directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs agencies to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action modifies existing regulations to correct an error in the regulations and therefore involves technical standards previously established by EPA. The amendments to the regulations do not involve the application of new technical standards. EPA is continuing to use the technical standards previously established in its rules regarding the light-duty vehicle GHG standards for MYs 2017–2025. See 77 FR 62960 and 85 FR 25265.

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This regulatory action merely corrects previously established provisions that auto manufacturers use to demonstrate compliance for light-duty vehicles.

List of Subjects in 40 CFR Part 600

Environmental protection, Administrative practice and procedure, Electric power, Fuel economy, Labeling, Reporting and recordkeeping requirements.

Andrew Wheeler,

Administrator.

[FR Doc. 2020–17214 Filed 8–28–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 206

[Docket ID: FEMA–2019–0012]

RIN 1660–AB00

Public Assistance Appeals and Arbitrations

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Emergency Management Agency (FEMA) is proposing regulations to implement the new right of arbitration authorized by the Disaster Recovery Reform Act of 2018 (DRRA), and to revise its regulations regarding first and second Public Assistance appeals.

DATES: Comments must be received no later than October 30, 2020.

ADDRESSES: You may submit comments, identified by Docket ID: FEMA–2019–0012, via the Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Shabnaum Amjad, Deputy Associate Chief Counsel, Regulatory Affairs, Office of Chief Counsel, Federal Emergency Management Agency, 500 C Street SW, Washington, DC 20472. Phone: 202–212–2398 or email: *Shabnaum.Amjad@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Public Participation

We encourage you to participate in this rulemaking by submitting comments and related materials. We will consider all comments and materials received during the comment period.

If you submit a comment, identify the agency name and the Docket ID for this rulemaking, indicate the specific section of this document to which each comment applies, and give the reason for each comment. All submissions will be posted, without change, to the Federal e-Rulemaking Portal at *www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. For more about privacy and the docket, visit *https://www.regulations.gov/document?D=DHS-2018-0029-0001.*

Viewing comments and documents: For access to the docket to read background documents or comments received, go to the Federal e-Rulemaking Portal at *http://www.regulations.gov.*

II. Background

A. The Public Assistance Program

Under the Public Assistance (PA) Program, authorized by the Robert T. Stafford Disaster Relief and Emergency Assistance Act [1] (Stafford Act), FEMA awards grants to eligible applicants to assist them in responding to and recovering from Presidentially-declared emergencies and major disasters. The recipient, as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. Generally, the State for which the emergency or major disaster is declared is the recipient. The recipient can also be an Indian Tribal government. The applicant, as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible private nonprofit organization submitting an application to the recipient for assistance under the recipient's grant.

The PA Program provides Federal funds for debris removal, emergency protective measures, and permanent restoration of infrastructure. When the President issues an emergency or major disaster declaration authorizing PA FEMA may accept applications from eligible applicants under the PA Program. To apply for a grant under the PA Program, the eligible applicant must submit a Request for PA to FEMA through the recipient. Upon award, the recipient notifies the applicant of the award, and the applicant becomes a subrecipient.

FEMA uses Project Worksheets (PWs) to administer the PA Program. A FEMA Project Specialist develops PWs for large projects, working with a recipient representative and the applicant. A PW is the primary form used to document the location, damage description and dimensions, scope of work, and cost estimate for a project. Although large projects are funded on documented actual costs, work typically is not complete at the time of project formulation, PW development, and approval. Therefore, FEMA obligates large project grants based on estimated costs and relies on financial reconciliation at project closeout for final costs.

The obligation process is the process by which FEMA makes funds available to the recipient. The funds reside in a

[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.*

Federal account until drawn down by the recipient and disbursed to the applicant, unless partially or otherwise deobligated for reasons including, but not limited to, discrepancies between estimated and actual costs, updated estimates, a determination that a prior eligibility determination was incorrect, additional funds received from other sources that could represent a prohibited duplication of benefits, or expiration of the period of performance.

Occasionally, an applicant or recipient may disagree with FEMA regarding a determination related to their request for Public Assistance. Such disagreements may include, for instance, whether an applicant or recipient, facility, item of work, or project is eligible for Public Assistance; whether approved costs are sufficient to complete the work; whether a requested time extension was properly denied; whether a portion of the cost claimed for the work is eligible; or whether the approved scope of work is correct. In such circumstances, the applicant or recipient may appeal FEMA's determination. 44 CFR 206.206.

B. 44 CFR 206.206, Public Assistance Appeals

Under the appeals procedures in 44 CFR 206.206, an eligible applicant, subrecipient, or recipient may appeal any determination made by FEMA related to an application for or the provision of Public Assistance. There are two levels of appeal. The first appeal is to the FEMA Regional Administrator. The second appeal is to the FEMA Assistant Administrator for Recovery at FEMA Headquarters.

The applicant must file an appeal with the recipient within 60 calendar days of the applicant's receipt of a notice from FEMA of the Federal determination that is being appealed. 44 CFR 206.206(c)(1). The applicant must provide documentation to support the position of the appeal. In this documentation, the applicant will specify the monetary amount in dispute and the provisions in Federal law, regulation, or policy with which the applicant believes FEMA's initial action was inconsistent. 44 CFR 206.206(a). The recipient reviews and evaluates the appeal documentation. The recipient then prepares a written recommendation on the merits of the appeal and forwards that recommendation to the FEMA Regional Administrator within 60 calendar days of the recipient's receipt of the appeal from the applicant. 44 CFR 206.206(c)(2). Recipients may make recipient-related appeals to the FEMA Administrator.

The FEMA Regional Administrator reviews the appeal and takes one of two actions: (1) Renders a decision on the appeal and informs the recipient of the decision; or (2) requests additional information. If the appeal is granted, the FEMA Regional Administrator takes appropriate action, such as approving additional funding or sending a Project Specialist to meet with the appellant to determine additional eligible funding. 44 CFR 206.206(c)(3).

If the FEMA Regional Administrator denies the appeal, the applicant or recipient may submit a second appeal.[2] The applicant must submit the second appeal to the recipient within 60 calendar days of receiving the notice of the FEMA Regional Administrator's decision on the first appeal. The recipient must forward the second appeal with a written recommendation to the FEMA Regional Administrator within 60 calendar days of receiving the second appeal. 44 CFR 206.206(c)(2). The FEMA Regional Administrator will forward the second appeal for action to the FEMA Assistant Administrator for Recovery as soon as practicable. Recipients may make recipient-related second appeals to the FEMA Assistant Administrator for Recovery.

The FEMA Assistant Administrator for Recovery at FEMA Headquarters reviews the second appeal and renders a decision or requests additional information from the applicant. In a case involving highly technical issues, FEMA may request an independent scientific or technical analysis by a group or person having expertise in the subject matter of the appeal. 44 CFR 206.206(d). Upon receipt of requested information and reports from the applicant, FEMA must render a decision on the second appeal within 90 calendar days. 44 CFR 206.206(c)(3). This decision constitutes the final administrative decision of FEMA. 44 CFR 206.206(e)(3).

C. 44 CFR 206.209, Arbitration for Public Assistance Determinations Related to Hurricanes Katrina and Rita

Under 44 CFR 206.209, applicants may request arbitration to resolve disputed PA applications under major disaster declarations for Hurricanes Katrina and Rita, pursuant to the authority of the American Recovery and Reinvestment Act of 2009 (ARRA).[3] Pursuant to section 601 of the ARRA, FEMA promulgated 44 CFR 206.209 to establish arbitration procedures to resolve outstanding disputes regarding PA projects over $500,000. The ARRA arbitration regulations are only available to the States of Louisiana, Mississippi, Alabama, and Texas under the following declarations: DR–1603, DR–1604, DR–1605, DR–1606, and DR–1607.

D. Former 44 CFR 206.210, Dispute Resolution Pilot Program

The Sandy Recovery Improvement Act of 2013[4] (SRIA) authorized FEMA to conduct a Dispute Resolution Pilot Program (DRPP), which was in effect from August 16, 2013 to December 31, 2015. 78 FR 49950, Aug 16, 2013. FEMA promulgated regulations at 44 CFR 206.210 (since removed) to effectuate the pilot program. It included arbitration by an independent review panel to resolve disputes relating to PA projects, to facilitate an efficient recovery from major disasters. Applicants could choose to use for their second appeal either the DRPP or the review already offered under 44 CFR 206.206. Arbitration by an independent review panel was available only for disputes in an amount equal to or greater than $1,000,000 for projects with non-Federal cost share requirement (where, the subrecipient had a cost share requirement), and for applicants that had completed a first appeal pursuant to 44 CFR 206.206.

The arbitration decisions under this section were to be binding upon the parties to the dispute, as required by section 1105(b)(2) of SRIA. Under section 1105 of SRIA, the authority to accept a request for arbitration pursuant to the DRPP sunset on December 31, 2015, and FEMA has since removed these regulations.[5] FEMA did not receive any requests for arbitration pursuant to the DRPP.

E. Arbitration Under the Disaster Recovery Reform Act of 2018 (DRRA)

On October 5, 2018, the President signed into law the Disaster Recovery Reform Act of 2018 (DRRA).[6] Section 1219 of DRRA, which amended Section 423(d) of the Stafford Act (42 U.S.C. 5189a), provides a right of arbitration to certain applicants of the PA Program that have a dispute concerning the eligibility for assistance or repayment of assistance.

[2] Introductory text of paragraph(a) of 44 CFR 206.206.

[3] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (Feb. 17, 2009), 26 U.S.C. 1 note.

[4] Sandy Recovery Improvement Act of 2013, Public Law 113–2, 127 Stat. 43 (Jan. 29, 2013), 42 U.S.C. 5189a note.

[5] See Removal of Dispute Resolution Pilot Program for Public Assistance Appeals, 83 FR 44238, Aug. 30, 2018.

[6] Disaster Recovery Reform Act of 2018, Public Law 115–254, 132 Stat. 3186 (Oct. 5, 2018), 42 U.S.C. 5189a.

To request arbitration pursuant to the newly amended 42 U.S.C. 5189a, a PA applicant (1) must have a dispute arising from a disaster declared after January 1, 2016, (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 and outside of an urbanized area), and (3) must have submitted a first appeal pursuant to the requirements established under 44 CFR 206.206. Such applicants that receive a negative first appeal decision then have the option of submitting either a request for a second appeal or a request for arbitration. In addition, an applicant that has had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration.

Applicants that had a second appeal pending with FEMA as of October 5, 2018, from a disaster declared after January 1, 2016 may, if they meet the amount in dispute requirement of $500,000 (or $100,000 for rural areas), withdraw their second appeal and request arbitration. Following the DRRA's enactment, FEMA individually notified applicants with pending second appeals that were eligible to withdraw those appeals and request arbitration.

