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SUBCHAPTER E—FIRE ASSISTANCE

PART 295—CERRO GRANDE FIRE ASSISTANCE

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AUTHORITY: Pub. L. 106–246, 114 Stat. 511, 584; Reorganization Plan No. 3 of 1978, 43 FR 41493, 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.

SOURCE: 66 FR 15959, Mar. 21, 2001, unless otherwise noted.

Subpart A—General

§ 295.1 Purpose.

This part implements the Cerro Grande Fire Assistance Act (CGFAA), Public Law 106–246, 114 Stat. 584, which requires that the Federal Emergency Management Agency (FEMA) establish a process to evaluate, process and pay claims injuries and property damage resulting from the Cerro Grande Fire.

§ 295.2 Policy.

It is our policy to provide for the expeditious resolution of meritorious claims through a process that is administered with sensitivity to the burdens placed upon Claimants by the Cerro Grande Fire.

§ 295.3 Information and assistance.

Information and assistance concerning the CGFAA is available from the Office of Cerro Grande Fire Claims (OCGFC), Federal Emergency Management Agency, P.O. Box 1480, Los Alamos, New Mexico, 87544–1480, or telephone 1–888–748–1853 (toll free). The Cerro Grande Fire Assistance site on the World Wide Web can be accessed at *http://www.fema.gov/cerrogrande*. In the interest of brevity, we do not restate the provisions of the CGFAA in most instances. Our website has a copy of the CGFAA and we will provide a copy upon request.

§ 295.4 Organization of this part 295.

This part contains six subparts. Subpart A provides an overview of the CGFAA process. Subpart B describes the procedures for bringing a claim. Subpart C explains what compensation is available. Subpart D discusses the claims evaluation process. Subpart E explains the dispute resolution process. Subpart F contains a glossary in which various terms used in the rule are defined.

§ 295.5 Overview of the claims process.

(a) The CGFAA is intended to provide persons who suffered losses from the Cerro Grande Fire with a simple, expedited process to seek redress from the

United States. This section provides a brief explanation of the claims process for claims other than subrogation claims. It is not intended to supersede the more specific regulations that follow and explain the claims process in greater detail. In order to obtain benefits under this legislation, a person must submit all Cerro Grande Fire related claims against the United States to FEMA. A person who elects to proceed under the CGFAA is barred from bringing a claim under the Federal Tort Claims Act or filing a civil action against the United States for damages resulting from the Cerro Grande Fire. Judicial review of our decisions under the CGFAA is available.

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

(c) Shortly thereafter, a Claims Reviewer will contact the Claimant to review the claim. The Claims Reviewer will help the Claimant formulate a strategy for obtaining any necessary documentation or other support. This assistance does not relieve the Claimant of his or her responsibility for establishing all elements of the Loss and the compensatory damages that are sought, including that the Cerro Grande Fire caused the Loss. After the Claimant has had an opportunity to discuss the claim with the Claims Reviewer, a Proof of Loss will be presented to the Claimant for signature. After any necessary documentation has been obtained and the claim has been fully evaluated, the Claims Reviewer will submit a report to the Authorized Official. The Claims Reviewer is responsible for providing an objective evaluation of the claim to the Authorized Official.

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

§ 295.6 Partial payments.

OCGFC, on its own initiative, or in response to a request by a Claimant, may make one or more partial payments on the claim. A partial payment can be made if OCGFC has a reasonable basis to estimate the Claimant's damages. Acceptance of a partial payment in no way affects a Claimant's ability to pursue an Administrative Appeal of the Authorized Official's Determination or to pursue other rights afforded by the CGFAA. Partial payment decisions cannot be appealed.

§ 295.7 Authority to settle or compromise claims.

Notwithstanding any other provision of these regulations, the Director of OCGFC may extend an offer to settle or compromise a claim or any portion of a claim, which if accepted by the Claimant will be binding on the Claimant and on the United States, except that the United States may recover funds improperly paid to a Claimant due to fraud or misrepresentation on the part of the Claimant or the Claimant's representative, a material mistake on our part or the Claimant's failure to cooperate in an audit as required by § 295.35.

Subpart B—Bringing a Claim Under the CGFAA

§ 295.10 Bringing a claim under the CGFAA.

