

ACTION: Notice of intent to delete the Delilah Road Landfill Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 2 is issuing a Notice of Intent to Delete the Delilah Road Landfill Superfund Site (Site) located in Egg Harbor Township, New Jersey, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of New Jersey, through the New Jersey Department of Environmental Protection, have determined that all appropriate response actions under CERCLA, have been completed. However, this deletion does not preclude future actions under Superfund.

DATES: Comments must be received by September 10, 2009.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA-HQ-SFUND-2005-0011, by one of the following methods:

- <http://www.regulations.gov>. Follow on-line instructions for submitting comments.
- *E-mail:* loney.natalie@epa.gov.
- *Fax:* [Enter fax number].
- *Mail:* Natalie Loney, Community Involvement Coordinator, U.S. Environmental Protection Agency, 290 Broadway, 26th Floor, New York, New York 10007-1866.
- *Hand delivery:* U.S. Environmental Protection Agency Records Center, Region 2, 290 Broadway, 18th Floor, New York, New York 10007-1866. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA-HQ-SFUND-2005-0011. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov> or e-mail. The <http://www.regulations.gov> Web site is an "anonymous access" system, which

means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket

All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in the hard copy. Publicly available docket materials are available either electronically in <http://www.regulations.gov> or in hard copy at: United States Environmental Protection Agency Region 2 Records Center, 290 Broadway, 18th Floor, New York, NY 10007-1866, Building hours are Monday to Friday 9 a.m.—5 p.m., Telephone number is (212) 637-4308; or The Atlantic County Library, Egg Harbor Township Branch, 1 Swift Avenue, Egg Harbor Township, New Jersey 08234, Building hours are Monday to Thursday 9 a.m. to 8 p.m., Friday and Saturday 9 a.m. to p.m., Telephone number is (609) 927-8664.

FOR FURTHER INFORMATION CONTACT:

Tanya Mitchell, Remedial Project Manager, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 19th Floor, New York, New York 10007-1866, (212) 637-4362, e-mail: mitchell.tanya@epa.gov.

SUPPLEMENTARY INFORMATION:

In the "Rules and Regulations" Section of today's **Federal Register**, we are publishing a direct final Notice of Deletion of Delilah Road Landfill Superfund Site without prior Notice of Intent to Delete because we view this as a noncontroversial revision and anticipate no adverse comment. We have explained our reasons for this

deletion in the preamble to the direct final Notice of Deletion, and those reasons are incorporated herein. If we receive no adverse comment(s) on this deletion action, we will not take further action on this Notice of Intent to Delete. If we receive significant adverse comment(s), we will withdraw the direct final Notice of Deletion, and it will not take effect. We will, as appropriate, address all public comments in a subsequent final Notice of Deletion based on this Notice of Intent to Delete. We will not institute a second comment period on this Notice of Intent to Delete. Any parties interested in commenting must do so at this time.

For additional information, see the direct final Notice of Deletion which is located in the *Rules* section of this **Federal Register**.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601-9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923; 3 CFR, 1987 Comp., p. 193.

Dated: July 27, 2009.

George Pavlou,

Acting Regional Administrator, Region II.

[FR Doc. E9-19065 Filed 8-10-09; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID FEMA-2008-0006]

RIN 1660-AA47

Disaster Assistance; Public Assistance Repetitive Damage

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule implements aspects of the Disaster Mitigation Act of 2000 by reducing the Federal cost share of FEMA Public Assistance to public and certain private nonprofit facilities repetitively damaged in the preceding 10 years by the same type of event and for which required hazard mitigation has not been

implemented. The Federal government should not repetitively reimburse eligible applicants for damage that could be prevented through mitigation efforts. The reduced Federal cost share of the proposed rule is intended to provide an incentive to mitigate repetitive damage, promote measures that reduce future loss to life and property, protect Federal investment in public infrastructure, and help build disaster-resistant communities.

DATES: Submit comments on or before October 13, 2009.

ADDRESSES: You may submit comments, identified by Docket ID FEMA-2008-0006, by one of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: FEMA-RULES@dhs.gov.

Include Docket ID FEMA-2008-0006 in the subject line of the message.

Fax: 703-483-2999.

Mail/Hand Delivery/Courier: Rules Docket Clerk, Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472-3100.

Instructions: All Submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at <http://www.regulations.gov>, and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of <http://www.regulations.gov>.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at <http://www.regulations.gov> and search for Federal Emergency Management Agency docket ID "FEMA-2008-0006." Submitted comments may also be inspected at FEMA, Office of Chief Counsel, Room 835, 500 C Street, SW., Washington, DC 20472-3100.