Applicants that are not eligible to request arbitration are (1) applicants that have received a second appeal determination from FEMA prior to October 5, 2018, and (2) applicants that were eligible to submit a second appeal prior to October 5, 2018, but did not do so within the 60 calendar days required by 44 CFR 206.206.[7]

As amended by Section 1219 of the DRRA, 42 U.S.C. 5189a(d) names the Civilian Board of Contract Appeals (CBCA) as the entity responsible for conducting these arbitrations. The CBCA has promulgated regulations at 48 CFR part 6106 establishing its arbitration procedures for such purpose. The CBCA also currently conducts arbitrations arising from Hurricanes Katrina and Rita under the ARRA regulations pursuant to an Inter-Agency Agreement between the CBCA and FEMA.

III. Proposed Rule

FEMA proposes to revise its current PA appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA, in conjunction with some revisions to the current appeals process. The DRRA adds arbitration as a permanent alternative to a second appeal under the PA Program. Additionally, applicants that have had a first appeal pending with FEMA for more than 180 calendar days may withdraw such appeal and submit a request for arbitration. In both cases, the amount in dispute must be greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

These proposed rules for arbitration are separate and distinct from the arbitration provisions located in 44 CFR 206.209.

Applicants should also review the Civilian Board of Contract Appeals regulations at 48 CFR part 6101, Rules of Procedure of the Civilian Board of Contract Appeals, and 48 CFR part 6106, Rules of Procedure for Arbitration of Public Assistance Eligibility or Repayment, for additional CBCA rules of procedure.

FEMA proposes to change the 44 CFR 206.206 section heading from ''Appeals'' to ''Appeals and arbitrations,'' since FEMA proposes new regulatory text to implement DRRA's right of arbitration at § 206.206. Throughout this section, FEMA proposes to change references to the ''Disaster Assistance Directorate'' to the ''Recovery Directorate.'' The proposed changes are technical edits, as they represent past FEMA organizational changes. Also, throughout this section FEMA proposes to change all ''dates'' to ''calendar dates'' for clarity. Finally, since FEMA is proposing new arbitration regulations, FEMA is proposing that the first appeal, second appeal, and arbitration requirements are in separate paragraphs for clarity. Currently in § 206.206, FEMA's first and second appeal requirements are comingled.

A. Definitions (Proposed 44 CFR 206.206(a))

Currently, § 206.206 does not include any definitions. FEMA proposes to add the terms ''Administrator,'' ''Amount in dispute,'' ''Applicant,'' ''Final agency determination,'' ''Recipient,'' ''Rural area,'' and ''Urbanized area,'' as follows.

Administrator. FEMA proposes to define the term ''Administrator'' to mean the Administrator of the Federal Emergency Management Agency for clarity.

Amount in dispute. FEMA proposes to define the term ''Amount in dispute'' to mean the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible. The DRRA amendments to 42 U.S.C. 5189a(d)(1) introduced the term ''dispute,'' and also added dollar thresholds that applicants must meet (which differ depending on the area of the country in which the applicant applies for assistance) in order to request arbitration. ''Amount in dispute'' is not used in the current appeals section, 44 CFR 206.206, because there is no required dollar threshold to appeal a decision. Accordingly, FEMA proposes to define the term ''amount in dispute'' because applicants seeking arbitration must state an amount in dispute as a prerequisite for the arbitration portion of proposed 44 CFR 206.206.

A Project is a logical grouping of work required as a result of the declared major disaster or emergency. The scope of work and cost estimate for a project are documented on a PW. 44 CFR 206.201(k). Applicants and recipients cannot combine PWs together in order to obtain eligibility. FEMA makes PA determinations at the PW level.

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. 44 CFR 206.201(c). FEMA must consider the amount in dispute at the PW level, rather than by facility (as one PW could encompass multiple facilities) or by appeal (which could consolidate multiple PWs, thereby increasing the amount in dispute).

Applicant. FEMA proposes to define the term ''Applicant'' to refer to the definition at 206.201(a) for the sake of consistency within the program.

Final agency determination. FEMA proposes to define the term ''Final agency determination'' to mean the decision of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of proposed § 206.206; or the decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a

[7] On December 18, 2018, FEMA implemented section 1219 of DRRA by posting a Fact Sheet on its website. After CBCA published their March 5, 2019 proposed rule, see 84 FR 7861, FEMA updated the: Section 1219 Public Assistance Appeals and Arbitration Fact Sheet on March 27, 2019. A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or the decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of proposed § 206.206. This term was introduced by the DRRA amendments to 42 U.S.C. 5189a(d)(5)(B) and requires a definition.

The purpose of the proposed definition is to clearly state when a FEMA determination is final and thus no longer ripe for any additional review through FEMA's administrative appeal process or arbitration under the DRRA. Using ''final agency determination'' to replace the current term ''final administrative decision,'' used in § 206.206(e)(3), will align FEMA's regulation with the language introduced by the DRRA amendments at 42 U.S.C. 5189a(d)(5)(B).

Recipient. FEMA proposes to define the term ''Recipient'' to refer to the definition at § 206.201(m) for the sake of consistency within the program.

Rural area. FEMA proposes to define the term ''Rural area'' to mean an area with a population of less than 200,000 outside an urbanized area. As amended by the DRRA, 42 U.S.C. 5189a(d)(4) defines this term.

FEMA makes PA determinations at the PW level. Therefore, considerations of the amount in dispute and rural/urban status must be done at the PW level, rather than by facility (as one PW could encompass multiple facilities) or by appeal (which could consolidate multiple PWs. If a PW encompasses multiple facilities, and those facilities happen to be in both rural and urbanized areas, then FEMA will consider the entire PW as ''rural.''

Urbanized area. FEMA proposes to define the term ''Urbanized area'' to mean the area as identified by the United States Census Bureau. The Census Bureau defines an ''urbanized area'' as an area that consists of densely settled territory that contains 50,000 or more people.[8] The DRRA amendments to 42 U.S.C. 5189a(d)(4) introduced this term and it requires a definition. FEMA proposes to defer to the Census Bureau definition, which meets FEMA's needs for determining eligibility for an arbitration.

B. Appeals and Arbitrations (Proposed 44 CFR 206.206(b) Introductory Paragraph)

For the introductory paragraph of § 206.206(b), FEMA proposes to state that an eligible applicant or recipient may appeal or an eligible applicant may arbitrate any determination previously made related to an application for or the provision of Public Assistance according to the procedures of proposed § 206.206. This language is similar to the current regulation at § 206.206 introductory paragraph. FEMA proposes changing '' applicant, subrecipient, or recipient'' to ''applicant or recipient'' since the definition of applicant at § 206.201(a) includes subrecipient. FEMA proposes changing ''Federal assistance'' to ''Public Assistance'' to clarify that appeal and arbitration procedures only apply to Public Assistance. Additionally, FEMA proposes to add ''or an eligible applicant may arbitrate'' to the proposed § 206.206(b) introductory paragraph, since the current § 206.206 only discusses an appeal and 42 U.S.C. 5189a requires applicants to have the choice to either request an arbitration or a second appeal. FEMA also proposes to replace ''procedures below'' with ''procedures of this section'' for clarity.

C. First Appeal (Proposed 44 CFR 206.206(b)(1))

In the introductory paragraph of proposed paragraph (b)(1), FEMA states that the applicant must make a first appeal in writing and submit it electronically through the recipient to the Regional Administrator. The current regulation (at 44 CFR 206.206(a)) does not require submission electronically, but states submissions must be in writing. FEMA proposes this revision to the current regulation to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration.

The revision removes the mandatory language that the recipient ''shall review and evaluate'' all subrecipient appeals before submission to the Regional Administrator. Instead, FEMA proposes that the recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. To include a recommendation on the applicant's appeal, the recipient must review and evaluate the appeal. Accordingly, FEMA proposes striking the review and the evaluation portion of the sentence as superfluous. FEMA's proposed language regarding the mandatory recommendation includes electronic submission to the Regional Administrator. Again, the change to electronic submissions is to accurately track the transmittal/receipt of recommendations for the purposes of establishing deadlines for second appeals and arbitrations.

FEMA is proposing a requirement that the recipient provide a recommendation on the applicant's appeal due to the recipient's grant management responsibilities and fiscal accountability for all PA grants under a major disaster declaration, including its commitment to comply with the applicable cost share requirement.[9] The recipient has a responsibility to ensure all applicants abide by grant and cost share requirements, so in this capacity FEMA believes that the recipient should make a recommendation on the substance of the applicant's first appeal.

The final sentence of proposed paragraph (b)(1) is currently the third sentence in paragraph 206.206(a), which states that the recipient may make recipient-related appeals to the Regional Administrator.

In proposed paragraph (b)(1)(i), FEMA states the requirements of a first appeal, which must include all documented justification supporting the applicant or recipient's position; the specific amount in dispute, as applicable; and the specific provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent. This is consistent with the current regulation in § 206.206(a), except that FEMA proposes to change ''initial action'' to ''FEMA determination.'' This change clarifies what the ''initial action'' actually is and aligns the regulation with the terminology the program now uses. As such, no substantive change is intended. Similarly, FEMA proposes to change ''monetary figure in dispute'' to ''amount in dispute, as applicable'' so that we could use one term for both appeals and arbitrations, plus for clarity. Currently, FEMA allows an applicant, subrecipient, or recipient to appeal a provision of assistance without providing a monetary figure. (E.g. time extension requests, scope of work change requests, etc.) Therefore, FEMA has proposed ''amount in dispute, as applicable'' to replace the current regulations of ''monetary figure in

[8] See ''Qualifying Urban Areas for the 2010 Census, 77 FR 18651, Mar. 27, 2012.

[9] All grants FEMA administers must comply with the government-wide rules governing all Federal assistance. These rules, set out at 2 CFR part 200, apply to FEMA awards to recipients as well as to subawards under the FEMA award, which a recipient, as pass-through entity, awards to subrecipients. These rules govern administrative and grants management requirements, cost principles, and audit requirements. FEMA Manual 205–0–1, ''Grants Management,'' as a whole serves to explain key requirements of 2 CFR part 200 as they pertain to FEMA assistance. The following regulations cover FEMA's cost share requirement: 44 CFR 206.36(c)(5), 206.44, and 206.203(b).

dispute.'' Also, the current regulation uses the term ''appellant'' instead of ''applicant or recipient'' for the requirement of specifying the provisions in Federal law, regulation, or policy in dispute. FEMA's reason for changing from ''appellant'' to ''applicant or ''recipient'' is for consistency in terminology and no substantive change is intended. Finally, in keeping with principles of transparency and plain language, FEMA proposes to replace ''shall'' with ''must'' in the last sentence of current § 206.206(a) and reorganizing the last sentence by separating it into subparagraphs (b)(1)(i)(A) through (C).

Proposed paragraph (b)(1)(ii) addresses time limits for first appeals. Under proposed paragraph (b)(1)(ii)(A), the applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal, and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. FEMA proposes to change the term ''appellant'' to ''applicant'' for consistency in terminology; no substantive change is intended. FEMA also proposes to change ''after receipt of a notice of the action that is being appealed'' to ''from the date of the FEMA determination that is the subject of the appeal'' to enable FEMA to accurately track the transmittal/receipt of appeals.

The proposed revision removes the mandatory language that the recipient ''will review'' the first appeal. In order for the recipient to provide a written recommendation, the recipient must review the appeal, so the deleted language is superfluous. FEMA proposes adding a requirement that the recipient forward the applicant's appeal and the recipient's recommendation electronically to the Regional Administrator. The proposed change to electronic submissions is to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration.