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

(b) A single Notice of Loss may be submitted on behalf of a Household containing Injured Persons provided

that all Injured Persons on whose behalf the claim is presented are identified.

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

(d) Notice of Loss forms are available from OCGFC by request. They may be obtained through the mail, in person at the OCGFC office or by telephone request. The Notice of Loss form can also be downloaded from the Internet at *http://www.fema.gov/cerrogrande*.

(e) Notices of Loss may be filed with OCGFC by mail to P.O. Box 1480, Los Alamos, NM 87544–1480. OCGFC is unable to accept Notices of Loss submitted by facsimile or e-mail.

(f) A Notice of Loss that is completely filled out and properly signed is deemed to be filed on the date it is received by OCGFC.

§ 295.11 Deadline for notifying FEMA of losses.

The deadline for filing a Notice of Loss is August 28, 2002. Except as provided in § 295.21(d) with respect to mitigation and in § 295.31(b) with respect to the lump sum payment described therein, a Loss that has not been described: on a Notice of Loss, on a supplement to a Notice of Loss or a request to supplement a Notice of Loss under § 295.33, or a request to reopen a claim under § 295.34, received by OCGFC on or before August 28, 2002 cannot be compensated under the CGFAA. The CGFAA establishes this deadline and does not provide any extensions of the filing deadline.

§ 295.12 Election of remedies.

(a) By filing a Notice of Loss, an Injured Person waives the right to seek redress for Cerro Grande Fire related claims against the United States through the Federal Tort Claims Act or by filing a civil action authorized by any other provision of law.

(b) An Injured Person who files a Federal Tort Claims Act claim or who initiates a civil action against the United States or any officer, employee or agent of the United States relating to the Cerro Grande Fire on or after August 28, 2000 is not eligible under the CGFAA to file a Notice of Loss.

(c) An Injured Person who filed before August 28, 2000 a Federal Tort Claims Act claim or a civil action against the United States for injuries, losses or damages relating to the Cerro Grande Fire may file a Notice of Loss provided that the Federal Tort Claims Act claim is withdrawn or the Injured Person is dismissed as a party to the civil action with prejudice not later than October 27, 2000. The withdrawal of a Federal Tort Claims Act claim must be in the form of a signed, written statement on a form provided by OCGFC that is filed with OCGFC not later than October 27, 2000. OCGFC will promptly forward the original notice of withdrawal to the applicable federal agency and retain a copy in the Claimant's file.

§ 295.13 Subrogation.

An insurer or other third party with the rights of a subrogee, who has compensated an Injured Person for Cerro Grande Fire related losses, may file a Subrogation Notice of Loss under the CGFAA for the subrogated claim. An insurer or other third party with the rights of a subrogee may file a Subrogation Notice of Loss without regard to whether the Injured Party who received payment from the insurer or third party filed a Notice of Loss. A Subrogation Notice of Loss may not be filed until the insurer or other party with the rights of a subrogee has made all payments that it believes the Injured Person is entitled to receive for Cerro Grande Fire related losses under the terms of the insurance policy or other agreement between the insurer or other party with the rights of a subrogee and the Injured Person. By filing a Subrogation Notice of Loss for any subrogated claim, the insurer or third party elects the CGFAA as its exclusive remedy against the United States for all subrogated claims arising

out of the Cerro Grande Fire. Subrogation claims must be made on a Subrogation Notice of Loss form furnished by OCGFC. FEMA will evaluate subrogation claims on their merits. FEMA may reimburse insurers and other third parties with the rights of a subrogee for reasonable payments made to an Injured Party on or before October 25, 2000, which exceeded or were not required by the terms of the insurance policy or other agreement creating a right of subrogation. FEMA will not reimburse insurers and other third parties with the rights of a subrogee for payments made to an Injured Party after October 25, 2000 that exceeded or are not required by the terms of the insurance policy or other agreement creating a right of subrogation.

§ 295.14 Assignments.

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

Subpart C—Compensation Available Under the CGFAA

§ 295.20 Prerequisite to compensation.

In order to receive compensation under the CGFAA a Claimant must be an Injured Person who suffered a Loss as a result of the Cerro Grande Fire and sustained damages.

§ 295.21 Allowable compensation.

