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FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Parts 201 and 206

RIN 3067-AD22

Hazard Mitigation Planning and Hazard Mitigation Grant Program

AGENCY: Federal Emergency Management Agency.

ACTION: Interim final rule.

SUMMARY: This rule extends the date by which State and local governments must develop mitigation plans as a condition of grant assistance in compliance with 44 CFR Part 201. The regulations in Part 201 outline the requirements for State and local mitigation plans, which must be completed by November 1, 2003 in order to continue to receive FEMA grant assistance. This interim final rule extends that date to November 1, 2004.

DATES: Effective Date: October 1, 2002.

Comment Date: We will accept written comments through December 2, 2002.

ADDRESSES: Please send written comments to the Rules Docket Clerk, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street, SW., room 840, Washington, DC 20472, (facsimile) 202-646-4536, or (e-mail) rules@fema.gov.

FOR FURTHER INFORMATION CONTACT: Terry Baker, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC, 20472, 202-646-4648, (facsimile) 202-646-3104, or (e-mail) terry.baker@fema.gov.

SUPPLEMENTARY INFORMATION:

Introduction

Throughout the preamble and the rule the terms ``we'', ``our'' and ``us'' refer to FEMA.

On February 26, 2002, FEMA published an interim final rule implementing Section 322 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act or the Act), 42 U.S.C. 5165, enacted under Sec. 104 of the Disaster Mitigation Act of 2000, (DMA 2000) Pub. L. 106-390. This identified the requirements for State and local mitigation plans necessary for FEMA assistance. The critical portion of the current interim final rule being published extends the date that the planning requirements take effect. The date is being modified from November 1, 2003 to November 1, 2004 for all programs except the Pre-Disaster Mitigation (PDM) program.

The date that local mitigation plans will be required for the PDM program as a condition of "brick and mortar" project grant funding will continue to be November 1, 2003. Our objective is to encourage the use of the PDM program to develop State and local mitigation plans that will meet the criteria for all of our mitigation programs. The initial implementation of the PDM program allows States to prioritize the funding towards the development of mitigation plans in their most high-risk communities, positioning them to be eligible for project grant funding when it becomes available. The PDM program will benefit from the experiences in the Flood Mitigation Assistance (FMA) program, which has had a planning requirement for many years. States often prioritize FMA planning funds to a community in one year, with the implementation of the project occurring after the appropriate planning has been completed.

We received many thoughtful comments on much of the rule, and we intend to address them all prior to finalizing the rule. However, the overwhelming number of comments regarding the effective date for the new planning requirements on both the State and local governments indicated to us a need to extend that date. This new interim final rule will address this issue, and clarify the planning requirement for the recently published Fire Management Assistance Grant Program final rule.

Since publication of the interim final rule, it became clear to us that, in some cases, there was a need to extend the effective date of the planning requirement to allow more time for plan development. An additional year will allow State, tribal, and local governments time to identify necessary resources, establish support for the planning process, and develop meaningful mitigation plans. Legislative sessions, which in some cases may be once every two years, may be necessary to obtain funding for plan development and/or adoption of the plan prior to submittal to FEMA. Many State and local fiscal years run from July through June, and budget requests must be made months prior to the beginning of the fiscal year. This has made it difficult for many jurisdictions to begin the planning process. Our intention in extending the date is to allow for more thoughtful and comprehensive development of plans and implementation of this regulation. Nearly all of those commenting on the rule recognize the importance of planning. The generally accepted model is that good mitigation happens when good mitigation plans are the basis for the actions taken.

Even though we are extending the date for meeting the planning requirements, we encourage States and localities to continue to work on getting plans developed and approved as soon as feasible, and not to wait until the deadline to begin the process. It is important to note that although there is no deadline for approval of Enhanced State Mitigation Plans in order to qualify for the 20 percent HMPG funding, it will only be available to States if the plan is approved prior to a disaster declaration.

Although many comments addressed the need to extend the deadline, only a few provided specific alternative dates. We received several comments requesting a phased approach to the deadline for

communities based on general risk levels or the priorities identified in a State plan. At this point, FEMA is not considering any option for a phased approach to the timeline since we believe that it would make this requirement too difficult to administer, for both States and FEMA. We believe that the one-year extension for the HMGP will address most of the concerns regarding the effective date of the planning requirements.

We have also received some questions regarding the relationship of the planning requirements of the Fire Management Assistance Grant Program to the plans developed under 44 CFR part 201. A Standard or Enhanced State Mitigation plan, which includes an evaluation of wildfire risk and mitigation, as identified in 44 CFR part 201 will meet the planning requirement of the Fire Management Assistance Grant Program. Until States develop and have either of those plans approved by FEMA, States must comply with the fire management planning requirement as stated in 44 CFR part 204 by ensuring that there is a fire component to the existing State Mitigation Plan or a separate wildfire mitigation plan.

