) and (d)(2)(iii). FEMA received no public comments on the IR regarding its NEPA determination.

B. Executive Order 11988, Floodplain Management

FEMA has prepared and reviewed this rule under the provisions of Executive Order 11988, Floodplain Management. FEMA's policy, procedures, and responsibilities in implementing this Executive Order are set forth in 44 CFR part 9. FEMA's floodplain management regulations are intended to avoid long and short term adverse impacts associated with the occupancy and modification of floodplains; to avoid direct and indirect support of floodplain development whenever there is a practical alternative; to reduce the risk of flood loss; to promote the use of nonstructural flood protection methods to reduce the risk of flood loss; to minimize the impacts of floods on human health, safety and welfare; to restore and preserve the natural and beneficial values served by floodplains; and to adhere to the objectives of the Unified National Program for Floodplain Management. As stated in the rulemaking, the purpose of the SRL and FMA programs is to mitigate insured property losses from floods, thereby minimizing impacts to the NFIF, which is consistent with the intent of the Executive Order. In addition, for project activities funded through the SRL and FMA programs, each project will go through the environmental review process, which will include compliance with Executive Order 11988. FEMA received no public comments on the IR regarding its Executive Order 11988 determination.

C. Executive Order 12866, Regulatory Planning and Review

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 or entitlements, grants, user fees, or loan programs or the right and obligations of recipients thereof; or

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

This final rule adopts the regulations established in the IR with a few nonsignificant changes that are a logical outgrowth from the IR. This final rule does not meet the criteria under paragraphs 2, 3, or 4 of the provision of the Executive Order. In addition, FEMA determined that it is not likely to have a significant economic impact of $100 million or more per year (under paragraph 1 of this provision). This rule has not been reviewed by OMB.

This final rule is intended to have a positive impact on State, local, and Indian Tribal governments. The new SRL program and the modified FMA program assist State, local, and Indian Tribal governments in reducing the loss of life and property from flooding events by providing additional grant resources and the ability to increase the Federal cost share for projects mitigating SRL properties. The FMA is an annual grant program created with the goal of reducing or eliminating claims under the NFIP. The SRL pilot program provides funding to assist States and communities in implementing measures to reduce or eliminate the long-term risk of flood damage to severe repetitive loss structures insured under the NFIP, therefore reducing payments from the NFIF. The SRL program differs from FEMA's other mitigation grant programs, as those property owners who decline offers of mitigation assistance will be subject to increases to their flood insurance premium rates. This final rule also implements changes to the FMA program by allowing for up to a 90 percent Federal cost share for the mitigation of severe repetitive loss properties (the standard Federal cost share is 75 percent). While the SRL and FMA programs will be implemented as separate programs with different funding accounts, they are similar in their goals and purpose. Therefore, FEMA has included both of these programs into one implementing regulation to ensure consistency between the programs.

The primary economic impact of the final rule is defined as the additional transfer of funding from FEMA to State, local, and Indian Tribal governments to implement measures to reduce or eliminate the long-term risk of flood

damage to severe repetitive loss structures. FEMA made conservative assumptions in order not to under estimate the economic impact of the final rule. Historically, the FMA program has provided $20 million in grants on an annual basis. The NFIA, as amended, authorizes the appropriations for the existing FMA program to be increased from $20 million to $40 million per year. Congressional appropriators have gradually increased the funding for this program, and the FMA program may eventually reach its total authorized $40 million cap per year.

In fiscal year 2008, FEMA awarded $38 million for the mitigation of 173 properties at an average of $220,000 per property under the SRL pilot program. In fiscal year 2009, FEMA expects to award $50 million for the mitigation of 227 properties also at an average of $220,000 per property. To date, no one has refused the offer of mitigation or appealed, therefore no premiums have increased.