(a) *Allowable compensation.* The CGFAA provides for the payment of compensatory damages. Compensatory damages are ''real, substantial and just money damages established by the Claimant in compensation for actual or real injury or loss.'' In general, an Injured Person will be compensated for Losses to the same extent that the plaintiff in a successful tort action brought against a private party under the laws of the State of New Mexico would be compensated. In addition the CGFAA permits FEMA to compensate Injured Parties for certain categories of ''loss of property,'' ''business loss,'' and ''financial loss,'' which are enumerated in the CGFAA. Damages must be reasonable in amount. Claimants must take reasonable steps to mitigate (reduce) their damages, if possible, as required by New Mexico tort law.

(b) *Exclusions.* Except as otherwise provided in the CGFAA, a Claimant will not receive compensation for any injury or damage that is not compensable under the Federal Tort Claims Act and New Mexico law. Punitive damages, statutory damages under § 30–32–4 of the New Mexico Statutes Annotated (1978), interest on claims, attorney's fees and agents' fees incurred in prosecuting a claim under the CGFAA or an insurance policy, adjusting costs incurred by an insurer or other third party with the rights of a subrogee, and taxes that may be owed by a Claimant as a consequence of receiving an award are not recoverable from FEMA. The cost to a Claimant of prosecuting a claim under the CGFAA does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 295.31(b).

(c) *Damages arising in the future.* In the event that a lump sum payment is awarded to a Claimant for future damages the amount of the payment will be Discounted to Present Value.

(d) *Destruction of home*—(1) *Home and contents.* Compensatory damages for the Destruction of a Home may include the reasonable cost of reconstructing a home comparable in design, construction materials, size and improvements to the home that was lost taking into account post-fire construction costs in the community in which the home existed before the fire and current building codes and standards. Compensatory damages may also include the cost of removing debris and burned trees, stabilizing the land, replacing household contents, and compensation for any decrease in the value of land on which the structure sat pursuant to paragraph (e) of this section. (2) *Trees and landscaping.* Compensation for the Replacement Cost of destroyed trees and landscaping will be limited to 25% of the pre-fire value of the structure and lot.

(3) *Mitigation.* If requested by a Claimant, FEMA may compensate a Claimant for the reasonable cost of mitigation measures that will reduce the property's vulnerability to the future risk of wildfire, flood or other natural hazards related to the Cerro

Grande Fire. Mitigation compensation made available under this section may not exceed fifteen percent of payments from all sources (i.e., CGFAA, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot. The Claimant must obtain all government permits, approvals and clearances required by applicable law, ordinance or regulation before constructing the mitigation measures. The mitigation measures must be reviewed by FEMA under applicable environmental and historic preservation laws. Claimants must construct the mitigation measures for which they have received compensation.

(e) *Reduction in the value of real property.* Compensatory damages may be awarded for reduction in the value of real property that a Claimant owned before the fire if:

(1) The Claimant sells the real property in a good faith arm's length transaction that is closed no later than August 28, 2002 and realizes a loss in the pre-fire value; or

(2) The Claimant can establish that the value of the real property was permanently diminished as a result of the Cerro Grande Fire.

(f) *Destruction of unique items of personal property.* Compensatory damages may be awarded for unique items of personal property that were destroyed as a result of the Cerro Grande Fire. If the item can be replaced in the current market, the cost to replace the item will be awarded. If the item cannot be replaced in the current market, its fair market value on the date it was destroyed will be awarded.

(g) *Disaster recovery loans.* FEMA will reimburse Claimants awarded compensation under the CGFAA for interest paid on Small Business Administration disaster loans and similar loans obtained after May 4, 2000. Interest will be reimbursed for the period beginning on the date that the loan was taken out and ending on the date when the Claimant receives a compensation award (other than a partial payment). Claimants are required to use the proceeds of their compensation awards to repay Small Business Administration disaster loans. FEMA will cooperate with the Small Business Administration to formulate procedures for assuring that Claimants repay Small Business Administration disaster loans contemporaneously with the receipt of CGFAA compensation awards.