Finally, we would like to clarify that for grants awarded under any hazard mitigation program prior to October 30, 2000 for the purpose of developing or updating a hazard mitigation plan, we will not provide an increase in funding or extensions for changes in the scope of work for purposes of meeting the enhanced state plan criteria, since the enhanced plan concept did not exist prior to the Disaster Mitigation Act of 2000, enacted on that date.

We encourage comments on this interim final rule, and we will make every effort to involve all interested parties, including those who commented on the original interim final planning rule, prior to the development of the Final Rule.

Justification for Interim Final Rule

In general, FEMA publishes a rule for public comment before issuing a final rule, under the Administrative Procedure Act, 5 U.S.C. 533 and 44 CFR 1.12. The Administrative Procedure Act, however, provides an exception from that general rule where the agency for good cause finds the procedures for comment and response contrary to public interest.

This interim final rule extends the date that State, tribal, and local governments have to develop mitigation plans required as a condition of FEMA grant assistance. State, tribal, and local governments are currently under the assumption that plans are required by November 1, 2003, whereas this interim final rule extends that date to November 1, 2004 for the HMGP. It does not affect the date for compliance for other programs, such as the Pre-disaster Mitigation (PDM) program. In order for State, local and tribal resources to be appropriately identified and used, it is essential that the date extension be made effective as soon as possible. We believe it is contrary to the public interest to delay the benefits of this rule. In accordance with the Administrative Procedure Act, 5 U.S.C. 553(d)(3), we find that there is good cause for the interim final rule to take effect immediately upon publication in the Federal Register in order to meet the needs of States and communities by identifying the new effective date for planning requirement under 44 CFR part 201. Therefore, we find that prior notice and comment on this rule would not further the public interest. We actively encourage and solicit comments on this interim final rule from interested parties, and we will consider them as well as those submitted on the original interim final planning rule in preparing the final rule. For these reasons, we believe we have good cause to publish an interim final rule.

National Environmental Policy Act

44 CFR 10.8(d)(2)(ii) excludes this rule from the preparation of an environmental assessment or environmental impact statement, where the rule relates to actions that qualify for categorical exclusion under 44 CFR 10.8(d)(2)(iii), such as the development of plans under this section.

Executive Order 12866, Regulatory Planning and Review

We have prepared and reviewed this rule under the provisions of E.O. 12866, Regulatory Planning and Review. Under Executive Order 12866, 58 FR 51735, October 4, 1993, a significant regulatory action is subject to review by The Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

The purpose of this rule is to extend the date by which State and local governments have to prepare or update their plans to meet the criteria identified in 44 CFR part 201. The original date, November 1, 2003, was determined to be difficult to meet. This interim final rule extends that date to November 1, 2004 for the post disaster Hazard Mitigation Grant Program. The date of November 1, 2003 will still apply to project grants under the Pre-disaster Mitigation program. As such, the rule itself will not have an effect on the economy of more than \$100,000,000.

Therefore, this rule is not a significant regulatory action and is not an economically significant rule under Executive Order 12866. OMB has not reviewed this rule under Executive Order 12866.

Executive Order 12898, Environmental Justice

Under Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, February 16, 1994, we incorporate environmental justice into our policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect

of excluding persons from participation in our programs, denying persons the benefits of our programs, or subjecting persons to discrimination because of their race, color, or national origin.

No action that we can anticipate under the final rule will have a disproportionately high or adverse human health and environmental effect on any segment of the population. This rule extends the date for development or update of State and local mitigation plans in compliance with 44 CFR part 201. Accordingly, the requirements of Executive Order 12898 do not apply to this interim final rule.

Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) we submitted a request for review and approval of a new collection of information when the initial interim final rule was published on February 26, 2002. OMB approved this collection of information for use through August 31, 2002, under the emergency processing procedures in OMB regulation 5 CFR 1320.1, OMB Number 3067-0297. There have been no changes to the collection of information, and we have submitted a request for OMB approval to continue the use of the collection of information for a term of three years. The request is being processed under OMB's normal clearance procedures in accordance with provisions of OMB regulation 5 CFR 1320.11.

This new interim final rule simply extends the date by which States and communities have to comply with the planning requirements, and clarifies which FEMA programs are affected by these requirements. The changes do not affect the collection of information; therefore, no change to the request for the collection of information is necessary. In summary, this interim final rule complies with the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)).

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the OMB paperwork clearance package by contacting Ms. Muriel Anderson at (202) 646-2625 (voice), (202) 646-3347 (facsimile), or by e-mail at informationcollectios@fema.gov.

Executive Order 13132, Federalism

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

We have reviewed this rule under E.O. 13132 and have concluded that the rule does not have federalism implications as defined by the Executive Order. We have 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.

We will continue to evaluate the planning requirements and will work with interested parties as we implement the planning requirements of 44 CFR part 201. In addition, we actively encourage and solicit comments on this interim final rule from interested parties, and we will consider them in preparing the final rule.