FOR FURTHER INFORMATION CONTACT: Tod Wells, Acting Director, Public Assistance Division, Federal Emergency Management Agency, 500 C Street, SW., Room 414, Washington, DC 20472-3100, (phone) 202-646-3936; (facsimile) 202-646-3304; or (e-mail) Tod.Wells@dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Each year, disasters strike the United States, including natural events such as

hurricanes, tornadoes, storms, earthquakes, volcanic eruptions, landslides, snowstorms, and droughts and events that occur from various other causes such as fires, floods, and explosions. When a disaster occurs and a locality has responded to the best of its ability and is, or will be, overwhelmed by the magnitude of the damage, the community turns to the State for help. If it is evident that the situation is or will be beyond the combined capabilities of the local and State resources, the Governor may request that the President declare that an emergency or major disaster exists in the State, under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act¹ (Stafford Act).

If an emergency or major disaster is declared, the Federal Emergency Management Agency (FEMA) may award Public Assistance grants to assist State, Tribal, and local governments and certain private nonprofit entities (applicants), as defined in subpart H of 44 CFR part 206, with the response to and recovery from disasters. Specifically, the Public Assistance Program provides assistance for debris removal, emergency protective measures and permanent restoration of infrastructure. To obtain these Public Assistance grants for damaged facilities, the applicants must identify disaster-related damage which is documented on a Project Worksheet (PW), referenced at 44 CFR 206.201(i).

The PW is the basis for Public Assistance grants and FEMA uses the PW to document eligible costs. Federal funding is subject to the cost share provisions established in the Stafford Act (42 U.S.C. 5172(b)), and FEMA-State Agreement (44 CFR 206.47(a)). Typically, the Federal cost share is 75 percent of the eligible costs identified on the PW.

In 2000, the President signed into law the Disaster Mitigation Act of 2000 (DMA 2000), Public Law 106-390, 42 U.S.C. 5121 note. Subsection 205(b) of DMA 2000 amended section 406 of the Stafford Act by adding a new paragraph (b)(2) (42 U.S.C. 5172(b)(2)) which states:

The President shall promulgate regulations to reduce the Federal share of assistance under this section to not less than 25 percent in the case of the repair, restoration, reconstruction, or replacement of any eligible public facility or private nonprofit facility following an event associated with a major disaster—(A) that has been damaged, on more than one occasion within the

preceding 10-year period, by the same type of event; and (B) the owner of which has failed to implement appropriate mitigation measures to address the hazard that caused the damage to the facility.

This cost share reduction adds to existing hazard mitigation authorities under sections 203, 404, and 406 of the Stafford Act.

II. Discussion of the Proposed Rule

In accordance with the amendment to section 406 of the Stafford Act, this proposed rule would reduce the Federal cost share to 25 percent of eligible costs if the applicant has not taken appropriate mitigation measures on a repetitively damaged facility. FEMA identified a number of key issues in drafting this proposed rule. These include: (A) Defining a "facility" as it relates to the new statutory provision; (B) determining when the requirements of the new provision will become effective; (C) determining what qualifies as "more than one occasion;" (D) defining the "same type of event;" (E) determining the amount of the cost share reduction; (F) defining an "appropriate mitigation measure;" and the process for identifying such mitigation measures; and (G) establishing a system to identify repetitively damaged facilities. FEMA discusses each of these issues individually below. FEMA invites comment on each of these issues as well as any other issues the public may find relevant.

A. Definition of "Facility"

FEMA proposes to use the existing definition of a "facility" in 44 CFR 206.201(c). The existing definition states: "Facility means any publicly or privately owned building, works, system, or equipment, built or manufactured, or an improved and maintained natural feature. Land used for agricultural purposes is not a facility." Using the existing definition of "facility" in 44 CFR 206.201(c) will eliminate any potential confusion caused by a separate definition for the application of this rule and ensure programmatic consistency.

B. When Will the Requirements Become Effective?

FEMA would begin the process of counting events for eligible damaged facilities only after it issues an effective rule. While one might argue that FEMA should have begun tracking such events upon the enactment of the DMA 2000, FEMA proposes not to begin that process until it issues an effective rule, in order to give applicants ample time to implement appropriate mitigation

¹ Disaster Relief Act of 1974, Public Law 93-288, 88 Stat. 143 (May 22, 1974), as amended 42 U.S.C. 5121 *et seq.*

measures. FEMA believes this process is further justified because this proposed rule is still subject to change based upon public comments received.

C. Definition of "More Than One Occasion"

FEMA would reduce the Federal cost share upon the third occurrence of damage to an eligible facility. In drafting the proposed rule, FEMA contemplated reducing the Federal cost share upon the second damaging event. However, the Stafford Act states that the reduction in benefits can only occur to a facility "that has been damaged, on more than one occasion." A facility that is damaged on "more than one occasion" has suffered damage at least twice. Therefore, the benefit reduction would have to occur on or after the third occasion. Consistent with the statutory language, FEMA would reduce Federal assistance upon the third occurrence of the "same type of event."