(h) *Mitigation.* FEMA may compensate Claimants for the cost of reasonable and cost-effective efforts incurred on or before August 28, 2003 to mitigate the heightened risks of wildfire, flood or other natural disaster resulting from the Cerro Grande Fire that are consistent with a OCGFC-approved Mitigation Compensation Plan. No more than 15% of the total amount appropriated by Congress for the payment of Cerro Grande fire related claims may be allocated for mitigation compensation under this subsection. Claimants seeking compensation under this provision must file a Notice of Loss under § 295.10 or amend a Notice of Loss previously filed under § 295.33 or § 295.34. The Notice of Loss or amendment must specify that compensation for mitigation is sought. The Notice of Loss must be filed or a proposed amendment under § 295.33 or § 295.34 submitted no later than August 28, 2002. A separate request for mitigation assistance must be filed with OCGFC no later than August 28, 2003. Claimants must construct the mitigation measures for which they have received compensation.

(i) *Subsistence*—(1) *Allowable damages.* FEMA may reimburse an Indian tribe, a Tribal Member or a Household Including Tribal Members for the reasonable cost of replacing Subsistence Resources customarily and traditionally used by the Claimant on or before May 4, 2000, but no longer available to the Claimant as a result of the Cerro Grande Fire. For each category of Subsistence Resources, the Claimant must elect to receive compensatory damages either for the increased cost of obtaining Subsistence Resources from lands not damaged by the Cerro Grande Fire or for the cost of procuring substitute resources in the cash economy. Long-term damage awards will be made in the form of lump sum cash payments to eligible Claimants.

(2) *Proof of subsistence use.* FEMA may consider evidence submitted by Claimants, Indian Tribes and other knowledgeable sources in determining

the nature and extent of a Claimant's subsistence uses.

(3) *Duration of damages.* Compensatory damages for subsistence losses will be paid for the period between May 4, 2000 and the date when Subsistence Resources can reasonably be expected to return to the level of availability that existed before the Cerro Grande Fire. FEMA may rely upon the advice of experts in making this determination.

(j) *Flood insurance.* A Claimant that owned or leased real property in the counties of Los Alamos, Rio Arriba, Sandoval or Santa Fe at the time of the Cerro Grande Fire who was not required by law to maintain flood insurance before the fire and who did not maintain flood insurance before the fire may be reimbursed by FEMA for reasonable flood insurance premiums incurred during the period beginning May 12, 2000 and ending May 12, 2002 on the owned or leased real property. Alternatively, FEMA may provide flood insurance to such Claimants directly through a group or blanket policy.

(k) *Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual Claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from the Cerro Grande Fire and which could not be effectively addressed through no-cost crisis counseling services available in the community. FEMA will not reimburse for treatment rendered after December 31, 2001.

(l) *Donations.* FEMA will compensate individual or business Claimants in the counties of Los Alamos, Rio Arriba, Sandoval and Santa Fe (including those located on pueblos and Indian reservations) for the cost of merchandise, use of equipment or other nonpersonal services, directly or indirectly donated to survivors of the Cerro Grande Fire not later than June 19, 2000. Donations will be valued at cost. FEMA will also compensate businesses located in the counties of Los Alamos, Rio Arriba, Sandoval and Santa Fe (including those located on pueblos and Indian reservations) for discounts offered to fire survivors on goods and services not later than June 19, 2000 provided that actual revenues earned by the business during the period May 1–June 30, 2000 did not exceed reasonable projections for the period and the shortfall between actual revenues and reasonable projections resulted from the Cerro Grande Fire. Compensation will be the difference between the Claimant's established post-fire price for the good or service actually charged to the general public and the post-fire discounted price charged to fire survivors.

(m) *Duplication of benefits.* The CGFAA allows FEMA to compensate Injured Parties only if their damages have not been paid or will not be paid by insurance or a third party.

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

(2) *Coordination with our Public Assistance Program.* Injured Parties eligible for disaster assistance under our Public Assistance Program are expected to apply for all available assistance. Compensation will not be awarded under the CGFAA for:

(i) Emergency costs that are eligible for reimbursement under the Public Assistance Program; or

(ii) Losses that are eligible for repair, restoration or replacement under the Public Assistance Program; or

(iii) Costs or charges determined excessive under the Public Assistance Program.