Finally, under proposed paragraph (b)(1)(ii)(A), FEMA proposes to state that FEMA will deny all first appeals it receives from the recipient more than 120 calendar days from the date of the FEMA determination that is the subject of the appeal. This addition is added for clarity to explain what occurs if an applicant misses the deadline. This addition is not a new deadline. Currently, 44 CFR 206.206(c)(1) allows an applicant 60 days to file an appeal and paragraph 206.206(c)(2) allows a recipient to review and forward an applicant's appeals along with a written recommendation within 60 days. FEMA has combined the two 60-day deadlines into a 120-calendar days deadline.

Under proposed paragraph (b)(1)(ii)(B), within 90 calendar days following receipt of a first appeal, if there is a need for additional information, the Regional Administrator will provide electronic notice to the recipient and applicant. This is consistent with the current regulations, with the added requirement for electronic notification and simultaneous notification of the applicant. FEMA also proposes for clarity to state that if there is no need for additional information, then FEMA will not provide notification. Finally, FEMA also proposes to state that the Regional Administrator will generally allow the recipient 30 calendar days to provide any additional information. This is consistent with the current regulation, except that the current regulation does not include the 30-calendar day timeframe, but rather states that the Regional Administrator will include a date by which the information must be provided. This change is to better allow FEMA to issue timely determinations on first appeal. The proposed regulations, at (b)(1)(ii)(B) and (C), have split the current regulations into two paragraphs.

Under proposed paragraph (b)(1)(ii)(C), FEMA will require the Regional Administrator to provide electronic notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information. The proposed regulations reorganize the word order of the current regulation and adds the following phrase ''within 90 calendar days of receipt of the appeal'' for clarification. Additionally, proposed paragraph (b)(1)(ii)(C) adds the requirement to provide electronic notice of the disposition of the appeal, removes the requirement that it be ''in writing,'' and includes simultaneous notification of the applicant. The change to electronic submissions is to accurately track the transmittal/receipt of appeals for the purposes of establishing deadlines for second appeal and arbitration. Currently, FEMA may receive submissions several ways, including electronically, through courier delivery, and through the United States (U.S.) mail.

Proposed paragraph (b)(1)(iii) addresses technical advice and states that in appeals involving highly technical issues, the Regional Administrator may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for technical review may be in addition to other allotted time periods. Within 90 calendar days of the report, the Regional Administrator will provide electronic notice of the disposition of the appeal to the recipient and applicant. This is consistent with the current regulation at 44 CFR 206.206(d), except for the requirement to electronically notify the recipient and provide simultaneous notice to the applicant.

FEMA proposes to add a new paragraph regarding the effect of an appeal in proposed paragraph (b)(1)(iv). Proposed paragraph (b)(1)(iv)(A) states that FEMA will take no action to implement any determination pending an appeal decision from the Regional Administrator, subject to the exceptions in paragraph (b)(1)(iv)(B) of proposed § 206.206. This section is added to provide clarity to an appellant as to what actions FEMA will not take and what actions FEMA may take while an appeal is pending. It does not alter any current FEMA practices or procedures, nor does the rule limit any rights an appellant has regarding their appeal.

In proposed paragraph (b)(1)(iv)(B), FEMA states that, notwithstanding (b)(1)(iv)(A), FEMA may suspend funding (referring to 2 CFR 200.338); defer or disallow other claims questioned for reasons also disputed in the pending appeal; or take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation. As stated above, this section is added to provide clarity to an appellant as to what actions FEMA will not take and what actions FEMA may take while an appeal is pending and does not alter any of FEMA's current practices or procedures or limit any rights an appellant has regarding their appeal.

As stated in the current regulation in the final sentence of § 206.206(c)(3), if the Regional Administrator grants an appeal, the Regional Administrator will take appropriate implementing action(s). This language is now in proposed paragraph (b)(1)(v).

In proposed paragraph (b)(1)(vi), FEMA states that FEMA may issue separate guidance as necessary to supplement paragraph (b)(1). This language arises from 44 CFR 206.209(m) and is carried over to this proposed regulation for consistency. Since FEMA has separated first appeal, second

appeal, and arbitration requirements into separate paragraphs for clarity, FEMA proposes adding a guidance subparagraph to the first and second appeal paragraphs for consistency. FEMA already provides guidance for first appeals in the Public Assistance Program and Policy Guide, FP–104–009–2 (April 2018). FEMA likewise provides guidance for staff implementing appeals procedures in Recovery Directorate Manual Public Assistance Program Appeal Procedures (Version 4) Approval Date: March 29, 2016. As such, proposed paragraph (b)(1)(vi) will not alter current practice.

D. Second Appeal (Proposed 44 CFR 206.206(b)(2))

The introductory paragraph to proposed § 206.206(b)(2) states that if the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal in writing and submit it electronically through the recipient to the Assistant Administrator for the Recovery Directorate. This is consistent with the current regulation, except for the addition of the requirement to submit electronically. This requirement ensures the accurate and clear tracking of transmittal dates of appeals for the purposes of establishing deadlines for arbitrations. In addition, the current regulation refers to the ''Assistant Administrator for the Disaster Assistance Directorate.'' The title of this position is now the ''Assistant Administrator for the Recovery Directorate;'' the proposed regulation reflects this new title.

The second to last sentence under the introductory paragraph to proposed § 206.206(b)(2) states that the recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's second appeal to the Assistant Administrator for the Recovery Directorate. This is consistent with FEMA's current implementation of § 206.206(c)(2). FEMA's proposed language regarding the mandatory recommendation includes electronic submission to the Assistant Administrator for the Recovery Directorate. Again, the change to electronic submissions is to accurately track the transmittal/receipt of recommendations for the purposes of establishing deadlines.

The last sentence under the introductory paragraph to proposed § 206.206(b)(2) states that the recipient may make recipient-related second appeals to the Assistant Administrator for the Recovery Directorate. This is consistent with the current third sentence in paragraph 206.206(a) that the recipient may make recipient-related appeals to the Regional Administrator.

In proposed paragraph (b)(2)(i), FEMA states the requirements of a second appeal, which must include all documented justification supporting the applicant or recipient's position; the specific amount in dispute, as applicable; and the specific provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent. This is consistent with the current regulation, with the substitution of ''FEMA determination'' for ''initial action'' and ''appellant'' for ''applicant or recipient'' for clarity as described above.

Also consistent with the proposed paragraph (b)(1)(i) described above, FEMA proposes replacing ''monetary figure in dispute'' with ''amount in dispute, as applicable,'' since FEMA allows an applicant or recipient to appeal a FEMA determination that does not concern a monetary figure. Additionally, FEMA proposes again to change ''appellant'' to ''applicant or recipient'' in this paragraph for consistency of terminology, and replacing ''shall'' with ''must'' for purposes of plain language. FEMA finally proposes reorganizing the last sentence by separating it into subparagraphs (b)(2)(i)(A)–(b)(2)(i)(C).

Proposed paragraph (b)(2)(ii) addresses time limits for second appeals. Under proposed paragraph (b)(2)(ii)(A), if the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal through the recipient within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate the applicant's second appeal with a recommendation within 120 calendar days from the date of the Regional Administrator's first appeal decision. FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision. This proposed language allows the recipient the same level of review and involvement in the second appeal process as they have with the first appeals process, which is consistent with how FEMA currently implements § 206.206, and emphasizes that FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision. This addition is not a new deadline. Currently, 44 CFR 206.206(c)(1) allows an applicant 60 days to file an appeal and paragraph 206.206(c)(2) allows a recipient to review and forward an applicant's appeals along with a written recommendation within 60 days. FEMA has combined the two 60-day deadlines into a 120-calendar day deadline.

Proposed paragraph (b)(2)(ii)(B) states that within 90 calendar days following receipt of a second appeal, if there is a need for additional information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Assistant Administrator for the Recovery Directorate will generally allow the recipient 30 calendar days to provide any additional information. This is consistent with the current regulation, except that the current regulation does not include the 30-calendar day time limit or simultaneous notification of the applicant.

Proposed paragraph (b)(2)(ii)(C) states that the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information. This is consistent with the current regulations except for the requirement that the notice be provided electronically, and the simultaneous notification of the applicant. Again, the change to electronic submission is to accurately track the transmittal/receipt.

Proposed paragraph (b)(2)(iii) states that in appeals involving highly technical issues, the Assistant Administrator for the Recovery Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The paragraph further states that the period for this technical review may be in addition to other allotted time periods and within 90 calendar days of receipt of the report, the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant. Proposed paragraph (b)(2)(iii) has been added to this section to be consistent with proposed paragraph (b)(1)(iii), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(iv) addresses the effect of an appeal and has

been added to this section to be consistent with the proposed paragraph in (b)(1)(iv), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(v) states that if the Assistant Administrator for the Recovery Directorate grants an appeal, the Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s). Proposed paragraph (b)(2)(v) has been added to this section for consistency with the proposed paragraph in (b)(1)(v), which mirrors this section for first appeals.

Proposed paragraph (b)(2)(vi) addresses guidance and has been added to this section for consistency with the proposed paragraph (b)(1)(vi), which mirrors this section for first appeals.

E. Arbitration (Proposed 44 CFR 206.206(b)(3))

Proposed paragraph 206.206(b)(3)(i) states that an applicant may request arbitration from the CBCA if there is a disputed agency determination arising from a major disaster declared on or after January 1, 2016. This is consistent with the requirements set forth in 42 U.S.C. 5189a(d), as amended by Section 1219 of the DRRA. The proposed paragraph sets forth additional requirements for eligibility to request arbitration, stating in (b)(3)(i)(B) that the amount in dispute is greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area; and in (b)(3)(i)(C) that the Regional Administrator has either denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt. These eligibility requirements are consistent with the requirements set forth in 42 U.S.C. 5189a(d). FEMA added proposed paragraph (b)(3)(ii) to clarify that arbitration is in lieu of a second appeal. The proposed regulatory text clarifies that an applicant cannot submit a second appeal after requesting arbitration.

Proposed paragraph 206.206(b)(3)(iii) details how applicants may request arbitration. Proposed paragraph 206.206(b)(3)(iii)(A) states that an applicant may initiate arbitration by submitting an electronic request simultaneously to the recipient, CBCA, and FEMA. See 48 CFR part 6106 (CBCA's ''Rules of Procedure for Arbitration of PA Eligibility or Repayment''). Proposed paragraph 206.206(b)(3)(iii)(B)*(1)* states that an applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision. This proposed rule is consistent with 42 U.S.C. 5189a(d)(5)(A).

FEMA is proposing in paragraph 206.206(b)(3)(iii)(B)*(1)* a 60 calendar day deadline for submission of requests for arbitration. FEMA is proposing 60 calendar days to be consistent with the submission time limits for second appeals.