D. Definition of "Same Type of Event"

Another issue that FEMA addressed is the definition of the "same type of event" that will trigger the cost share reduction mandates. FEMA considered how precisely the term "event" should be defined. The proposed rule defines "same type of event" as one that is the same major disaster type (e.g., hurricane, tornado, flood, or earthquake). FEMA documents the major disaster type on every PW. By defining "same type of event" by major disaster type, FEMA can easily track and ensure consistent application of the proposed rule. For example, if a facility was damaged by a hurricane three times in a 10-year period, the facility would be considered a repetitively damaged facility. However, to trigger the cost share reduction under this rule, the applicant must have been required, and failed to take, "appropriate mitigation measures," which are discussed below. "Appropriate mitigation measures" would address the type of damage that the facility sustained.

The new cost share reduction provision of the Stafford Act does not contain a damage threshold amount below which this provision does not apply. However, in situations where eligible facilities sustain less than \$1,000 in damages during a major disaster, the damage is not eligible for FEMA assistance. See 44 CFR 206.202(d)(2). Therefore, FEMA would not consider the event that resulted in damage in an amount less than \$1,000 as an "event" for the purposes of implementation of the new statutory provision. Similarly, under the proposed rule if an eligible applicant

elects to pay 100 percent of the costs to repair a particular facility and those costs would otherwise have been eligible for FEMA assistance, FEMA would not count the disaster as an "event" with regard to that particular facility.

E. Determining Amount of Cost Share Reduction

This proposed rule also describes how FEMA proposes to calculate the cost share reduction. FEMA must define how it will "reduce the Federal share of assistance under this section to not less than 25 percent" of eligible costs for facilities that have been damaged repetitively and whose owners have not implemented appropriate hazard mitigation measures. Rather than imposing a cost share reduction on a gradual basis, the proposed rule imposes a cost share reduction to 25 percent of eligible costs immediately upon the occurrence of the third event.

FEMA drafted the proposed rule to effect a direct reduction in cost share from no less than 75 percent to 25 percent; i.e., FEMA would not make any variable cost share between 75 and 25 percent. FEMA reasoned that this is consistent with the Congressional desire that this type of concern be addressed aggressively and independent of FEMA's other hazard mitigation authorities. FEMA concluded that a "sliding" scale would subject FEMA to routine cost share negotiations and appeals whenever a facility met the repetitive loss criteria, and that the development of lengthy criteria to detail exactly how and when the sliding reduction would occur, as well as a resulting complex rule that would be difficult to implement consistently, would place undue administrative burdens on disaster assistance applicants and on FEMA. FEMA also considered a stepped cost share reduction, e.g., 75 percent \Rightarrow 50 percent \Rightarrow 25 percent, but concluded that this option would not result in mitigation against future losses as quickly as going directly to a 25 percent reduction immediately upon the third event. FEMA notes that Congress set 25 percent as the most stringent reduction and thus FEMA concludes that going directly to that percentage reduction is the most effective means to meet the objective of the statute, absent use of a sliding scale or stepped cost share reduction. Therefore, this proposed rule implements the 25 percent reduction immediately upon the third event.

F. Definition of Appropriate Mitigation Measures

In drafting this proposed rule, FEMA also considered the definition of the statutory language "appropriate mitigation measures" for the purpose of implementing the amendment to section 406 of the Stafford Act, (42 U.S.C. 5172(b)(2)). Sections 203, 322, 404, and 406 of the Stafford Act and their implementing regulations such as 44 CFR 201.2, 206.2, 206.111, 206.117, and 206.431 currently reference "hazard mitigation measures," "eligible hazard mitigation measures," "hazard mitigation measures that are cost effective," and "hazard mitigation criteria required by the President." However, the new provision of the Stafford Act, 42 U.S.C. 5172(b)(2), contains the first reference within the Stafford Act to "appropriate mitigation measures" and there is no legislative history that clarifies the meaning of this new statutory language.

In the proposed rule FEMA has defined "appropriate mitigation measures" using the same definition as "hazard mitigation" which is defined in 44 CFR 206.2(a)(14). Section 206.2(a)(14) defines "hazard mitigation" as: "Any cost effective measure which will reduce the potential for damage to a facility from a disaster event." FEMA's policy to determine cost-effectiveness under the Public Assistance program includes mitigation measures that amount up to 15 percent of the total eligible cost of the eligible repair work on a particular project, certain mitigation measures that FEMA has pre-determined cost-effective, and an acceptable benefit/cost analysis methodology. See FEMA Public Assistance Guide FEMA 322 (June 2007), Disaster Assistance Policy 9526.1, "Hazard Mitigation Funding Under Section 406 (Stafford Act)" (available at: http://www.fema.gov/government/grant/pa/9526_1.shtm). The eligibility of hazard mitigation for Public Assistance applicants is further addressed in 44 CFR 206.226. In approving grant assistance for restoration of facilities, FEMA may require cost effective hazard mitigation measures not required by applicable standards pursuant to 44 CFR 206.226(e). Defining "appropriate mitigation measures" with the same criteria as "hazard mitigation" ensures a more consistent evaluation for determining required mitigation.