(3) *Benefits provided by non-governmental organizations and individuals.* Unless otherwise provided by these regulations, disaster relief payments made to a Claimant by a non-governmental organization or an individual, other than wages paid by the Claimant's employer or insurance payments, will be disregarded in evaluating claims and need not be disclosed to OCGFC by Claimants.

(4) *Benefits provided by our Individual Assistance program.* Compensation under the CGFAA will not be awarded

for losses or costs that have been reimbursed under the Individual and Family Grant Program or any other FEMA Individual Assistance Program.

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

Subpart D—Claims Evaluation

§ 295.30 Establishing losses and damages.

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

(b) *Proof of Loss.* All Claimants are required to attest to the nature and extent of each Loss for which compensation is sought in the Proof of Loss. The Proof of Loss, which will be in a form specified by OCGFC, must be signed by the Claimant or the Claimant's legal representative if the Claimant is a not an individual or is an individual who lacks the legal capacity to execute the Proof of Loss. The Proof of Loss must be signed under penalty of perjury and subject to the provisions of 18 U.S.C.1001, which establishes penalties for false statements. Non-subrogation Claimants who filed a Notice of Loss before January 1, 2001 should submit a signed Proof of Loss to OCGFC not later than June 19, 2001. Non-subrogation Claimants who file a Notice of Loss on or after January 1, 2001 should submit a signed Proof of Loss to OCGFC not later than 150 days after the date when the Notice of Loss was submitted. These deadlines may be extended at the discretion of the Director of OCGFC for good cause. If a non-subrogation Claimant fails to submit a signed Proof of Loss within the timeframes set forth in this section and does not obtain an extension from the Director of OCGFC, OCGFC may administratively close the claim and require the Claimant to repay any partial payments made on the claim. Subrogation Claimants will submit the Proof of Loss contemporaneously with filing the Notice of Loss.

(c) *Release and Certification Form.* All Claimants who receive compensation under the CGFAA are required to sign a Release and Certification Form. The Release and Certification Form must be executed by the Claimant or the Claimant's legal representative if the Claimant is an entity or lacks the legal capacity to execute the Release and Certification Form. The Release and Certification Form must be received by OCGFC within 120 days of the date when the Authorized Official's Determination is rendered under § 295.32, or if subsequent proceedings occur under Subpart E of these regulations, not later than 60 days after the date when further review of the decision (if available) is precluded. The United States will not attempt to recover compensatory damages paid to a Claimant who has executed and returned a Release and Certification Form within the periods provided above, except in the case of fraud or misrepresentation by the Claimant or the Claimant's representative, failure of the Claimant to cooperate with an audit as required by § 295.35 or a material mistake by FEMA.

§ 295.31 Reimbursement of claim expenses.

(a) FEMA will reimburse Claimants for the reasonable costs they incur in copying documentation requested by OCGFC. FEMA will also reimburse Claimants for the reasonable costs

they incur in providing appraisals, or other third-party opinions, requested by OCGFC. FEMA will not reimburse Claimant for the cost of appraisals, or other third party opinions, not requested by OCGFC.

(b) FEMA will provide a lump sum payment for incidental expenses incurred in claims preparation to individual and business Claimants that are awarded compensatory damages under the CGFAA after a properly executed Release and Certification Form has been returned to OCGFC. The amount of the lump sum payment will be the greater of $100 or 5% of CGFAA compensatory damages and insurance proceeds recovered by the Claimant for Cerro Grande Fire related losses (not including the lump sum payment or monies reimbursed under the CGFAA for the purchase of flood insurance), but will not exceed $15,000. No more than one lump sum payment will be made to all Claimants in a Household, regardless of whether the Household filed separate or combined Notices of Loss. The following Claimants will not be eligible to receive the lump sum payment: subrogation Claimants and Claimants whose only Cerro Grande Fire related loss is for flood insurance premiums.

§ 295.32 Determination of compensation due to claimant.

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

(b) *Claimant's options upon issuance of the Authorized Official's determination.* Not later than 120 days after the date that appears on the Authorized Official's Determination, the Claimant must either accept the findings by submitting a Release and Certification Form to FEMA or initiate an Administrative Appeal in accordance with § 295.41. The CGFAA requires that Claimants sign the Release and Certification Form to receive payment on their claims (except for partial payments). The Claimant will receive payment of compensation awarded by the Authorized Official after FEMA receives the completed Release and Certification Form. If the Claimant does not either submit a Release and Certification Form to FEMA or initiate an Administrative Appeal no later than 120 Days after the date that appears on the Authorized Official's Determination, he or she will be conclusively presumed to have accepted the Authorized Official's Determination. The Director of OCGFC may modify the deadlines set forth in this subsection at the request of a Claimant for good cause shown.