Proposed paragraph 206.206(b)(3)(iii)(B)*(2)* provides that if the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of receiving the appeal, an applicant may electronically submit a withdrawal of the pending appeal simultaneously to the recipient, the FEMA Regional Administrator, and the CBCA. The applicant may then submit a request for arbitration within 30 calendar days from the date of the withdrawal of the pending appeal. This proposed language describes the right to arbitration consistent with 42 U.S.C. 5189a(d)(5)(A) and adds a 30-day deadline to ensure that applicants make requests for arbitration promptly. Since the applicant will have already received 60 calendar days when they initially filed their appeal, FEMA believes that allowing 30 calendar days to request arbitration following withdrawal of their appeal is a sufficient submission period. If the applicant does not request arbitration within 30 calendar days after withdrawing their pending appeal, then the decision of FEMA becomes the final agency determination.

Proposed paragraph 206.206(b)(3)(iii)(C) states that the request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. This rule is consistent with 42 U.S.C. 5189a(d)(5)(A), which refers to the arbitration process established under the authority of section 601 of ARRA codified at 44 CFR 206.209.[10]

Proposed paragraph 206.206(b)(3)(iv) states that expenses for each party will be paid by the party who incurred the expense. This is consistent with 42 U.S.C. 5189a(d)(5)(A). Since 42 U.S.C. 5189a(d)(1) requires the Civilian Board of Contract Appeals to conduct arbitrations, CBCA's regulations state that the CBCA arbitrates at no cost to the parties. (See 48 CFR 6106.606.)

Proposed paragraph 206.206(b)(3)(v) states that FEMA may issue separate guidance as necessary to supplement paragraph (b)(3). This proposed rule is consistent with 42 U.S.C. 5189a(d)(5)(A) and directly corresponds to language contained in 44 CFR 206.209(m).

F. Finality of Decision (Proposed 44 CFR 206.206(c))

Proposed paragraph 206.206(c) states that a FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitutes a final decision of FEMA. In the alternative, a decision of the majority of the CBCA panel constitutes a final decision, binding on all parties. See 48 CFR 6106.613. (CBCA's Decision; finality regulation.) Final decisions are not subject to further administrative review. This is consistent with the provision in 42 U.S.C. 5189a(d)(1) that CBCA decisions are binding. The purpose of this paragraph is to clarify that an applicant cannot appeal, arbitrate, or pursue any administrative remedy for any matter for which FEMA has issued a final agency determination or a second appeal decision; or regarding which the CBCA has issued an arbitration decision.

G. Removal of Current 44 CFR 206.206(e), Transition

FEMA proposes removing current paragraphs 206.206(e)(1) and (2) as they are no longer necessary for this section. FEMA proposes removing current paragraph 206.206(e)(3) because FEMA proposes defining ''final agency determination'' in § 206.206(a). Using the proposed term ''final agency determination'' to replace the current term ''final administrative decision,'' used in § 206.206(e)(3), will align FEMA's regulation with the language introduced by Congress in 42 U.S.C. 5189a(d)(5)(B), offering consistency with the statute.

IV. Regulatory and Statutory Analyses

A. Executive Order 12866, as Amended, Regulatory Planning and Review, Executive Order 13563, Improving Regulation and Regulatory Review; and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

[10] American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (Feb. 17, 2009), 26 U.S.C. 1 note.

effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (''Reducing Regulation and Controlling Regulatory Costs'') directs agencies to reduce regulation and control regulatory costs and provides that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

The Office of Management and Budget (OMB) has designated this rule as a non-significant regulatory action, under section 3(f) of Executive Order 12866. Accordingly, OMB has not reviewed it. Due to this non-significant determination, this rule is also exempt from the requirements of Executive Order 13771. See the OMB Memorandum titled ''Guidance Implementing Executive Order 13771, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (April 5, 2017.)

FEMA is proposing this rule to implement a new right of arbitration authorized by DRRA, and to revise its regulations regarding first and second PA appeals.

FEMA's PA Program provides Federal grant assistance to government organizations and eligible private nonprofit (PNP) organizations following a Presidential disaster declaration. The PA Program is administered through a coordinated effort between FEMA, States, or federally recognized Tribes and local governments or eligible PNPs (subrecipients).

Need for Regulatory Action

Under current regulations, when FEMA determines that an applicant or recipient is ineligible for PA funding, or if the applicant or recipient disputes the amount awarded, FEMA has implemented a process to appeal the decision. First, the applicant or recipient can appeal to the FEMA Regional Administrator. If the applicant or recipient does not submit a second appeal within 60 days, the result of the first appeal is the final agency determination. If the applicant or recipient is not satisfied with the result of the first appeal, they can submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate. The result of the second appeal is a final decision of FEMA.

FEMA is proposing in this rule to implement provisions for arbitration in lieu of a second appeal, or in cases where an applicant has had a first appeal pending with FEMA for more than 180 calendar days. Applicants choosing arbitration would have their case heard by a panel of judges with the CBCA. A decision by the majority of the CBCA panel constitutes a final decision that would be binding on all parties. Final decisions would not be subject to further administrative review.

Pursuant to 42 U.S.C. 5189a, as amended by section 1219 of the DRRA, to request arbitration, an applicant (1) must have a dispute arising from a disaster declared after January 1, 2016; (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 and outside of an urbanized area); and, (3) must have submitted a first appeal and has either received a denial of the first appeal or has not received a decision after 180 calendar days.

This proposed rule would directly affect applicants or recipients disputing FEMA PA eligibility determinations or disputing the amount awarded for PA projects. Applicants would be required to submit appeals through their State, or in the case of a Tribal declaration,[11] their Tribal government (recipients). The recipient would then forward the request to the FEMA Regional Administrator, along with a recommendation for a first appeal.

If an applicant has not received a decision on their first appeal after 180 days and meets the other two previously-outlined criteria, they may withdraw the first appeal and request arbitration. Alternatively, if the applicant does not agree with the Regional Administrator's decision on the first appeal, they may either submit a second appeal to the FEMA Assistant Administrator for the Recovery Directorate or request arbitration. A panel of judges with the CBCA would hear any arbitration cases. The applicant would send a representative and possibly expert witnesses to the arbitration hearing. The recipient would also send a representative to support the applicant. FEMA representatives and expert witnesses would also attend the hearing to defend FEMA's determination.

The proposed rule would codify regulations for the appeals and arbitration process as directed by 42 U.S.C. 5189a(d)(5). Applicants are eligible for arbitration for disputes arising from major disasters declared on or after January 1, 2016. This process is already available, and eligible applicants have been notified of this option.[12]

As amended by Section 1219 of the DRRA, 42 U.S.C. 5189a(d) names the CBCA as the entity responsible for conducting these arbitrations. The CBCA has promulgated regulations at 48 CFR part 6106 establishing its arbitration procedures for such purpose.

FEMA is proposing in paragraph 206.206(b)(3)(iii)(B) a 60 calendar day deadline for submitting requests for arbitration. FEMA is proposing this as FEMA does not want different submission time limits for second appeals and arbitrations. Rather, FEMA believes that there should be consistency between the time to request arbitration and the time to submit second appeals for administrative ease and to reduce potential confusion amongst applicants.

Affected Population

The proposed rule would affect PA applicants arising from major disaster declarations. Specifically, applicants that (1) submitted a first appeal and received a negative decision, or, (2) have a first appeal pending for more than 180 days and wish to withdraw the appeal in favor of arbitration. Applicants may only request arbitration for disputes in excess of $500,000, or $100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016.

Summary of Regulatory Changes

FEMA proposes to revise its current PA appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA, in conjunction with some revisions to the current appeals process. DRRA adds arbitration as a permanent alternative to a second appeal under the PA Program, or for applicants that have had a first appeal pending with FEMA for more than 180 calendar days that may withdraw such appeal and submit a request for arbitration, provided the dispute is in excess of $500,000, or $100,000 in rural areas, and for disputes that arise from major disasters declared on or after January 1, 2016. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while

[11] Tribes may choose to apply for PA independently as a recipient (tribal declaration) or may submit through their State as a subrecipient.

[12] On December 18, 2018, FEMA implemented section 1219 of DRRA by posting a Fact Sheet on its website. After CBCA published their March 5, 2019 proposed rule, see 84 FR 7861, FEMA updated the: Section 1219 Public Assistance Appeals and Arbitration Fact Sheet (3–27–19). A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall time limits for first and second appeals.

Assumptions

This analysis uses the following assumptions:

- All monetary values are presented in 2018 dollars. FEMA used the Bureau of Labor Statistics (BLS) Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month, Annual Average as published May 2019.[13]
- This proposed rule does not apply to emergency disaster declarations. Thus, FEMA only included major disaster declarations in this analysis.
- FEMA assumes the length of time for an arbitration case is based on the hearing location.
- FEMA used 2018 wage rates for all parties involved in arbitration cases.

Baseline

Following guidance in OMB Circular A–4, FEMA assesses the impacts of this proposed rule against a pre-statutory baseline. The pre-statutory baseline is an assessment of what the world would look like if the relevant statute(s) had not been adopted. In this instance, FEMA has been accepting arbitration cases since the implementation of DRRA, and retroactive to January 1, 2016. Since the statute has already been implemented and because this rule is not making additional substantive changes, the rule has no cost or benefits related to the new right of arbitration. The benefit of this rule is making information publicly available in the CFR for transparency and to prevent any confusion on the most up-to-date arbitration process.

Currently, FEMA has no permanent regulations for arbitrations outside of Hurricanes Katrina and Rita. Since the passage of the DRRA, certain PA applicants under declarations since January 1, 2016 may request arbitration pursuant to 42 U.S.C. 5189a(d). On June 21, 2019, CBCA published a final rule (see 84 FR 29085) and FEMA has published a corresponding fact sheet. Between January 1, 2016 and May 7, 2020, FEMA received 15 [14] requests for arbitration. Five of these cases are still in progress, so FEMA does not have available data on the outcome of these cases. Of the 10 closed cases, FEMA prevailed in 6 cases, the applicant prevailed in 3 cases, and the applicant withdrew from the arbitration process prior to a decision in 1 case. Of the four cases involving PNPs, FEMA prevailed in three cases and the applicant prevailed in one case. These figures will continue to change as FEMA continues to receive arbitration requests.

While arbitration is available for disaster declarations retroactive to January 1, 2016, the process did not become available to applicants until FEMA published guidance in December 2018, and FEMA did not begin receiving arbitration requests until March 7, 2019. This means that FEMA only has 14 months of historical data, and therefore, FEMA also relies on older arbitration regulations as a proxy for the expected number of arbitration cases arising out of this proposed rule.

FEMA previously had regulations permitting arbitrations arising from disaster declarations for Superstorm Sandy. No applicants requested arbitration pursuant to these regulations. The authority for these arbitrations has sunset and FEMA has since removed the regulations. FEMA has regulations, at 44 CFR 206.209, permitting arbitrations arising from disaster declarations for Hurricanes Katrina and Rita. This regulation is only available for PA applicants under Hurricane Katrina and Rita disaster declarations. The number of arbitrations submitted under this authority and the process relied on to conduct these arbitrations provide insight to project the number of arbitration cases in this proposed rule. While the Katrina/Rita arbitration regulations have some key differences from the proposed regulations, such as time frames and allowing applicants to request arbitration in lieu of first appeals, it is the best historical data that FEMA has available to estimate the number of expected arbitration cases for this proposed rule.