The purpose of the SRL grant program is to reduce or eliminate claims through flood mitigation projects that would result in the greatest savings to the NFIF. The two most common types of flood mitigation projects are elevation of a flood prone structure, and acquisition and demolition or relocation of a flood prone structure. In 2006, the NFIP paid a total of $617.28 million for claims with an average claim payment of $25,545. Severe Repetitive Loss properties account for far less than 1 percent of the current NFIP policies, yet these properties account for over 7 percent of the total amount paid in claims. Approximately, 8,544 properties were identified as meeting the definition of severe repetitive loss, among which 1,067 SRL properties were damaged by flood and paid $46.21 million in 2006 (or $49.35 million in 2008, if adjusted to reflect inflation). Assuming that all 400 SRL properties (173 in FY08 + 227 in FY09) have accepted mitigation offers, 4.7 percent of the 8,544 SRL properties will lower or eliminate the risk of future flood damages by the end of fiscal year 2009. Therefore, the reduction in claims paid for SRL properties is estimated at up to $2.31 million per year (4.7 percent × $49.35 million).

Assuming that the FMA program reaches its $40 million cap per year, the net economic impact of the final rule is estimated to be up to $61.69 million per year. Table 1 details the annual impact of the final rule. The NFIA, as amended, authorizes the SRL program through the end of fiscal year 2009; therefore, the impact of this rule will be reduced by $44 million in fiscal year 2010 and beyond.

TABLE 1—NET ANNUAL IMPACT OF THE FINAL RULE

[in 2008 $]

FMA Program	$20,000,000
SRL Program	*44,000,000
National Flood Insurance Fund	(2,310,000)
Total	61,690,000

*Average of $38 million in FY 2008 and $50 million in FY 2009.

D. Executive Order 12898, Environmental Justice

In accordance with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, Feb. 16, 1994, FEMA incorporates environmental justice into our 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 our programs, denying persons the benefits of our programs, or subjecting persons to discrimination because of their race, color, or national origin.

This rule implements the SRL program, providing mitigation grants to severe repetitive loss properties, and improves the FMA program and the mitigation planning requirements. This rule also clarifies and simplifies the planning requirements for Indian Tribal governments. No action in this rule will have a disproportionately high or adverse human health and environmental effect on any segment of the population. FEMA received no comments during the IR comment period that disagreed with this determination.

E. Paperwork Reduction Act of 1995

In accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520, OMB has approved use of OMB Numbers 1660–0025, FEMA Emergency Preparedness and Response Directorate Grants Administration Forms under 44 CFR parts 78, 79, and 206 in this rule; 1660–0062, State/Local/Tribal Hazard Mitigation Plans—Section 322 of the Disaster Mitigation Act of 2000 under 44 CFR part 201; 1660–0103, Property Acquisition and Relocation for Open Space under 44 CFR part 80; and 1660–0104, Severe Repetitive Loss (SRL) Appeals process under 44 CFR part 79. The approved collections have gone through the OMB's normal clearance procedures in accordance with the provisions of OMB regulation at 5 CFR 1320.10. Use of these collections, under this final rule, does not impose addition burden and are approved for use until August 31, 2011.

The information collection activity under the approved OMB information collection 1660–0072, Mitigation Grant Programs/e-Grants (previously named Flood Mitigation Assistance (e-Grants) and Grant Supplemental Information) have been combined with OMB No. 1660–0071, Pre-Disaster Mitigation (PDM) Grant Program/eGrants to streamline and simplify documentation of the same information collected for all mitigation e-Grants program under section 203 (Predisaster Hazard Mitigation) of the Stafford Act (42 U.S.C. 5133) and has been approved for use until February 28, 2011.

F. Executive Order 13132, Federalism

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

FEMA reviewed the IR under Executive Order 13132 and concluded that the IR, which implemented the statutory requirements for a new SRL program as well as a potential increase in the Federal share for the FMA program, simplified the planning requirements, and reflected a statutorily-mandated change to the HMGP allocation, does not have federalism implications as defined by the Executive Order. FEMA received no comments during the IR comment period that disagreed with this determination. FEMA also determined that this final rule does not significantly affect the rights, roles, and responsibilities of States, and involves no preemption of State law nor does it limit State policymaking discretion.