§ 295.33 Supplementing claims.

A Claimant may amend the Notice of Loss to include additional claims at any time before signing a Proof of Loss. After the Claimant has submitted a Proof of Loss and before submission of the Release and Certification Form, a Claimant may request that the Director of OCGFC consider one or more Losses not addressed in the Proof of Loss. The request must be submitted in writing to the Director of OCGFC and received not later than the deadline for filing an Administrative Appeal under § 295.32 or August 28, 2002, whichever is earlier. It must be supported by the Claimant's explanation of why the Loss was not previously reported. If good cause is found to consider the additional loss, the Director will determine whether compensation is due to the Claimant for the Loss under the Administrative Appeal procedures described in § 295.41.

§ 295.34 Reopening a claim.

(a) The Director of OCGFC may reopen a claim if requested to do so by the Claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if:

(1) The Claimant desires mitigation compensation and the request to reopen is filed not later than August 28, 2003 in accordance with § 295.21(d) or (h); or

(2) The Claimant closed the sale of real property not later than August 28, 2002 and wishes to present a claim for reduction in the value of the real property under § 295.21(e) and the request to

reopen is filed not later than August 28, 2002; or

(3) The Claimant has incurred Replacement Costs under § 295.21(d) in excess of those previously awarded and is not prohibited by the terms of an agreement pertaining to home replacement with OCGFC from requesting that the case be reopened; or

(4) The Director of OCGFC otherwise determines that Claimant has demonstrated good cause.

(b) The Director of OCGFC may establish a deadline by which requests to reopen under paragraphs (a)(3) or (4) of this section must be submitted. The deadline will be published as a notice in the FEDERAL REGISTER and broadly disseminated throughout the communities, pueblos and Indian reservations in Los Alamos, Rio Arriba, Sandoval, and Santa Fe Counties.

§ 295.35 Access to records.

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

§ 295.36 Confidentiality of information.

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

Subpart E—Dispute Resolution

§ 295.40 Scope.

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

§ 295.41 Administrative appeal.

(a) *Notice of appeal.* A Claimant may request that the Director of OCGFC review the Authorized Official's Determination by written request to the Appeals Docket, Office of Cerro Grande Claims, P.O. Box 1480, Los Alamos, NM 87544–1480, postmarked or delivered within 120 Days after the date that appears on the Authorized Official's Determination. The Claimant will submit along with the notice of appeal a statement explaining why the Authorized Official's Determination was incorrect.

(b) *Acknowledgement of appeal.* OCGFC will acknowledge the receipt of appeals that are timely filed. Following the receipt of a timely filed appeal, the Director of OCGFC will obtain the Administrative Record from the Authorized Official and transmit a copy to the Claimant.

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

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

(e) *Obtaining evidence.* The Director of OCGFC may request from the Claimant or from the Authorized Official any additional information that is relevant to the issues posed by the appeal in his or her discretion.

(f) *Conferences.* The Director of OCGFC may schedule a conference to gain a better understanding of the issues or to explore settlement possibilities.

(g) *Hearings.* The Director of OCGFC may exercise the discretion to convene an informal hearing to receive oral testimony from witnesses or experts. The

rules under which hearings will be conducted will be established by the Director of OCGFC. Formal rules of evidence applicable to court proceedings will not be used in hearings under this subsection. Hearings will be transcribed and the transcript will be entered in the Administrative Record.

(h) *Decision on appeal.* After the allotted time for submission of evidence has passed, the Director of OCGFC will close the Administrative Record and render a written decision on the Administrative Appeal. The Director of OCGFC's decision on the Administrative Appeal will constitute the final decision of the Administrator of FEMA under §§ 104(d)(2)(B) and 104(i)(1) of the CGFAA.