The applicant would have to perform the appropriate mitigation measure on the damaged component of the facility. The appropriate mitigation should be for the type of damage sustained (wind,

water, etc.). For example, if a roof was damaged by wind, FEMA may require mitigation against wind damage to the roof rather than requiring mitigation against fire or water damage to the roof.

FEMA examined several options for determining appropriate mitigation measures for a facility. FEMA considered linking an “appropriate mitigation measure” to compliance with current, local building codes applicable to certain hazards, such as earthquakes. However, such a definition would not be adequate for all hazards, such as floods, affecting all disaster-prone communities in the United States.

FEMA also considered defining “appropriate mitigation measures” in terms of probabilities, *e.g.*, measures designed to reduce the likelihood of damage from the flood event with a 1-percent annual chance of occurrence. However, one general probabilistic-based design may not work for all hazard scenarios. FEMA deemed this approach problematic for a number of reasons. First, these probabilistic design standards may have conflicted with local codes and design standards. Second, in some cases these probabilistic-based designs may have exacerbated the hazard that they were intended to mitigate. For example, culverts for storm drainage which handle intermittent flows are, in most cases, designed to handle significantly less than the 1-percent annual chance of a storm event; sizing them to handle the 1-percent flood flow would tend to increase downstream flood flows and increase costs and environmental impacts. Third, a probabilistic-based design standard for “appropriate mitigation measures” could result in inconsistencies with the State, Local and Indian Tribal Mitigation Plans required by section 322 of the Stafford Act, as well as inconsistencies in application because such a probabilistic design would require FEMA to approve the mitigation measures on a case-by-case basis.

Under section 322 of the Stafford Act and 44 CFR 201.4 and 201.7, a State or Indian Tribal government acting as a Grantee must have, at a minimum, a FEMA approved Standard State or Tribal Mitigation Plan in effect to receive certain types of non-emergency assistance under the Stafford Act. Under section 322 of the Stafford Act and 44 CFR 201.4, a local or Indian Tribal government must have an approved local or Indian Tribal plan in effect to receive assistance under the Hazard Mitigation Grant Program (HMGP). Since FEMA believes that it is important for its hazard mitigation programs to complement one another, FEMA

proposes to require that any appropriate mitigation measure for an eligible facility be consistent with the State Mitigation Plan or Tribal Mitigation Plan, if the Indian Tribal government is the Grantee, as described at 44 CFR 201.4 through 44 CFR 201.6.

State Mitigation Plans provide general mitigation planning guidelines for mitigation measures throughout the State, while Local and/or Indian Tribal Mitigation Plans provide more specific criterion for appropriate mitigation measures for a facility. FEMA was concerned that, in the absence of a Local and/or Indian Tribal Mitigation Plan for a designated area, the State Mitigation Plan would not provide sufficient guidance regarding appropriate mitigation measures for a facility. FEMA considered requiring revision to, or creation of, a Local and/or Indian Tribal Mitigation Plan should a specific appropriate mitigation measure not be specified for a facility; however, the time required to do so could cause unacceptable delays in providing appropriate mitigation to the facility. Further, State Mitigation Plans as described under 44 CFR 201.4 already require the State to coordinate mitigation measures with Local or Tribal Mitigation Plans, where they exist.

G. Identifying Repetitively Damaged Facilities

To implement the proposed requirements in this rulemaking, FEMA needs to collect repetitive loss information. FEMA would track the history of the provision of disaster assistance following Presidentially-declared major disasters by applicant and facility through the use of its National Emergency Management Information System (NEMIS)/ Emergency Management Mission Integrated Environment (EMMIE) computer program and database in which all PW's are stored. FEMA would use the latitude and longitude documented on the PW and entered into NEMIS/EMMIE for the damaged facility to track repetitively damaged facilities. Tracking and recording this information in NEMIS/EMMIE would assist FEMA in correctly and consistently interpreting the requirements in this proposed rule, and if the Federal cost share is reduced it would serve as essential documentation for resolving appeals that may follow.

III. Regulatory Analysis

A. National Environmental Policy Act (NEPA)

The National Environmental Policy Act of 1969 (NEPA), Public Law 91–190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*), as amended, requires that agencies consider environmental impacts in their decision-making. Specifically, NEPA requires agencies to prepare an Environmental Impact Statement (EIS) for “major federal actions significantly affecting the quality of the human environment.” If an action may or may not have a significant impact, the agency must prepare an Environmental Assessment (EA). If, as a result of this study, the agency makes a Finding of No Significant Impact (FONSI), no further action is necessary. If the action will have a significant effect, the agency uses the EA to develop an EIS.