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

While this rule does have ''Tribal implications'' as defined in Executive Order 13175, it does not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. FEMA coordinates with Indian Tribal governments while implementing its programs, and has modified its procedures to accommodate some of the issues relating to the Tribal governments. This rule clarifies those procedures and streamlines the roles and responsibilities of Indian Tribal governments in mitigation planning.

Indian Tribal governments may apply for assistance directly to FEMA as a grantee, or through the State as a subgrantee. (*See* 44 CFR 201.3(e) and 206.202(f)(1).) Before the IR went into effect, Indian Tribes were permitted to prepare either a State-level Mitigation Plan, or a Local-level Mitigation Plan depending on whether they intend to apply as a grantee, or as a subgrantee. Before publishing the IR, FEMA discussed the existing planning requirements with many of the Indian Tribal governments as they were developing their plans, or while attending Tribal training courses, and were informed that neither of these options sufficiently met the needs of the Indian Tribal governments. To address this problem, the IR established a specific planning requirement for Indian Tribal governments in 44 CFR 201.7 that recognized some of the unique aspects of these governments and combined the appropriate aspects of State and local planning requirements into one section for Indian Tribal governments.

The substance of this rule is intended to have a positive impact on Indian Tribal governments and their relationship with the Federal Government. The rule does not impose substantial direct compliance costs on Indian Tribal governments, nor does it preempt Tribal law, impair treaty rights nor limit the self-governing powers of Indian Tribal governments. FEMA received no comments during the IR comment period that disagreed with this determination.

H. Congressional Review of Agency Rulemaking

FEMA has sent this final rule to the Congress and to the General Accountability Office under the Congressional Review of Agency Rulemaking Act, (Congressional Review Act), 5 U.S.C. 801–808. The final 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.

I. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. When an agency invokes the good cause exception under the Administrative Procedure Act to make changes effective through an interim final or final rule, the RFA does not require an agency to prepare a regulatory flexibility analysis. FEMA determined in the IR that good cause exists under 5 U.S.C. 553(b)(B) to exempt this rule from the notice and comment requirements of 5 U.S.C. 553(b) (72 FR 61720, Oct. 31, 2007). Therefore, a regulatory flexibility analysis is not required for this rule.

J. Executive Order 12630, Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. In 44 CFR 80.11(a), this final rule explicitly states that a grantee/subgrantee cannot use its eminent domain authority to acquire the property for open space purposes; only such projects where the property owner participates voluntarily are eligible to receive a grant.

K. Executive Order 12988, Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

L. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), enacted as Public Law 104–4 on March 22, 1995 (2 U.S.C. 1531–1538), 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. UMRA exempts from its definition of ''Federal intergovernmental mandate'' regulations that establish conditions of Federal assistance or provide for emergency assistance or relief at the request of any State, local, or Tribal government. Therefore, this rule is not an unfunded Federal mandate under that Act.

List of Subjects

44 CFR Part 59

Flood insurance, Reporting and recordkeeping requirements.

44 CFR Part 61

Flood insurance, Reporting and recordkeeping requirements.

44 CFR Parts 78 and 79

Flood insurance, Grant programs.

44 CFR Part 80

Acquisition and Relocation for open space.

44 CFR Part 201

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

44 CFR Part 206

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

■ Accordingly, the Interim Rule amending 44 CFR Parts 59, 61, 78, 79, 80, 201, and 206 published on October 31, 2007 (72 FR 61720), is adopted as a final rule with the following changes:

PART 79—FLOOD MITIGATION GRANTS

■ 1. The authority citation for part 79 continues 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.

■ 2. Amend § 79.2 by redesignating paragraphs (e) through (l) as (f) through (m); by adding a new paragraph (e); and by revising paragraphs (c)(1), newly designated paragraph (l), and newly designated paragraph (m) to read as follows:

§ 79.2 Definitions.