(i) *Claimant's options following appeal.* The Claimant's concurrence with the decision in the Administrative Appeal will be conclusively presumed unless the Claimant initiates arbitration in accordance with § 295.42 or seeks judicial review in accordance with § 295.43. If the Claimant concurs with the Director's determination, payment of any additional damages awarded by the Director will be made to the Claimant upon receipt of a properly executed Release and Certification Form.

§ 295.42 Arbitration.

(a) *Initiating arbitration.* A Claimant who is dissatisfied with the outcome of the Administrative Appeal may initiate binding arbitration by submitting a written request for arbitration to the Arbitration Administrator for Cerro Grande Claims, Alternate Dispute Resolution Office, Federal Emergency Management Agency, 500 C Street, SW., room 214, Washington, DC 20472 on a form provided by OCGFC. The written request for arbitration must be received not later than 60 days after the date that appears on the Administrative Appeal decision.

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

(c) *Settlement and mediation alternatives.* At any time after a request for arbitration is filed and before the time a decision is rendered, either party may request in writing that the Alternate Dispute Resolution Office stay further proceedings in the arbitration to facilitate settlement discussions. A mediator may be appointed (if requested by the parties) to facilitate settlement discussions. If both parties concur in the request, the Alternate Dispute Resolution Office will stay the arbitration and appoint a mediator at our expense. The stay may be terminated and the arbitration resumed upon written request of either party to the Alternate Dispute Resolution Office. If the dispute is settled, the Alternate Dispute Resolution Office will issue an order terminating the arbitration and provide the Claimant with a Release and Certification Form.

(d) *Selection of arbitrator.* Arbitrators will be selected from a list of qualified arbitrators who have agreed to serve provided by the Alternate Dispute Resolution Office. If the amount in dispute is $300,000 or less, the arbitration will be decided by one arbitrator selected by the Claimant from the list. If the amount in dispute exceeds $300,000, a panel of three arbitrators selected at random by the Alternate Dispute Resolution Office will decide the arbitration.

(e) *Conduct of arbitration.* The arbitration will be conducted in a manner determined by the arbitrator consistent with guidelines established by the Alternate Dispute Resolution Office. The Alternate Dispute Resolution Office will provide these guidelines upon request.

(f) *Hearings.* The arbitrator may convene a hearing at a location designated by the Alternate Dispute Resolution Office. Whenever possible hearings will be held in Los Alamos, New Mexico unless the parties jointly agree to a different location.

(g) *Decision.* After reviewing the evidence, the arbitrator(s) will render a decision in writing to the Alternate Dispute Resolution Office. The Alternate Dispute Resolution Office will transmit the decision to the Claimant and the Director of OCGFC. If a panel

of three arbitrators conducts the arbitration, at least two of the three arbitrators must sign the decision. The decision will be rendered no later than 10 Days after a hearing is concluded or 60 Days after the arbitration is initiated, whichever is earlier. The Alternate Dispute Resolution Office may extend the time for a decision. The decision will establish the compensation due to the Claimant, if any, and the reasons therefore.

(h) *Action on arbitration decision.* The Alternate Dispute Resolution Office will forward the arbitration decision and a Release and Certification Form to the Claimant. A Claimant who has received or who has been awarded any compensation under the CGFAA must sign and return the Release and Certification Form, regardless of whether any additional compensation is awarded by the arbitration. Additional compensation awarded in the arbitration will be paid to the Claimant after the signed Release and Certification Form is received.

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

(j) *Administration of arbitration.* The Alternate Dispute Resolution Office will serve as arbitration administrator and will conclusively resolve any procedural disputes arising in the course of the arbitration. The Alternate Dispute Resolution Office will pay the fees of the arbitrator and reimburse the arbitrator for arbitration related expenses unless the parties jointly agree otherwise.

§ 295.43 Judicial review.

As an alternative to arbitration, a Claimant dissatisfied with the outcome of an Administrative Appeal may seek judicial review of the decision by bringing a civil lawsuit against FEMA in the United States District Court for the District of New Mexico. This lawsuit must be brought within 60 Days of the date that appears on the Administrative Appeal decision. The court may only consider evidence in the Administrative Record. The court will uphold our decision if it is supported by substantial evidence on the record considered as a whole. If the judge has awarded damages over and above those previously paid, FEMA will cause the damages to be paid to the Claimant upon receipt of the Release and Certification Form or as otherwise specified by order of the court. Claimants who have received any compensation under the CGFAA must return a Release and Certification Form as provided in §295.30(c), regardless of whether the court awards additional compensation.