Pursuant to 44 CFR 10.8(c)(2), action taken or assistance provided under sections 402, 403, 407, or 502 of the Stafford Act and action taken or assistance provided under section 406 of the Stafford Act that has the effect of restoring facilities substantially as they existed before a major disaster or emergency are statutorily excluded from NEPA and the preparation of environmental impact statements and environmental assessments by section 316 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), as amended, 42 U.S.C. 5159. Also, 44 CFR 10.8(d)(2)(xix) excludes hazard mitigation activities under the Stafford Act, and 44 CFR 10.8(d)(2)(ii) excludes the preparation, revision and adoption of regulations from the preparation of an EA or EIS where the rule relates to actions that qualify for categorical exclusions, FEMA has determined that this proposed rule is categorically excluded from the preparation of an EA or an EIS. Further, the changes proposed by this rule are administrative changes to the Public Assistance program that would have no effect on the environment. *See* 44 CFR 10.8(d)(1).

B. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA) Public Law 104–33 (44 U.S.C. 3501 *et seq.*), as amended, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number. This rulemaking involves the reduction in Federal assistance for public or private nonprofit facilities repetitively damaged by the same type of disaster when the

owner has failed to take appropriate mitigation measures. To identify repetitively damaged facilities, FEMA must be able to track damaged facilities.

In order to accurately record damaged facilities and, therefore, track repetitively damaged facilities, FEMA would use the latitude and longitude for the damaged facility. FEMA already collects the latitude and longitude of facilities on the PW and enters the latitude and longitude into NEMIS/EMMIE. The PW instructions currently require the latitude and longitude for all damaged facilities. The PW instructions fall under OMB Collection No. 1660-0017 "Project Worksheets and Continuation Forms" which expires December 31, 2011. There would be no additional burden to the approved collection as a result of the changes proposed in this rule.

C. Executive Order 12866, Regulatory Planning and Review

FEMA has prepared and reviewed this rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, a significant regulatory action is subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

This proposed rule does not meet the criteria under paragraph 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 proposed rule has not been reviewed by OMB.

As authorized by DMA 2000, this proposed rule would reduce the Federal cost share to 25 percent for eligible Public Assistance cost to repair, restore, reconstruct or replace an eligible public

facility or private nonprofit facility that has been damaged twice within the preceding 10 years by the same type of event and the owner of the facility has not implemented appropriate mitigation measures before the third event of the same type. The proposed rule would not affect the Public Assistance eligibility requirements. Further, the proposed rule would only affect public facilities and eligible private nonprofit facilities. It would not affect grants made under the Individual Assistance program.

The statutory mandate imposed upon FEMA required the agency to reduce the Federal share to "not less than 25 percent" of eligible costs, and did not specifically mandate that FEMA establish the 25 percent rate chosen in this rule. Rather than imposing a cost share reduction on a gradual basis, the proposed rule imposes a cost share reduction to 25 percent of eligible costs immediately upon the occurrence of the third event. Developing objective criteria for an incremental cost share reduction from 75 percent to 25 percent (perhaps with a median reduction at 50 percent) would likely result in a complex rule that FEMA could not implement consistently without placing additional administrative burdens on disaster assistance applicants, as well as an undue burden on FEMA to develop and administer such a rule. Therefore, this proposed rule would implement the full 25 percent reduction immediately upon the third event.

FEMA cannot predict with certainty the future number of major disasters that will affect the nation in a given year or the number of facilities that will be repetitively damaged from those disasters. However, between January 1, 1998, and January 1, 2008, there was an average of 54 major disaster declarations made per year. Out of the approximately 88,060 Public Assistance applicants in the past 10 years, FEMA identified 1,756 of those applicants that suffered similar damage within the same damage category at least twice in that time period. These applicants would have, if this proposed rule had been in effect, undertaken mitigation efforts or risk a reduced cost share percentage should a disaster of the same type damage their facility a third time within 10 years of the first of those two disasters. This figure only amounts to 2 percent of all Public Assistance applicants. The total eligible cost for these 1,756 Public Assistance applicants was \$1.32 billion (in 2008 dollars)² over the past 10 years,

which amounts to approximately \$132 million per year.

Under section 406 of the Stafford Act, 42 U.S.C. 5172(b)(1), the Federal share could not be less than 75 percent of eligible costs. Under the terms of this proposed rule which would implement the new paragraph 42 U.S.C. 5172(b)(2), if applicants failed to implement appropriate mitigation measures for these repetitively damaged facilities, the percentage of the Federal share would be reduced to 25 percent. Taking a conservative estimate and assuming that all 1,756 applicants failed to implement appropriate mitigation measures, the cost implication would be as follows: 75 percent of the eligible costs of \$132 million is \$99 million and 25 percent of \$132 million is \$33 million, so the potential reduction in Federal assistance would be approximately \$66 million annually based on an analysis of the period January 1, 1998 through January 1, 2008.