* * * * *

(c) * * *

(1) A political subdivision, including any Indian Tribe, authorized Tribal organization, Alaska Native village or authorized native organization, that has zoning and building code jurisdiction over a particular area having special flood hazards, and is participating in the NFIP; or

* * * * *

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

* * * * *

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

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

■ 3. In § 79.4, revise paragraph (c) introductory text and paragraph (c)(2) to read as follows:

§ 79.4 Availability of funding.

* * * * *

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

* * * * *

(2) FEMA may contribute up to 90 percent of the cost of the eligible activities for each severe repetitive loss property for which grant amounts are provided if the applicant has an approved Mitigation Plan meeting the repetitive loss requirements identified in § 201.4(c)(3)(v) or § 201.7(c)(3)(vi) of this chapter, as applicable, at the time the project application is submitted;

* * * * *

■ 4. Amend § 79.6 by removing paragraph (c)(2)(ii), redesignating paragraphs (c)(2)(iii) through (c)(2)(vii) as (c)(2)(ii) through (c)(2)(vi), and revising paragraphs (b)(1) and (c)(2)(i) to read as follows:

§ 79.6 Eligibility.

* * * * *

(b) * * *

(1) States must have an approved State Mitigation Plan meeting the requirements of §§ 201.4 or 201.5 of this chapter in order to apply for grants through the FMA or SRL programs. Indian Tribal governments must have an approved plan meeting the requirements of § 201.7 of this chapter at the time of application.

* * * * *

(c) * * *

(2) * * *

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

* * * * *

PART 80—PROPERTY ACQUISITION AND RELOCATION FOR OPEN SPACE

■ 5. The authority citation for part 80 is revised to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; 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.

■ 6. In § 80.3, revise paragraphs (l) and (m) to read as follows:

§ 80.3 Definitions.

* * * * *

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

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

■ 7. Revise § 80.11(d) to read as follows:

§ 80.11 Project eligibility.

* * * * *

(d) *Subapplicant property interest.* To be eligible, the subapplicant must acquire or retain fee title (full property interest), except for encumbrances FEMA determines are compatible with open space uses, as part of the project implementation. A pass through of funds from an eligible entity to an ineligible entity must not occur.

* * * * *

■ 8. Revise § 80.13(a)(6) to read as follows:

§ 80.13 Application information.

(a) * * *

(6) If the subapplicant is offering pre-event value: the property owner's certification that the property owner is a National of the United States or qualified alien; and

* * * * *

■ 9. Revise § 80.17(c)(4) to read as follows:

§ 80.17 Project implementation.

* * * * *

(c) * * *

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

* * * * *

PART 201—MITIGATION PLANNING

■ 10. The authority citation for part 201 is revised to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; 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.

■ 11. In § 201.2, revise the definition of ''Administrator'', the first sentence of the definition of ''Indian Tribal government'', and the definition of ''Regional Administrator'' to read as follows:

§ 201.2 Definitions.

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

* * * * *

Indian Tribal government means any Federally recognized governing body of an Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian Tribe under the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

* * *

* * * * *

Regional Administrator means the head of a Federal Emergency

Management Agency regional office, or his/her designated representative.

* * * * *

■ 12. Amend § 201.3 by removing paragraph (c)(7) and by revising the last sentence of paragraph (e)(1) to read as follows:

§ 201.3 Responsibilities.

* * * * *

(e) * * *

(1) * * * In addition, an Indian Tribal government applying to FEMA as a grantee may choose to address severe repetitive loss properties as identified in § 201.4(c)(3)(v) as a condition of receiving the reduced cost share for the FMA and SRL programs, pursuant to § 79.4(c)(2) of this chapter.