FEMA recognizes that the regulations at 44 CFR 206.209 have a 30 day time limit for submitting arbitration requests; whereas, FEMA is proposing a 60 calendar-day time limit for arbitrations under this proposed rule. FEMA does not know the impact that these additional 30 days may have on the number of arbitrations submitted.

Number of Potential Arbitration Cases

In addition to reviewing the limited historical data available on the 15 arbitration cases, FEMA also examined the number of arbitrations submitted from the Hurricane Katrina and Rita disasters pursuant to 44 CFR 206.209, in lieu of filing a first appeal, from 2009 through 2017 to derive an estimate on the number of arbitration cases that applicants might submit per year pursuant to 42 U.S.C. 5189a(d). Pursuant to 42 U.S.C. 5189(d)(5)(A), arbitrations authorized by the DRRA must follow the process established in 44 CFR 206.209 for Katrina and Rita arbitrations, so FEMA relied on the annual average percentage of cases submitted under this regulation as a basis for estimating the number of cases that would arise for this proposed rule. The authority to arbitrate in lieu of filing a first appeal for Hurricanes Katrina and Rita became available in February 2009 and 2017 is the latest calendar year where complete data was available at the time of this analysis. Applicants could arbitrate in lieu of a first appeal only if the amount of the project was greater than $500,000.[15] During this period, applicants submitted a total of 75 arbitrations and a total 290 first appeals.[16] From this available data, applicants chose arbitration in lieu of a first appeal 26 percent of the time ((75 ÷ 290) × 100 = approximately 26 percent).

Pursuant to 42 U.S.C. 5189(d)(5)(B), arbitration is authorized by the DRRA in lieu of a second appeal where the dispute is more $500,000, or $100,000 for rural areas. For second appeals estimates, FEMA looked at all PA appeals from 2009 through 2017, rather than just the appeals resulting from Hurricanes Katrina and Rita since a second appeal was available to all applicants. FEMA found that there were 801 [17] second appeals submitted. Of that total, FEMA had data on the amount in dispute for 559 appeals. FEMA applied the proposed urban/rural and minimum

[13] Accessed and downloaded June 17, 2019. *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-201905.pdf.*

[14] The number of arbitration requests was provided by FEMA's Office of Chief Counsel Disaster Disputes Branch as of May 7, 2020.

[15] Please note that arbitration cases for Hurricanes Katrina and Rita are not bound by a threshold for rural areas as is proposed by this rule. FEMA does not know if this limitation would result in more or less cases filed.

[16] Data on appeals and arbitrations is provided by FEMA's Office of Chief Counsel Disaster Disputes Branch. Not all of these first appeals would have been eligible for arbitration. To be eligible for arbitration, the amount in dispute would have had to have been greater than $500,000. FEMA does not have amount in dispute data available for these cases, so the arbitration percentage may be overstated.

[17] During the period of 2009–2017, 801 second level appeals were submitted. FEMA has amount in dispute data for 559 cases. The amount in dispute for 242 cases was not available. FEMA does not have the amount in dispute data on the 242 cases because FEMA did not maintain electronic records for appeals prior to 2015. Prior to 2015, this data was manually entered into a database with many fields left blank. Therefore, the percentages used for estimates for this proposed rule are based on a total of 559 cases.

project amount requirements to these appeals and found that 261 or 47 percent would have been eligible for arbitration under this proposed rule [18] ((261÷ 559) × 100 = approximately 47 percent).

FEMA then applied the arbitration rate of 47 percent from the Katrina and Rita arbitrations to the number of second appeals that would have been eligible under this proposed rule, by year, from 2009 to 2017 as shown in Table 1.

TABLE 1—TOTAL AND ANNUAL AVERAGE ESTIMATED ARBITRATION CASES PER YEAR

CY	Number of second appeals	Percent eligible under proposed rule	Percent choosing arbitration	Expected number of arbitration cases
2009	122	47	26	15
2010	92	47	26	11
2011	107	47	26	13
2012	93	47	26	11
2013	102	47	26	12
2014	82	47	26	10
2015	43	47	26	5
2016	83	47	26	10
2017	77	47	26	9
Total	801			96
Average	89			11

Based on historical data from 2009 through 2017 and case data from 44 CFR 206.209, FEMA estimates that there would be an average of 11 arbitration cases in lieu of a second appeal per year under the proposed rule.

The option to withdraw a first appeal and request arbitration was not available under 44 CFR 206.209, so FEMA could not use this historical data [19] to estimate the number of arbitration cases after a first appeal withdrawal. However, arbitration has been available under 42 U.S.C. 5189a(d)(5) since January 1, 2016. So far, 15 cases were submitted, with two submitted for a first appeal lasting more than 180 days. Based on this limited data, FEMA estimates that 13.3 percent of arbitration cases would result from a withdrawal of a first appeal. ((2 ÷ 15) × 100 = 13.3 percent). Applying the 13.3 percent rate to the annual average number of expected arbitration cases would result in one additional arbitration case per year (13.3 percent × 11 cases = 1.46, rounded to one case). Therefore, FEMA estimates an average of 12 arbitration cases per year (11 + 1 = 12 arbitrations per year).

Costs

Based on experience from the arbitrations conducted for Hurricanes Katrina and Rita, costs from this proposed rule would arise mainly from travel expenses; opportunity costs of time for the applicant and applicant's representatives, recipient's representatives, and FEMA's representatives; and contract costs for applicants and FEMA to retain legal counsel and experts. Cost estimates are based on the expected number of arbitration cases per year. Since FEMA does not reimburse for applicant arbitration expenses, FEMA does not have data on the expenses incurred by applicants who have arbitrated from Hurricanes Katrina and Rita to serve as a proxy for this proposed rule. Other provisions of the proposed rule, such as timeframe requirements, electronic filing requirements, technical advice and clarifications would not have associated costs. FEMA does not expect the electronic filing requirement to have associated costs since nearly all applicants have access to internet and email, and most submit arbitration requests through their attorneys. The proposed timeframe requirements would align the submission deadlines for arbitration and appeals and would not place additional burdens on the applicants. FEMA currently provides technical advice as needed, so this would not be a new practice under this proposed rule.

The arbitration process is highly customizable for the applicant. The applicant may choose to use an attorney, or several attorneys to represent them during the arbitration process. The applicant may also choose not to hire legal representation at all. Additionally, the applicant may use any number of expert witnesses or none. Because of the variability in the way arbitrations are conducted, FEMA is presenting what it considers a typical case upon which to base its cost estimates. This ''typical case'' is based on recent experience with the 15 arbitration already cases filed. Generally, the applicant will use one or two attorneys and at least one expert witness. However, the arbitration process is extremely flexible, and an applicant can use whatever resources it thinks would be most appropriate for its case. For example, in one case, the applicant hired several non-local attorneys for representation. In another case, the arbitration was conducted via written reports only, and no hearing was conducted.

Costs to the CBCA are not discussed in this analysis. CBCA promulgated their own regulations regarding their procedures for FEMA arbitration cases. Under DRRA, CBCA will be responsible for covering the costs of conducting arbitration hearings. All other parties including the applicant, the recipient, and FEMA would be responsible for covering their own expenses. The proposed rule does not mandate any costs for the applicant or recipient. The arbitration process would be entirely voluntary on the part of the applicant. Applicants would choose to request arbitration, if they determine that the cost of arbitration is justified by the potential benefits.

[18] Out of 559 cases, 166 had an amount in dispute greater than $500,000 and would be eligible regardless of the urban/rural classification. 193 cases were for amounts between $100,000 and $500,000, of which 95 were classified as rural. 261 (166 + 95 = 261) cases out of 559, or 47 percent would have met the eligibility requirements for arbitration in lieu of a second appeal.

[19] Out of 3,778 first appeals between 2009 and 2017, 1,834 or 49 percent lasted longer than 180 days. ((1,834 ÷ 3,778) × 100 = 49 percent).

This analysis estimates a range of potential costs based on the applicant's or recipient's use of attorneys for representation. The proposed rule would not require attorneys to represent any party for arbitration. However, FEMA would be represented by attorneys at any arbitration hearing.

The costs to the applicant, recipient, and FEMA would be due to travel and opportunity cost of time and contract costs for legal counsel and experts. To estimate the opportunity cost of time, FEMA assumed that each case would take each party 46.5 hours [20] (rounded to 47 hours) to prepare for the hearing, attend the hearing, and for post hearing work. Hearings have historically lasted two working days, or 16 hours.[21] Additional time would be required for travel as is discussed later in this analysis. FEMA also assumes that each party would make use of expert witnesses in support of their case. Additionally, FEMA generally pays for a court reporter.

Opportunity Cost of Time

A typical arbitration request requires the work of several people, including lawyers to represent the applicants, a court reporter to take a transcript of the hearing, and State, local, Tribal, or PNP managers who are responsible for compiling and submitting the original PA request. Applicants will also typically supply expert witnesses when making their case to the CBCA panel. FEMA used General and Operations Managers to represent State, Tribal, local, and PNP managers. Many PA projects involve repair or replacement of buildings and infrastructure, so FEMA assumes that Engineers would be the most likely occupation used as expert witnesses.

FEMA used hourly wage rates from the Bureau of Labor Statistics Occupational Employment Statistics for the following occupations: Lawyers (SOC 23–1011), $69.34; Court Reporters (SOC 23–2091), $30.00; Engineers (SOC 17–2000), $47.71; and General and Operations Managers (SOC 11–1021) $59.56.[22] To account for employee benefits, FEMA used a wage multiplier of 1.46,[23] resulting in fully-loaded hourly wages of $101.24 for Lawyers, $43.80 for Court Reporters, $69.66 for Engineers, and $86.96 for General and Operations Managers.

FEMA used the 2018 hourly wage tables for the Washington-Baltimore-Arlington, DC–MD–VA–WV–PA [24] locality rate for FEMA employees participating in arbitration cases. Based on current FEMA practice, FEMA assumes that GS–13 employees would perform both legal and other services for an arbitration case and the work would be reviewed by a manager at the GS–15 level. The hourly GS–13 Step 5 salary was $52.66, and the hourly GS–15 step 5 salary was $73.20. In order to account for the benefits paid by employers, FEMA used a 1.46 multiplier to calculate loaded wage rates of $76.88 for a GS–13 Federal employee and $106.87 for a GS–15 Federal employee.

Travel

Arbitration cases are heard by a panel of judges of the CBCA, which is based in Washington, DC. The arbitration process is very customizable, so applicants can choose to have the hearings locally, where a CBCA judge would travel to their location, and FEMA would also send its representatives. Alternatively, cases could be heard at the CBCA, and the applicant would travel to Washington, DC, along with any lawyers and expert witnesses. Finally, the applicant could choose to have the CBCA review documents, and nobody would be required to travel. Because PA applicants are located throughout the U.S. and can be travelling from any location within the U.S., FEMA used average nationwide travel costs to estimate the travel costs for this rule.