Under the proposed rule, to be eligible for the full Federal cost share an applicant must implement required hazard mitigation measures prior to the third event of the same type. The required hazard mitigation will vary from facility to facility. However, typical mitigation measures include, but are not limited to, the relocation out of hazardous locations, slope stabilization, protection from high winds (shutters, hurricane clips, anchors), flood proofing of buildings (elevation, use of flood-resistant materials), flood protection of bridges and culverts (use clear spans instead of multiple spans, riprap), protecting against seismic changes (bracing, anchoring), and the protection of utilities (anchoring, use of disaster-resistant materials, elevation). In general, appropriate mitigation measures should be cost-effective.

The cost to mitigate these facilities may be eligible for the HMGP, so States, local and/or Tribal governments and some private nonprofit entities may be able to seek Federal funds to offset the cost of mitigation efforts. Although this proposed regulation would not affect the HMGP, additional information regarding the program may be found in FEMA's regulations in 44 CFR parts 78, 201, and 206 and at <http://www.fema.gov/government/grant/hmgp/index.shtm>.

This proposed rule could potentially have an impact of approximately \$66 million per year. As a benefit, this reduced Federal cost share would provide an incentive to mitigate repetitive damage. Mitigation focuses on breaking the cycle of disaster damage, reconstruction, and repeated damage. Mitigation efforts provide value to the

²Data were adjusted for inflation based on Consumer Price Index (CPI) published by the Bureau of Labor Statistics (BLS).

American people by creating safer communities and reducing loss of life and property, enabling communities to recover more rapidly from disasters, and lessening the financial impact of disasters on individuals, the Treasury, State, local and Tribal communities.

D. Executive Order 13132, Federalism

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States and, to the extent practicable, must consult with State and local officials before implementing any such action.

FEMA has reviewed the proposed rule under Executive Order 13132 and has concluded that the proposed rule, which implements statutory requirements, does not have federalism implications as defined by Executive Order 13132. FEMA has determined that the 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. This rulemaking amends a voluntary grant program that may be used by State, local and Tribal governments and eligible private nonprofit organizations to receive Federal grants to assist in the recovery from disasters. States are not required to seek grant funding, and this rulemaking does not limit their policymaking discretion. In addition, FEMA actively encourages and solicits comments on this proposed rule from interested parties.

E. Executive Order 12898, Environmental Justice

Under Executive Order 12898, as amended "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" (59 FR 7629, Feb. 16, 1994), FEMA has undertaken to incorporate environmental justice into its policies and programs. Executive Order 12898 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, denying persons the benefit of, or subjecting persons to discrimination because of their race, color, or national origin or income level.

The purpose of this rule is to reduce the Federal cost share for repetitively damaged facilities where the owner of the facility has not implemented appropriate mitigation measures. This reduced Federal cost share would provide an incentive to mitigate future damage. Mitigation focuses on breaking the cycle of repeated disaster damage. Mitigation efforts provide value to the American people by creating safer communities and reducing loss of life and property, enables communities to recover more rapidly from disasters, and lessens the financial impact of disasters on individuals, the United States Department of the Treasury, State, local and Tribal communities.

No action that FEMA can anticipate under the proposed rule will have a disproportionately high and adverse human health or environmental effect on any segment of the population. In accordance with Congressional mandates, the proposed rule implements the Federal cost share reduction for repetitively damaged facilities. Accordingly, the requirements of Executive Order 12898 do not apply to this proposed rule.

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

FEMA has reviewed this proposed rule under Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, Nov. 9, 2000). Under Executive Order 13175, FEMA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute. In reviewing the proposed rule, FEMA finds that because Indian Tribal governments are potentially eligible applicants under the Public Assistance program, the proposed rule does have "tribal implications" as defined in the Executive Order. The implications of the proposed rule, however, will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The proposed 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.

Furthermore, this regulatory change is required by statute. This proposed regulation would implement an amendment to 42 U.S.C. 5172(b), which mandates a reduction in the percentage of Federal funding provided after a public or private nonprofit facility has been damaged more than once within the preceding 10 years by the same type of event and the owner of the facility has not implemented appropriate mitigation measures before the third event of the same type.

G. Regulatory Flexibility Act Statement

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612) and section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 847, 858–9 (March 29, 1996) (5 U.S.C. 601 note)), agencies must consider the impact of their rulemakings on "small entities" (small businesses, small organizations and local governments). The RFA applies to any proposed rulemaking subject to notice and comment under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553). The RFA 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.

FEMA used 2000 U.S. Census Bureau data to identify actual Public Assistance applicants that under the RFA could be considered small entities. FEMA identified 920 Public Assistance applicants with populations of 50,000 or less that suffered similar damage within the same damage category twice over the past 10 years. Therefore, these 920 Public Assistance applicants could be considered small entities under the RFA and could potentially meet the definition of repetitively damaged facilities if their facility is damaged a third time within that 10-year period. Out of the 920 Public Assistance applicants that are considered small entities, 914 are small governmental jurisdictions and 6 are private nonprofit (PNP) organizations. These 920 small entities amount to approximately 52 percent of the total 1,756 applicants that suffered similar damage at least twice over the past 10 years.