* * * * *

■ 13. In § 201.6 revise paragraphs (c)(2)(ii)(B) and (c)(3)(iii) to read as follows:

§ 201.6 Local Mitigation Plans.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

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

* * * * *

(3) * * *

(iii) An action plan describing how the actions identified in paragraph (c)(3)(ii) of this section will be prioritized, implemented, and administered by the local jurisdiction. Prioritization shall include a special emphasis on the extent to which benefits are maximized according to a cost benefit review of the proposed projects and their associated costs.

* * * * *

■ 14. In § 201.7 revise paragraphs (a)(2), (a)(3), (c)(2)(ii)(B), (c)(3)(iii), and (c)(3)(vi) to read as follows:

§ 201.7 Tribal Mitigation Plans.

* * * * *

(a) * * *

(2) An Indian Tribal government applying to FEMA as a grantee may choose to address severe repetitive loss properties in their plan, as identified in § 201.4(c)(3)(v), to receive the reduced cost share for the FMA and SRL programs.

(3) Indian Tribal governments applying through the State as a subgrantee must have an approved Tribal Mitigation Plan meeting the requirements of this section in order to receive HMGP project grants and, the Administrator, at his discretion may require a Tribal Mitigation Plan for the Repetitive Flood Claims Program. A Tribe must have an approved Tribal Mitigation Plan in order to apply for and receive FEMA mitigation project grants, under all other mitigation grant programs. The provisions in § 201.6(a)(3) are available to Tribes applying as subgrantees.

* * * * *

(c) * * *

(2) * * *

(ii) * * *

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

* * * * *

(3) * * *

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

* * * * *

(vi) An Indian Tribal government applying to FEMA as a grantee may request the reduced cost share authorized under § 79.4(c)(2) of this chapter of the FMA and SRL programs if they have an approved Tribal Mitigation Plan meeting the requirements of this section that also identifies actions the Indian Tribal government has taken to reduce the number of repetitive loss properties (which must include severe repetitive loss properties), and specifies how the Indian Tribal government intends to reduce the number of such repetitive loss properties.

* * * * *

PART 206—FEDERAL DISASTER ASSISTANCE

■ 15. The authority citation for part 206 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; Homeland Security Act of 2002, 6 U.S.C. 101; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 13286, 68 FR 10619, 3 CFR, 2003 Comp., p. 166.

■ 16. In § 206.226 revise paragraph (b) to read as follows:

§ 206.226 Restoration of damaged facilities.

* * * * *

(b) *Mitigation planning.* In order to receive assistance under this section, the State or Indian Tribal government applying to FEMA as a grantee must have in place a FEMA approved State or Tribal Mitigation Plan, as applicable, in accordance with 44 CFR part 201.

* * * * *

■ 17. Revise § 206.401 to read as follows:

§ 206.401 Local standards.

The cost of repairing or constructing a facility in conformity with minimum codes, specifications and standards may be eligible for reimbursement under section 406 of the Stafford Act, as long as such codes, specifications, and standards meet the criteria that are listed at 44 CFR 206.226(d).

■ 18. Amend § 206.431 by revising the definitions of ''Indian Tribal government'' and ''Local Mitigation Plan'' and by adding, in alphabetical order, the definition of ''Tribal Mitigation Plan'' to read as follows:

§ 206.431 Definitions.

* * * * *

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

Local Mitigation Plan is the hazard mitigation plan required of a local government acting as a subgrantee as a condition of receiving a project subgrant under the HMGP as outlined in 44 CFR 201.6.

* * * * *

Tribal Mitigation Plan is the hazard mitigation plan required of an Indian Tribal government acting as a grantee or subgrantee as a condition of receiving a project grant or subgrant under the HMGP as outlined in 44 CFR 201.7.

■ 19. In § 206.432 revise paragraphs (b) introductory text and (b)(2) to read as follows:

§ 206.432 Federal grant assistance.