The U.S. General Service Administration (GSA) provides guidance on travel policy, hotel rates, and meals and incidentals for Federal employees. FEMA used GSA data on hotel prices and per diem rates to estimate travel expense costs of attending a hearing in person.[25] Because data on travel expenses for non-Federal employees is not available, FEMA used the Federal lodging and per diem rates for applicants travelling to Washington DC to attend hearings. According to GSA, in 2018, the average price of a hotel room in the U.S. in the Washington, DC was $219 per night and outside of Washington, DC was $93 per night. The per diem rate for meals and incidentals on the first and last travel days is $52 and $69 for other travel day(s) in Washington, DC. Similarly, the per diem rates for meals and incidentals on the first and last day is $39 and $51 for the other days outside of Washington, DC.

The U.S. Department of Transportation (DOT) provides information on the price of domestic airfare.[26] According to the Bureau of Transportation Statistics, the annual cost of an average domestic flight within the United States, the average airfare was $350 roundtrip.[27] The total travel costs for applicants attending hearings in Washington, DC would be $1,249 per person ($350 average airfare + ($219 hotel in DC × 3 nights) + ($69 meals and incidentals × 2 days of stay) + ($52 meals and incidentals × 2 travel days)) = $1,249).

Expert Witnesses

FEMA assumes that each party would make use of expert witnesses to support their case. The expert witnesses would be required to travel to the hearing at the expense of the party that hired them. Based on historical experience, preparing for the hearing is estimated to take 20 hours, the duration of the hearing is estimated to be 16 hours and the travel time is estimated at 11 hours for a total of 47 hours for a hearing in Washington, DC, the opportunity costs of time for one expert witness to attend a hearing would be $3,274 ($69.66 × 47 hours). Thus, the total cost for one expert witness' travel and opportunity cost of time is $4,523 ($1,249 + $3,274). Table 2 shows the detailed the costs of an expert witness. To provide a range of estimates since cases vary, a hearing at the applicant's location for an expert witness would cost $2,508 ($69.66 × 36 hours).

[20] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[21] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[22] U.S. Bureau of Labor Statistics. National Occupational Employment and Wage Estimates United States. May 2018. Accessed May 20, 2020. *https://www.bls.gov/oes/2018/may/oes_nat.htm.*

[23] BLS Employer Costs for Employee Compensation, Table 1, December 2018 located at *https://www.bls.gov/news.release/archives/ecec_03192019.pdf.* The loaded wage factor is equal to the total compensation of $36.32 divided by the wages and salary of $24.91. Values for the total compensation and wages and salary are for civilian workers in the all workers occupational group. Accessed April 29, 2019.

[24] U.S. Office of Personnel Management. 2018 General Schedule (GS) Locality Pay Tables. Accessed May 22, 2020. *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/18Tables/html/DCB_h.aspx.*

[25] U.S. General Services Administration. ''FY 2018 Per Diem Rates for District of Columbia .'' Accessed on May 18, 2020. Standard CONUS rate used for lodging and MI&E. *https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems_report&state=DC&fiscal_year=2018&zip=&city=.* Per diem rates are calendar year instead of fiscal year.

[26] Bureau of Transportation Statistics. ''Annual Fares 1995–2019 3Q 2019'' (.xlsx) March 23, 2020. U.S. Department of Transportation. *https://www.bts.gov/sites/bts.dot.gov/files/Annual%20Fares%201995-2019%203Q%202019.xlsx.*

[27] The airfare was adjusted to 2018 dollars and excludes airline tickets under $50.

TABLE 2—ESTIMATED COST PER EXPERT WITNESS, WASHINGTON, DC HEARING

[2018$]

Round trip flight	Three nights of lodging at $219 per night	Meals and incidentals	Total travel expenses	Opportunity costs of time for a hearing in Washington, DC	Total expert witness cost
(A)	(B)	(C)	(D) = (A + B + C)	(E)	(D + E)
$350	$657	$242	$1,249	$3,274	$4,523

Cost for the Applicant

The total cost for the applicant includes travel expenses (round trip flight, three nights of lodging, and meals and incidentals) and opportunity costs of time for the applicant, the applicant's representatives, and the expert witnesses. The total travel expenses for the applicant and the representative would be $2,498 ($1,249 × 2 personnel = $2,498), if the hearing is held in Washington DC. As previously discussed in this analysis, costs include 47 hours for hearing preparation, attending the hearing, and post hearing work, plus 11 hours of travel time for applicants and the applicant's representative. FEMA notes that an applicant can choose not to bring a representative or an applicant's representative could be one attorney or in some cases more than one attorney. To provide a range of costs, FEMA analyzes the typical case where one attorney or no attorneys are present. If the applicant's representative is an attorney, the opportunity costs of time would be $10,916 ($101.24 per hour wages for a lawyer × 58 hours) + ($86.96 per hour wages for a general and operations manager × 58 hours) = $10,916). If the applicant does not use an attorney as their representative, the opportunity costs of time would be $10,087 (2 general and operations managers at $86.96 each × 58 hours = $10,087). Table 3 shows the range of total costs to the applicant.

TABLE 3—RANGE OF APPLICANT COSTS—WASHINGTON, DC HEARING

[2018$]

	Opportunity cost of time	Travel	Total
1 Attorney and 1 Non-Attorney	$10,916	$2,498	$13,414
2 Non-Attorneys	10,087	2,498	12,585

The total cost to the applicant if they were to travel to Washington, DC for a hearing with a representative and two expert witnesses, ranges from $21,631 ((2 expert witnesses at a cost of $4,523 each) + $12,585 recipient cost) to $22,460 ((2 expert witnesses at $4,523 each) + $13,414 recipient and attorney cost).

For a local hearing, the costs to the applicant would include 47 hours of opportunity costs of time for the applicant and representative (assuming the representative is local), and 36 hours of opportunity costs of time to attend the hearing for two expert witnesses (assuming the expert witnesses are local) and would range from $13,190 ((2 general and operations managers at $86.96 each × 47 hours) + (2 expert witnesses at $69.66 each × 36 hours) = $13,190) to $13,861 (($86.96 for a general and operations manager × 47 hours) + ($101.24 for an attorney × 47 hours) + (2 expert witnesses at $69.66 each × 36 hours) = $13,861) depending on who the recipient uses as a representative. Table 4 shows the range of total costs for an applicant for hearings held at the applicant's location.

TABLE 4—APPLICANT COSTS—LOCAL HEARING

[2018$]

	Expert witnesses	Opportunity cost of time	Total
1 Attorney and 1 Non-Attorney	$5,016	$8,845	$13,861
2 Non-Attorneys	5,016	8,174	13,190

Cost for the Recipient

The recipient would not present information in the arbitration case, but would send one or more representatives in a supporting role for the applicant. The cost per arbitration case for the recipient, is the opportunity costs of time for the representative totaling $10,087 (2 general and operations managers at $86.96 each × 58 hours = $10,087) and travel expenses $2,498 (2 representatives × $1,249) of those attending the hearing in Washington, DC. As shown in table 5, the total cost to the recipient would be $12,585 if the hearing was held in Washington, DC.

TABLE 5—ESTIMATED RECIPIENT COSTS, WASHINGTON, DC HEARING

[2018$]

	Opportunity cost of time	Travel	Total
General and Operations Managers	$10,087	$2,498	$12,585

For a local hearing, two representatives would spend 47 hours on the case and the cost to the recipient would be $8,174 (2 general and operations managers at $86.96 each × 47 hours = $8,174).

Cost to Government/FEMA

FEMA would require two attorneys for a typical arbitration case, a GS–13 step 5 attorney and a GS–15 step 5 supervisory attorney, to review and to prepare a response to the request for arbitration. Based on historical experience, the two attorneys' total time from preparation to post hearing is 47 hours.[28] The opportunity costs of time of the attorneys, including preparation and review of a case, is $8,636 (($76.88 GS 13 Step 5 attorney × 47 hours) + ($106.87 GS 15 Step 5 Supervisory Attorney × 47) hours = $8,636).

Based on historical experience, FEMA would also require four non-attorneys (*e.g.,* GS–13 Step 5 program analysts) to support the arbitration case only for the duration of the hearing. The opportunity costs of time associated with the program analysts would be $4,920 (4 GS 13 Step 5 program analysts at $76.88 each × 16 hours = $4,920). Thus, the total opportunity costs of time for all six FEMA personnel would be $13,556.

FEMA would also call their own expert witnesses to attend the hearing. Based on historical experience, FEMA assumes that it would use four expert witnesses per case for a total of $10,032 ($2,508 cost per expert witness × 4 expert witnesses = $10,032). The expert witnesses provide testimony on a range of subjects, for example soil degradation or building construction.

Arbitration hearings do not require transcription services. However, FEMA has historically hired a court reporter for hearings and provided the transcript to the CBCA for their records. FEMA would continue to pay for a court reporter for the duration of a hearing under the proposed rule. The opportunity costs of time for the court reporter services for a transcript would be $701 per arbitration case ($43.80 per hour wages for Court Reporters × 16 hours of arbitration time = $701).

The estimated total cost to FEMA, including staff time, expert witnesses and transcript services, would be $24,289 per case. Table 6 presents the cost of each component by opportunity cost of time and other costs.

TABLE 6—ESTIMATED FEMA COSTS—WASHINGTON, DC HEARING

[2018$]

Cost for four expert witnesses	Cost of court reporter	Cost for FEMA employees (2 attorneys and 4 program analysts)	Total per-case cost to FEMA
$10,032	$701	$13,556	$24,289

For a hearing at the applicant's location, FEMA representatives would need to travel to the location of the hearing. Costs for a local hearing would be higher due to paying for travel time as well as actual travel costs. Travel costs are estimated using the figures previously mentioned and would be $1,249 per person for a total of $2,498, if 2 attorneys travel to the applicant's location. Additionally, FEMA estimates that the time would increase to 58 hours due to 11 hours of travel time for the attorneys totaling (2 attorneys at $106.87 each × 58 hours) $12,397 plus $4,920 for non-travelling program analysts resulting in a total cost of $17,317. The estimated costs to FEMA for a local hearing are presented in Table 7.

TABLE 7—ESTIMATED FEMA COSTS—LOCAL

[2018$]

Cost for four expert witnesses	Cost of court reporter	Opportunity costs of time for FEMA employees	Travel costs (2 attorneys)	Total per-case cost to FEMA
$10,032	$701	$ 17,317	$2,498	$30,548

In addition to these costs, FEMA's PA Program would also hire an Arbitration Coordinator at the GS–13 Step 5 level with an annual salary of $109,900.With the 1.46 multiplier for a fully loaded wage rate, the additional cost to FEMA would be $160,454 per year. Therefore, the annual total costs to FEMA range from $184,743 ($160,454 + $24,289) if the hearing is held in Washington, DC to $191,002 ($160,454 + $30,548) if the hearing is held at the applicant's location.

[28] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

Total Costs

The total cost per case vary based on who the applicant uses as a representative, and whether the hearing is held in Washington, DC or local to the applicant. Government and FEMA costs would be higher for a hearing held local to the applicant, and likewise, applicant and recipient costs would be higher if the hearing was held in Washington, DC. FEMA estimates that the total costs per case to range between $51,912 and $59,343. Table 8 presents the range of estimated costs per arbitration case.