Executive Order 13175, Consultation and Coordination with Indian Tribal Governments

We have reviewed this interim final rule under Executive Order 13175, which became effective on February 6, 2001. In reviewing the interim final rule, we find that it does not have "tribal implications" as defined in Executive Order 13175 because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Moreover, the interim final rule does not impose substantial direct compliance costs on tribal governments, nor does it preempt tribal law, impair treaty rights or limit the self-governing powers of tribal governments.

Congressional Review of Agency Rulemaking

We have sent this interim final rule to the Congress and to the General Accounting Office under the Congressional Review of Agency Rulemaking Act, Public Law 104-121. The rule is a not "major rule" within the meaning of that Act. It is an administrative action to extend the time State and local governments have to prepare mitigation plans required by section 322 of the Stafford Act, as enacted in DMA 2000.

The rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. It will not have "significant adverse effects" on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises. This final rule is subject to the information collection requirements of the Paperwork Reduction Act, and OMB has assigned Control No. 3067-0297. The rule is not an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, and any enforceable duties that we impose are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

List of Subjects in 44 CFR Parts 201 and Part 206

Administrative practice and procedure, Disaster assistance, Grant programs, Mitigation planning, Reporting and record keeping requirements.

Accordingly, amend 44 CFR, chapter I, as follows:

PART 201--MITIGATION PLANNING

1. The authority for Part 201 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

2. Revise Sec. 201.3(c)(3) to read as follows:

Sec. 201.3 Responsibilities.

* * * * *

(c) * * *

(3) At a minimum, review and, if necessary, update the Standard State Mitigation Plan by November 1, 2004 and every three years from the date of the approval of the previous plan in order to continue program eligibility.

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3. Revise Sec. 201.4(a) to read as follows:

Sec. 201.1 Standard State Mitigation Plans.

(a) Plan requirement. By November 1, 2004, States must have an approved Standard State Mitigation plan meeting the requirements of this section in order to receive assistance under the Stafford Act, although assistance authorized under disasters declared prior to November 1, 2004 will continue to be made available. Until that date, existing, FEMA approved State Mitigation Plans will be accepted. In any case, emergency assistance provided under 42 U.S.C 5170a, 5170b, 5173, 5174, 5177, 5179, 5180, 5182, 5183, 5184, 5192 will not be affected. The mitigation plan is the demonstration of the State's commitment to reduce risks from natural hazards and serves as a guide for State decision makers as they commit resources to reducing the effects of natural hazards. States may choose to include the requirements of the HMGP Administrative Plan in their mitigation plan, but must comply with the updates, amendments or revisions requirement listed under 44 CFR 206.437.

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4. Revise Sec. 201.6(a) to read as follows:

Sec. 201.6 Local Mitigation Plans.

* * * * *

(a) Plan requirements.

(1) For disasters declared after November 1, 2004, a local government must have a mitigation plan approved pursuant to this section in order to receive HMGP project grants. Until November 1, 2004, local mitigation plans may be developed concurrent with the implementation of the HMGP project grant.

(2) By November 1, 2003, local governments must have a mitigation plan approved pursuant to this section in order to receive a project grant through the Pre-Disaster Mitigation (PDM) program, authorized under Sec. 203 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5133. PDM planning grants will continue to be made available to all local governments after this time to enable them to meet the requirements of this section.

(3) Regional Directors may grant an exception to the plan requirement in extraordinary circumstances, such as in a small and impoverished community, when justification is provided. In these cases, a plan will be completed within 12 months of the award of the project grant. If a plan is not provided within this timeframe, the project grant will be terminated, and any costs incurred after notice of grant's termination will not be reimbursed by FEMA.

(4) Multi-jurisdictional plans (e.g. watershed plans) may be accepted, as appropriate, as long as each jurisdiction has participated in the process and has officially adopted the plan. State-wide plans will not be accepted as multi-jurisdictional plans.

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PART 206--FEDERAL DISASTER ASSISTANCE FOR DISASTERS DECLARED ON OR AFTER NOVEMBER 23, 1988

4. The authority for Part 206 continues to read as follows:

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121-5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

5. Revise Sec. 206.432(b)(1) to read as follows:

Sec. 206.432 Federal grant assistance.

* * * * *

(b) * * *

(1) Fifteen (15) Percent. Effective November 1, 2004, a State with an approved Standard State Mitigation Plan, which meets the requirements outlined in 44 CFR 201.4, shall be eligible for assistance under the HMGP not to exceed 15 percent of the total estimated Federal assistance described in this paragraph. Until that date, existing, FEMA approved State Mitigation Plans will be accepted.

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6. Revise Sec. 206.434(b)(1) to read as follows:

Sec. 206.434 Eligibility.

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(b) * * *

(1) For all disasters declared on or after November 1, 2004, local and tribal government applicants for subgrants must have an approved local mitigation plan in accordance with 44 CFR 201.6 prior to receipt of HMGP subgrant funding. Until November 1, 2004, local mitigation plans may be developed concurrent with the implementation of subgrants.

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Dated: September 26, 2002.

Joe M. Allbaugh,

Director.

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