Assuming that all 920 Public Assistance applicants failed to implement required hazard mitigation and suffered damage a third time, so that they meet the definition of a repetitively damaged facility, this would only amount to one percent of all Public Assistance applicants. The total eligible cost was \$429.32 million (in 2008

dollars)³ for these 920 applicants over the past 10 years. This equals an annual average of approximately \$42.93 million.

Under the terms of this proposed rule, if applicants failed to implement required hazard mitigation for these repetitively damaged facilities, FEMA would reduce the percentage of the Federal cost share to 25 percent. Under section 406 of the Stafford Act, 42 U.S.C. 5172(b)(1), the Federal share could not be less than 75 percent of eligible costs. Since 75 percent of \$42.93 million is \$32.20 million and 25 percent of \$42.93 million is \$10.73 million, the potential reduction would be \$21.47 million in Federal assistance each year. As a result, the average impact to these 920 applicants is \$23,337 per year (= 21,470,000/920).

FEMA measured the annual impact of this rule on each of these 914 small governmental jurisdictions⁴ based on the estimated reduction in Federal assistance and annual revenues. Annual revenues for these 914 small governmental jurisdictions were estimated from the per capita revenue for local governments by State.⁵ For example, the total revenue for all local governments in Alabama in 2005–06 was \$18.41 billion (in 2008 dollars) and the population is 4.66 million, resulting in the per capita revenue of \$3,951. Therefore, annual revenue for a small governmental jurisdiction in Alabama with a population size of 500 is estimated approximately at \$1.98 million (= \$3,951 × 500). FEMA compared the estimated reduction in Federal assistance with the estimated annual revenue for each of these 914 small governmental jurisdictions. Out of these 914 small governmental jurisdictions, only 19 (or 2 percent) are expected to have an impact higher than 1 percent of their annual revenues. Consequently, FEMA certifies that there is no significant economic impact on a substantial number of small entities.

H. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, 109 Stat. 48 (March 22, 1995) (2 U.S.C. 1501 *et seq.*), 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 proposed rule is not an unfunded Federal mandate under that Act.

I. 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” (61 FR 4729, Feb. 7, 1996), to minimize litigation, eliminate ambiguity, and reduce burden.

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

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

K. Congressional Review of Agency Rulemaking

FEMA will send this rule to Congress and to the Government Accountability Office under the Congressional Review of Agency Rulemaking Act (Congressional Review Act), Public Law 104–121, 110 Stat. 873 (March 29, 1996) (5 U.S.C. 804) before it is effective. This proposed rule is not a “major rule” within the meaning of the Congressional Review Act. This rulemaking would not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, nor would it 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.

List of Subjects in 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.

For the reasons stated in the preamble, the Federal Emergency Management Agency proposes to amend 44 CFR part 206 as follows:

1. The authority citation of Part 206 is revised to read as follows:

Authority: 42 U.S.C. 5121 through 5207; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; 6 U.S.C. 101; EO 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.

In § 206.226, add a new paragraph (l) to read as follows:

§ 206.226 Restoration of damaged facilities.

* * * * *

(l) *Repetitively damaged facilities.* A repetitively damaged facility is an eligible facility that has suffered damage from the same type of event for which Public Assistance has been approved twice within the past 10 years. If appropriate mitigation measures, required pursuant to paragraph (e) of this section, have not been made to the facility before a third event of the same type, the Federal share of eligible repair costs is 25 percent.

(1) “Appropriate mitigation measures” has the same meaning as “hazard mitigation” which is defined in § 206.2(a)(14). The appropriate mitigation measures for the facility must be consistent with the mitigation strategy identified in the State Mitigation Plan described in § 201.4 of this chapter, or the Tribal Mitigation Plan, if the Indian Tribal government is the Grantee as described in § 201.7 of this chapter.

(2) The 25 percent Federal cost share will not be applied to a facility that is damaged before the deadline to complete approved mitigation work in accordance with § 206.204(c) and (d).

(3) “Same type of event” means the same major disaster type, including but not limited to hurricane, tornado, flood, or earthquake.

(4) Damage to an eligible facility will not be counted as a repetitive damage “event” for that particular facility if the eligible applicant elects to pay 100 percent of the costs to repair the facility, or the facility sustains less than \$1,000 in damage from the disaster event.

(5) Events will be counted toward repetitive status after [DATE 30 DAYS AFTER DATE OF PUBLICATION OF

³Data were adjusted for inflation based on the Consumer Price Index (CPI) published by the Bureau of Labor Statistics (BLS).