TABLE 8—TOTAL COST PER CASE

[2018$]

	FEMA	Applicant	Recipient	Total
Low	$30,548	$13,190	$8,174	$51,912
High	24,289	22,460	12,585	59,334

As established earlier in this analysis, FEMA estimate an average of 12 arbitration cases per year. Therefore, FEMA estimates the total annual costs to range between $783,398 ((12 cases × $30,548 per case) + $160,454 for a new FEMA employee + (12 × $13,190 per case for applicant) + (12 × $8,174 per case for the recipient)= $783,398) (low) and $872,462((12 cases × $24,289 per case) + $160,454 for a new FEMA employee + (12 × $22,460 per case for the applicant) + (12 × $12,585 for the recipient)= $872,462) (high). Table 9 shows the estimated total costs per year of this proposed rule. The low cost estimate assumes that all hearings would be held at the applicant's location, while the high estimate assumes hearings would be held in Washington, DC.

TABLE 9—TOTAL COST PER YEAR FOR 12 CASES

[2018$]

	FEMA	Applicant	Recipient	Total
Low	$527,030	$158,280	$98,088	$783,398
High	451,922	269,520	151,020	872,462

Tables 10 and 11 show the total 10-year costs and 10-year costs annualized at 3 percent and 7 percent.

TABLE 10—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES

[Low Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3% [1]	Annual costs discounted at 7% [1]
1	$527,030	$158,280	$98,088	$783,398	$759,896	$728,560
2	527,030	158,280	98,088	783,398	737,099	677,561
3	527,030	158,280	98,088	783,398	714,986	630,132
4	527,030	158,280	98,088	783,398	693,536	586,023
5	527,030	158,280	98,088	783,398	672,730	545,001
6	527,030	158,280	98,088	783,398	652,548	506,851
7	527,030	158,280	98,088	783,398	632,972	471,371
8	527,030	158,280	98,088	783,398	613,983	438,375
9	527,030	158,280	98,088	783,398	595,564	407,689
10	527,030	158,280	98,088	783,398	577,697	379,151
Total	5,270,300	1,582,800	980,880	7,833,980	6,651,012	5,370,714
Annualized					783,398	783,398

[1] The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.

TABLE 11—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES

[High Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3% [1]	Annual costs discounted at 7% [1]
1	$451,922	$269,520	$151,020	$872,462	$846,288	$811,390
2	451,922	269,520	151,020	872,462	820,899	754,593
3	451,922	269,520	151,020	872,462	796,273	701,771
4	451,922	269,520	151,020	872,462	772,384	652,647

TABLE 11—10-YEAR COST TOTALS USING 3 PERCENT AND 7 PERCENT DISCOUNT RATES—Continued
[High Estimate, 2018$]

Year	FEMA costs	Applicant costs	Recipient costs	Total costs	Annual costs discounted at 3%[1]	Annual costs discounted at 7%[1]
5	451,922	269,520	151,020	872,462	749,212	606,962
6	451,922	269,520	151,020	872,462	726,736	564,475
7	451,922	269,520	151,020	872,462	704,934	524,962
8	451,922	269,520	151,020	872,462	683,786	488,215
9	451,922	269,520	151,020	872,462	663,272	454,040
10	451,922	269,520	151,020	872,462	643,374	422,257
Total	4,519,220	2,595,200	1,510,200	8,724,620	7,407,158	5,981,312
Annualized					872,462	872,462

[1] The annualized amounts for 7 percent and 3 percent are equal in this table because the amounts for each year are identical and the first year is discounted.

FEMA believes that it would not have any implementation or familiarization costs. FEMA currently has an arbitration process that is very similar to the proposed rule for cases arising from Hurricanes Katrina and Rita. FEMA has already notified eligible applicants, dating back to January 1, 2016 of their eligibility for arbitration under DRRA section 1219.

Further, applicants would not have familiarization costs because the process for requesting arbitration would consist of an email request and would use materials previously submitted in the application for PA funding.

Benefits

The benefits of this proposed rule would be qualitative in nature, and would apply mostly to the applicant. FEMA believes that this proposed rule would further its mission of supporting State, Tribal, and local governments, as well as eligible PNPs by offering them an alternative procedure for disputing PA eligibility and funding decisions. Applicants retain the option to submit a second appeal. The proposed rule would offer an alternative that the applicant may see as more impartial because the arbitration cases would be heard by CBCA judges, as opposed to second appeals that would continue to be conducted entirely within FEMA. Additionally, applicants would have the opportunity to present their case in person and call expert witnesses to support their claims. These two options would allow applicants to choose the course that would be most appropriate to their circumstances.

Customization

Applicants may select arbitration, if they consider this process more customizable. The arbitration process would provide applicants with the opportunity to appear in person before an impartial panel and present evidence as to why they are disputing a FEMA determination. Applicants can also retain expert witnesses to provide support to their position. Expert witnesses provide testimony within their technical specialty to assist the arbitration panel in understanding the underlying work for which FEMA ultimately decides eligibility.

Additionally, applicants would have the opportunity to respond in real time to evidence presented by FEMA, allowing them more control over the dispute than they might have under a second appeal. Applicants may opt to hire an expert witness in arbitration to help present the disputed information in a manner more favorable to the applicant. The ability to hire expert witnesses may provide applicants with additional utility and may be an incentive to select arbitration.

The proposed rule would also allow applicants to present the same technical documentation in both the appeals and arbitration procedures. An applicant who submits a first appeal, but elects to withdrawal in favor of arbitration may opt to reuse the information in the request for arbitration that was previously submitted in the first appeal. Applicants may gain utility from the convenience of reusing documents.

Impartiality

It is not possible to quantify an applicant's increased utility due to perceived impartiality. The purpose of arbitration is to create a process to resolve the issues in a manner satisfactory to all parties. Based on past cases, FEMA has granted or partially granted 23 percent of the second appeals submitted by applicants.[29] CBCA has found in favor or partially in favor for the applicant in less than 20 percent of Katrina/Rita arbitrations.[30]

The applicant may nevertheless perceive they have a better opportunity to gain additional Federal funding through arbitration. Applicants would select arbitration as their case would be heard by a third party, rather than an appeal process that is conducted entirely by FEMA. Applicants would perceive a more impartial system, if the forum encourages both parties to solicit discussion rather than ''paper'' based appeals. Applicants would expect that impartiality would best achieve their objective of a fair resolution.

Tables 12 and 13 analyze the historical outcomes from second appeals and arbitration from 44 CFR 206.209. Because of the unpredictable nature and unique circumstances of every disaster, these figures may not be representative of future outcomes, as the outcomes are based on the arbitration policies for Hurricanes Rita and Katrina and the unique circumstances of each case.

TABLE 12—SECOND APPEALS OUTCOMES
[2009–2017]

Second appeal outcome	Number of cases	Percent
Granted	118	14.7
Denied	445	55.6
Partially Granted	67	8.4
Active	1	0.1
Other[1]	170	21.2
Total	801	100

[1] The category of Other includes appeal decision not available, remand, rescind, arbitration, and withdrawn.

[29] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

[30] Based on information provided by FEMA Office of Chief Counsel Disaster Disputes Branch.

TABLE 13—ARBITRATION OUTCOMES UNDER 44 CFR 206.209
[2009–2017]

Arbitration outcome	Number of cases	Percent
Binding Decision without CBCA	3	4.0
In Favor of FEMA	17	22.7
In Favor of Applicant	10	13.3
Partial in Favor of Applicant	31	41.3
Withdrawn	3	4.0
Other[2]	11	14.7
Total	75	100

[2] The category of Other includes other decision, dismissed, and ongoing cases.

Transfers

FEMA is unable to quantify transfers due to this proposed rule. Transfers would arise from the possibility that FEMA may award a different amount of grant funding under the arbitration process than it would under current regulations that only allow for a second appeal. However, it would be speculative for FEMA to make an estimate as to the potential changes in grant disbursement due to the proposed rule.

Impacts

Table 14 summarizes the costs, benefits, and transfer impacts from the proposed rule.

TABLE 14—OMB CIRCULAR A–4 ACCOUNTING TABLE

Category	Estimates		Units		
	Low estimate	High estimate	Year dollar	Discount rate	Period covered
Benefits:					
Annualized Monetized	$0	$0	2018	7%	10 Years.
	$0	$0	2018	3%	10 Years.
Annualized Quantified	0	0			
	0	0			
Qualitative	• Additional option for review of PA projects and decisions. • Greater perception of impartiality in the arbitration process. • Ability to customize arbitration process.				
Costs:					
Annualized Monetized	$783,398	$ 872,462	2018	7%	10 Years.
	$783,398	$4872,462	2018	3%	10 Years.
Annualized Quantified	0	0			
	0	0			
Qualitative	• Longer time frame to resolve disputes under arbitration option.				
Transfers	Possible changes to PA grant disbursements.				
Effects:					
Small Entities	FEMA expects 9 arbitration cases per year from small entities with an estimated cost of between $13,190 and $22,460 per small entity.				
Wages	None.				
Growth	None.				

Uncertainty Analysis

The estimates of the costs of the proposed rule are subject to uncertainty due to the uniqueness of each arbitration case. The cost estimates can vary widely depending on complexity and other factors. As a result, the cost estimate could be overstated or understated.

There are several sources of uncertainty in this analysis: The number of eligible applicants, the proposed deadlines for filing, and the potential number of arbitration cases. Major disasters do not occur on a regular time interval. The severity of the disaster would affect the number of applicants that decide to apply for funding in the PA Program. The number of eligible applicants can vary year-to-year.

Historical data used in this analysis was based on the arbitration process for Hurricanes Katrina and Rita, which is different in a couple of key respects from the proposed arbitration process. While the cost shares for Katrina and Rita were 100 percent, cost shares for future disaster declarations may be as high as 25 percent for applicants. Because Katrina/Rita applicants were not required to pay for any portion of their project cost, they had an incentive to apply for more costly projects and pursue arbitration when denied. Future disasters with a cost share may lead applicants to be more conservative in applying for PA projects, which may result in fewer arbitration requests than was indicated in the primary estimate.

Additionally, the timeframe for submitting arbitration requests under 44 CFR 206.209 was 30 days. However, FEMA is proposing a 60 day submission deadline for arbitration submissions under DRRA requirements to align with the current 60 day submission timeframe for second appeals. This additional time may affect the number of arbitration cases submitted in the future, but FEMA cannot reliably predict these impacts at this time.

Alternatives

FEMA considered several alternative regulatory approaches to the requirements in the proposed rule. The alternatives included: (1) Not issuing a mandatory regulation; (2) proposing an alternate definition of rural; and (3) not requiring electronic submission. FEMA did not consider a no-action alternative. The DRRA mandates FEMA to promulgate a rule allowing the option of arbitration in lieu of a second appeal and specifies the CBCA as the arbitration administrator. As such, FEMA must pursue a regulatory action.

FEMA considered using OMB's nonmetropolitan area definition as an alternate definition of the term ''rural.'' OMB's nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas.

Nonmetropolitan areas are outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000–49,999 persons and defined with the same criteria used to define metro areas.