* * * * *

(b) *Amounts of Assistance.* The total Federal contribution of funds is based on the estimated aggregate grant amount to be made under 42 U.S.C. 5170b, 5172, 5173, 5174, 5177, and 5183 of the Stafford Act for the major disaster (less associated administrative costs), and shall be as follows:

* * * * *

(2) *Twenty (20) percent.* A State with an approved Enhanced State Mitigation Plan, in effect before the disaster

declaration, which meets the requirements outlined in § 201.5 of this subchapter shall be eligible for assistance under the HMGP not to exceed 20 percent of such amounts, for amounts not more than $35.333 billion.

* * * * *

■ 20. In § 206.434 revise paragraphs (b)(1), (c)(1), and (e) introductory text to read as follows:

§ 206.434 Eligibility.

* * * * *

(b) * * *

(1) Local and Indian Tribal government applicants for project subgrants must have an approved local or Tribal Mitigation Plan in accordance with 44 CFR part 201 before receipt of HMGP subgrant funding for projects.

* * * * *

(c) * * *

(1) Be in conformance with the State Mitigation Plan and Local or Tribal Mitigation Plan approved under 44 CFR part 201; or for Indian Tribal governments acting as grantees, be in conformance with the Tribal Mitigation Plan approved under 44 CFR 201.7;

* * * * *

(e) *Property acquisitions and relocation requirements.* Property acquisitions and relocation projects for open space proposed for funding pursuant to a major disaster declared on or after December 3, 2007 must be implemented in accordance with part 80 of this chapter. For major disasters declared before December 3, 2007, a project involving property acquisition or the relocation of structures and individuals is eligible for assistance only if the applicant enters into an agreement with the FEMA Regional Administrator that provides assurances that:

* * * * *

Dated: September 8, 2009.

David Garratt,

Acting Deputy Administrator, Federal Emergency Management Agency.

[FR Doc. E9–22278 Filed 9–15–09; 8:45 am]

BILLING CODE 9110–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 09–2016; MB Docket No. 09–125; RM–11548]

Television Broadcasting Services; Biloxi, MS

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission grants a petition for rulemaking filed by WLOX License Subsidiary, LLC, the permittee of station WLOX(TV), channel 13, Biloxi, Mississippi, requesting the substitution of its pre-transition digital channel 39 for its allotted post-transition channel 13 at Biloxi.

DATES: This rule is effective September 16, 2009.

FOR FURTHER INFORMATION CONTACT: Joyce L. Bernstein, Media Bureau, (202) 418–1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order,* MB Docket No. 09–125, adopted September 3, 2009, and released September 4, 2009. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 12th Street, SW., Washington, DC, 20554. This document will also be available via ECFS (*http://www.fcc.gov/cgb/ecfs/*). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–478–3160 or via e-mail *http://www.BCPIWEB.com.* To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to *fcc504@fcc.gov* or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any information collection burden ''for small business concerns with fewer than 25 employees,'' pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

■ 1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622 [Amended]

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Mississippi, is amended by adding DTV channel 39 and removing DTV channel 13 at Biloxi.

Federal Communications Commission.

James J. Brown,

Deputy Chief, Video Division, Media Bureau.

[FR Doc. E9–22315 Filed 9–15–09; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R3–ES–2009–0063; 92220–1113–0000; C6]

RIN 1018–AW80

Endangered and Threatened Wildlife and Plants; Reinstatement of Protections for the Gray Wolf in the Western Great Lakes in Compliance With Settlement Agreement and Court Order

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are issuing this final rule to comply with a court order that has the effect of reinstating the regulatory protections under the Endangered Species Act of 1973, as amended (ESA), for the gray wolf (*Canis lupus*) in the western Great Lakes. This rule corrects the gray wolf listing in our regulations which will reinstate the listing of gray wolves in all of Wisconsin and Michigan, the eastern half of North Dakota and South Dakota, the northern half of Iowa, the northern portions of Illinois and Indiana, and the northwestern portion of Ohio as endangered, and reinstate the listing of wolves in Minnesota as threatened. This rule also reinstates the former designated critical habitat for gray wolves in Minnesota and Michigan and special regulations for gray wolves in Minnesota.

DATES: This action is effective September 16, 2009.