⁴The 6 PNP organizations were not included as their annual revenues cannot be estimated.

⁵U.S. Census Bureau (2009), State and Local Government Finance, <http://ftp2.census.gov/govs/estimate/06slsstab1a.xls>.

THE FINAL RULE IN THE FEDERAL REGISTER].

Dated: August 4, 2009.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. E9-19156 Filed 8-10-09; 8:45 am]

BILLING CODE 9111-23-P

DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 2, 4, 12, 39, and 52**

[FAR Case 2008-019; Docket 2009-0018; Sequence 2]

RIN 9000-AL11

Federal Acquisition Regulation; FAR Case 2008-019, Authentic Information Technology Products

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Advanced Notice of Proposed Rulemaking; notice of public meeting.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are hosting a public meeting to continue a dialogue with industry and Government agencies about ways to develop greater assurance around information technology (IT) products acquired by the Government. The public meeting will include dialogues on the impact of counterfeit IT products on matters of performance and security; contractor liability and consequential damages; the competition aspects of procuring IT products from the original manufacturer or authorized distributors; viable means of representing authenticity of IT products; and contractor supply chain risk management requirements as an evaluation factor in the procurement of IT products.

DATES: August 13, 2009, 9 a.m. to 2 p.m. EST.

ADDRESSES: See **SUPPLEMENTARY INFORMATION** section for public meeting address.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR case 2008-019.

SUPPLEMENTARY INFORMATION:**A. Public Meeting Address**

The meeting will be held at the General Services Administration (GSA), 1800 F Street, NW, Washington, DC 20405. The meeting will be held in the GSA Auditorium.

Interested parties are encouraged to arrive at least 30 minutes early to accommodate security procedures.

If you wish to make a presentation on any of the topics, please contact and submit a copy of your presentation prior to the meeting, to the General Services Administration, Contract Policy Division (VPC), 1800 F Street, NW, Room 4040, Attn: Ernest Woodson, Washington, DC 20405. Telephone: 202-501-3775.

Submit electronic materials via e-mail to ernest.woodson@gsa.gov. Please submit presentations only and cite Public Meeting IT Products Continued Dialogue in all correspondence related to the public meeting. The submitted presentations will be the only record of the public meeting.

Call-in Information: Parties interested in participating by phone may dial (877) 924-8049, passcode 5363978. Interested parties calling in will not be allowed to present or participate in the question and answer session during a public meeting. Phone lines have been reserved for the first 100 callers.

Special Accommodations: The public meeting is physically accessible to people with disabilities. Request for sign language interpretation or other auxiliary aids should be directed to Ernest Woodson, at 202-501-3775, at least 2-working days prior to the meeting date.

B. Background

On December 11, 2008, the Councils conducted a public meeting (see **Federal Register** notice at 73 FR 68373-68375 on November 18, 2008) to seek comments from both Government and industry, on among other things, whether the Federal Acquisition Regulation (FAR) should be revised to include a requirement that contractors selling IT products (including computer hardware and software) represent that such products are authentic. The Councils were interested in comments regarding contractor liability if IT products sold to the Government by contractor are not authentic, and whether contractors who are resellers or distributors of computer hardware and software should represent to the Government that they are authorized by the original equipment manufacturer (OEM) to sell IT products to the

Government. The comment period closed January 20, 2009.

While comments received will be considered in the preparation of a proposed rule, the public meeting contemplated by this notice and those conducted June 23, July 15 and 22, 2009 (see **Federal Register** notice at 74 FR 26646-26647 on June 3, 2009), will continue a dialogue with industry and Government agencies on the impact of counterfeit IT products on matters of performance and security; contractor liability and consequential damages; the competition aspects of procuring IT products from the original or authorized distributors; viable means of representing authenticity of IT products; and contractor supply chain risk management requirements as an evaluation factor in the procurement of IT products.

The public meeting is intended to provide for an exchange of information and ideas that may be used to assist in developing greater assurance around information technology products acquired by the Government. While the focus of this notice is IT products, public meeting comments/presentations are invited on (1) whether the measures proposed herein should be expanded to include other items sold to the Government, such as Electrical, Electronic, and Electromechanical parts; (2) whether the rule should apply when IT is a component of a system or assembled product; and (3) whether vendors, distributors, and manufacturers of IT products and other items sold to the Government should be prequalified based on specific standards of testing, quality, traceability, integrity, and etc., before they are allowed to sell to the Government.

The Councils are particularly interested in hearing how industry participants can maintain the integrity of the supply chain while providing Government customers with a variety of cost effective and reliable sources. Previous meetings initiated discussion of how various trade associations and other representative groups could propose to police member organizations or provide some auditable certification or declaration program that provides Government customers with uniform, reasonable assurance that purchased products and subcomponents are not counterfeit.

List of Subjects in 48 CFR Parts 2, 4, 12, 39, and 52

Government procurement.