Subpart F—Glossary

§ 295.50 Definitions.

Administrative Appeal means an appeal of the Authorized Official's Determination to the Director of OCGFC in accordance with the provisions of Subpart E of these regulations.

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

Alternate Dispute Resolution Office means the Office established by FEMA to promote use of Alternative Dispute Resolution as a means of resolving disputes. The address of the Alternate Dispute Resolution Office is Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

Authorized Official means an employee of the United States who is delegated with authority by the Director of OCGFC to render binding determinations on claims and to determine compensation due to Claimants under the CGFAA.

Authorized Official's Determination means a report signed by an Authorized Official and mailed to the Claimant evaluating each element of the claim as stated in the Proof of Loss

and determining the compensation, if any, due to the Claimant.

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

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

Days means calendar days, including weekends and holidays.

Destruction of a Home means destruction or physical damage to a residence or the land upon which it sat, resulting from the Cerro Grande Fire.

Discount to Net Present Value means a reduction of an award for damages arising in the future by making allowance for the fact that such award, if properly invested would earn interest.

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

Household Including Tribal Members means a Household that existed on May 4, 2000, which included one or more Tribal Members as continuous residents.

Indian tribe means an entity listed on the most recent list of federally recognized tribes published in the FEDERAL REGISTER by the Secretary of the Interior pursuant to the Federally Recognized Indian Tribe List Act, 25 U.S.C. 479a, or successor legislation.

Injured Person means an individual, regardless of citizenship or alien status, an Indian tribe, corporation, tribal corporation, partnership, company, association, cooperative, joint venture, limited liability company, estate, trust, county, city, State, school district, special district or other non-Federal entity that suffered Loss resulting from the Cerro Grande Fire and any entity that provided insurance to an Injured Person. The term Injured Person includes an Indian tribe with respect to any claim relating to property or natural resources held in trust for the Indian tribe by the United States. Lenders holding mortgages or security interests on property affected by the Cerro Grande fire and lien holders are not ''Injured Persons'' for purposes of the CGFAA.

Loss means ''injury or loss of property, or personal injury or death,'' as that phrase appears in the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1), and the several categories of ''property loss,'' ''business loss'' or ''financial loss'' set out in the § 104(d) of the CGFAA.

Mitigation Compensation Plan means a written mitigation plan submitted by a local government with land use regulatory authority or by an Indian tribe that recommends specific mitigation measures to reduce the heightened risks of wildfire, flood or other natural hazards resulting from the Cerro Grande Fire or seeks compensation for the cost of such measures expended before August 28, 2000, or both. The Mitigation Compensation Plan may address property specific mitigation measures and community level mitigation measures.

Notice of Loss means a form supplied by OCGFC through which an Injured Person makes a binding, conclusive and irrevocable election to have all Losses resulting from the Cerro Grande Fire reviewed by FEMA for possible compensation under the CGFAA.

Proof of Loss means a statement, signed by a Claimant under penalty of perjury and subject to the provisions of 18 U.S.C.1001 that the claim is true and correct, attesting to the nature and extent of the Claimant's injuries.

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

Replacement Cost means the cost of replacing an item that is damaged or destroyed with an item that is comparable in quality and utility.

Release and Certification Form means a document in the manner prescribed by § 104(e) of the CGFAA that all Claimants who have received or are awarded compensatory damages under the CGFAA must execute and return to OCGFC as required by § 295.30(c).

Subsistence Resources means food and other items obtained through hunting, fishing, firewood and other resource gathering, timbering, grazing or agricultural activities undertaken by the Claimant without financial remuneration.

Tribal Member means an enrolled member of an Indian Tribe.

PART 296—HERMIT'S PEAK/CALF CANYON FIRE ASSISTANCE

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

SOURCE: 88 FR 59777, Aug. 29, 2023, unless otherwise noted.

Subpart A—General

§ 296.1 Purpose.

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

§ 296.2 Policy.

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

§ 296.3 Information and assistance.

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

§ 296.4 Definitions.

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

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