2. All remaining counties, often labeled ''noncore'' counties because they are not part of ''core-based'' metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.

2. Outlying counties that are economically tied to the core counties as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called ''reverse'' commuting pattern.

FEMA did not recommend using the OMB's definition because it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas such as the Grand Canyon being considered a metropolitan county. This alternative would not result in reducing the impact on small entities, while accomplishing the stated objective of the rule.

FEMA considered not requiring applicants to submit a request for arbitration electronically. Current practices allow FEMA to accept hard copy submissions (through U.S. Mail or other means) for first and second appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. FEMA chose this alternative, as it would provide FEMA with enhanced ability to track and establish deadlines in the arbitration process. CBCA's rule requires applicants to use an electronic method to submit their documentation and request for arbitration to CBCA. Thus, FEMA believes requiring electronic submission would not pose an undue burden on most applicants.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FEMA does not believe this proposed rule will have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM. FEMA will consider all comments received during the public comment period when making a final determination. In accordance with the Regulatory Flexibility Act, an IFRA must contain the following statements, including descriptions of the reason(s) for the rulemaking, its objective(s), the affected small entities, any additional burden for book or record keeping and other compliance requirements; any Federal rules that duplicate, overlap, or conflict with the rulemaking, and significant alternatives considered. The following sections address these subjects individually in the context of this proposed rule.

1. A Description of the Reasons why Action by the Agency Is Being Considered

PA helps State and local governments respond to and recover from the challenges faced during major disasters and emergencies. To support State and local governments facing those challenges, Congress passed DRRA.

Under the PA Program, as authorized by the Stafford Act, FEMA awards grants to eligible applicants to assist them in responding to and recovering from Presidentially-declared emergencies and major disasters. The recipient, as defined at 44 CFR 206.201(m), is the government to which a grant is awarded, and which is accountable for the use of the funds provided. Generally, the State for which the emergency or major disaster is declared is the recipient. The recipient can also be an Indian Tribal government. The applicant, as defined at 44 CFR 206.201(a), is a State agency, local government, or eligible private nonprofit organization submitting an application to the recipient for assistance under the State's grant.

The PA Program provides Federal funds for debris removal, emergency protective measures, repair and replacement of roads and bridges, utilities, water treatment facilities, public buildings, and other infrastructure. When the President declares an emergency or major disaster declaration authorizing disbursement of funds through the PA Program, that presidential declaration automatically authorizes FEMA to accept applications from eligible applicants under the PA Program. To apply for a grant under the PA Program, the eligible applicant must submit a Request for PA to FEMA through the recipient. Upon award, the recipient notifies the applicant of the award, and the applicant becomes a subrecipient.

The DRRA requires FEMA to promulgate a regulation providing applicants with a right of arbitration under FEMA's PA Program. Applicants currently have a right to arbitration to dispute FEMA eligibility determinations associated with Hurricanes Katrina and Rita; see 44 CFR 206.209. The proposed rule would expand the scope by allowing applicants to request arbitration for disputes under all disaster declarations after January 1, 2016 that are above certain dollar amount thresholds. The proposed rule would grant applicants an additional method of recourse.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The proposed rule would implement section 1219 of the DRRA by providing applicants with a right to arbitration for the PA Program under major disaster declarations. Pursuant to section 1219, to request arbitration a PA applicant (1) must have a dispute arising from a disaster declared after January 1, 2016, (2) must be disputing an amount that exceeds $500,000 (or $100,000 for an applicant in a ''rural area'' with a population of less than 200,000 outside an urbanized area), and (3) must have submitted a first appeal pursuant to the time requirements established in 44 CFR 206.206.

Accordingly, FEMA is initiating a rulemaking to amend appeals regulation at 44 CFR 206.206 to add in the new right to arbitration under DRRA. The proposed rule would revise appeals procedures and establish arbitration procedures.

3. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Will Apply

''Small entity'' is defined in 5 U.S.C. 601. The term ''small entity'' can have the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''

Section 601(3) defines a ''small business'' as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act (SBA). This includes any small business concern that is independently owned and operated and is not dominant in its field of operation. Section 601(4) defines a ''small organization'' as any not-for-profit enterprise which is independently owned and operated and is not dominant in their field of operation. Section 601(5) defines ''small governmental jurisdiction'' as governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000.

The SBA also stipulates in its size standards of how large an entity may be and still be classified as a ''small entity.'' These small business size standards are matched to industries described in the North American Industry Classification System (NAICS) to determine if an entity is considered small.

This proposed rule does not place any requirements on small entities. It does, however, offer them an alternative means to dispute FEMA's determination for PA eligibility. If the entity chooses to dispute a PA determination, and they select arbitration rather than a second appeal, they would be responsible for their share of the cost of the arbitration process.

All small entities would have to meet the proposed requirements to be eligible for arbitration. FEMA identified 3,778 applicants for FEMA's PA Program that would be eligible for arbitration under the proposed requirements for the time frame from 2009 through 2017. FEMA used Slovin's formula and a 90 percent confidence interval to determine the sample size.[31] FEMA sampled 97 of these applicants and found that 73 (75 percent) met the definition of a small entity based on the population size of local governments (less than 50,000 population),[32] or PNPs based on size standards set by the SBA.[33] The remaining 24 entities were not found to be considered as small entities. Eligible small entities included 70 small government agencies and three PNP organizations. Based on information presented in the Executive Orders 12866 and 13563, FEMA estimates 12 arbitration cases per year. If 75 percent of these are small entities, FEMA estimates 9 arbitration requests per year from small entities with an average cost of between $13,190 and $22,460 per case. Nine small entities may not represent a substantial number of small entities impacted by this proposed rule and FEMA does not believe the costs imposed to these small entities are significant. FEMA welcomes any comments from the public on the number of small entities presented in this analysis and any impacts imposed onto them by this proposed rule.

4. A Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

Arbitration—As an alternative to the appeal process, applicants may request arbitration of the disputed determination. To be eligible for Section 423 arbitration, a PA applicant's request must meet all three of the following conditions: (1) The amount in dispute arises from a disaster declared after January 1, 2016; (2) the disputed amount exceeds $500,000 (or $100,000 if the applicant is in a ''rural area,'' defined as having a population of less than 200,000 living outside an urbanized area); and (3) the applicant submitted a first appeal with FEMA pursuant to the requirements established in 44 CFR 206.206.

The applicant must submit a Request for Arbitration to the recipient, CBCA, and FEMA. The Request for Arbitration must contain a written statement, which specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel. FEMA estimates that it would take an applicant 2 hours to complete the Request for Arbitration (these 2 hours are accounted for in the economic analysis through the 47 hours of hearing preparation time for applicants) with a wage rate of $86.96 for a general and operations manager. FEMA estimates the opportunity cost of time for completing the request would be $173.92 per applicant. With an estimated 9 cases per year, FEMA estimates the total burden for completing the request at $1,565 per year. The person completing the request would need to be familiar with PA regulations and policies.

5. An Identification, to the Extent Practicable, of all Relevant Federal Rules Which May Duplicate, Overlap, or Conflict With the Proposed Rule

FEMA's regulations on appeals, found at 44 CFR 206.206, are still in effect and provide the required process for submitting first and second appeals.[34] Applicants must submit a request for a first appeal prior to submitting a request for arbitration. Applicants may submit a request for arbitration or a second appeal, but not both.

Section of 1219 of DRRA requires CBCA to conduct the arbitrations. Accordingly, applicants that request arbitration to dispute a FEMA determination must also meet the CBCA electronic submission requirement.

There are overlapping provisions between FEMA's proposed rule and CBCA's final rule.[35] Applicants should also see CBCA regulations at 48 CFR parts 6101 and 6106 for additional procedures for requesting arbitration.

6. A Description of Any Significant Alternatives to the Proposed Rule Which Accomplish the Stated Objectives of Applicable Statutes and Which Minimize Any Significant Economic Impact of the Proposed Rule on Small Entities

The alternatives included: (1) Using another definition for ''rural'' and (2) not requiring electronic submission.

FEMA considered using OMB's nonmetropolitan area definition as an alternate definition of the term ''rural.'' OMB's nonmetropolitan area is defined as areas outside the boundaries of metropolitan areas and are further subdivided into two types:

1. Micropolitan (micro) areas, which are nonmetro labor-market areas centered on urban clusters of 10,000–49,999 persons and defined with the same criteria used to define metro areas.

2. All remaining counties, often labeled ''noncore'' counties because they are not part of ''core-based'' metro or micro areas.

OMB defines metropolitan areas to include:

1. Central counties with one or more urbanized areas; urbanized areas are densely-settled urban entities with 50,000 or more people.

2. Outlying counties that are economically tied to the core counties

[31] Slovin's formula is n = N/(1 + N *e ∧2). Therefore, 3,778/(1 + 3,778 * 0.1∧2) = 97 (rounded).

[32] Information on population sizes was obtained using the U.S. Census Bureau's City and Town Population Totals 2010–2018. Available at *https://www.census.gov/data/tables/time-series/demo/popest/2010s-total-cities-and-towns.html.*

[33] Small Business Administration. ''Table of Size Standards'' (.xlxs). Available at *https://www.sba.gov/document/support--table-size-standards.* Revenue and employment information for individual PNP's was obtained from PNP websites.

[34] A link to the current Fact Sheet: *https://www.fema.gov/media-library/assets/documents/175821.* Accessed May 15, 2020.

[35] A copy of CBCA's final rule can be found online at: *https://www.govinfo.gov/content/pkg/FR-2019-06-21/pdf/2019-13081.pdf.* Accessed July 22, 2019.

as measured by labor-force commuting. Outlying counties are included if 25 percent of workers living in the county commute to the central counties, or if 25 percent of the employment in the county consists of workers coming out from the central counties—the so-called ''reverse'' commuting pattern.

FEMA did not recommend using the OMB's definition as it combines rural area populations into Metropolitan counties. The OMB definition would also result in some rural areas such as the Grand Canyon being considered a metropolitan county. This alternative would not result in reducing the impact on small entities while accomplishing the stated objective of the rule.

FEMA considered not requiring electronic submission. Current practices allow FEMA to accept physical mail for appeals. In addition, FEMA currently accepts electronic submissions for requests for arbitration under 44 CFR 206.209. As CBCA provided an electronic address for applicants to submit their request for arbitration and documentation, applicants must use electronic method if they choose the arbitration process. Thus, FEMA believes requiring electronic submission would not pose an additional undue burden on applicants that are considered small entities.

Conclusion

FEMA is interested in the potential impacts from this rule on small businesses and requests public comment on these potential impacts. If you think that this rule will have a significant economic impact on you, your business, or organization, please submit a comment to the docket at the address under **ADDRESSES** in this proposed rule. In your comment, explain why, how, and to what degree you think this rule will have an economic impact. FEMA does not believe this proposed rule will have a significant economic impact on a substantial number of small entities. However, FEMA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FEMA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM.

C. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 658, 1501–1504, 1531–1536, 1571 (the Act), pertains to any notice of proposed rulemaking which implements any rule that includes a Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) or more in any one year. If the rulemaking includes a Federal mandate, the Act requires an agency to prepare an assessment of the anticipated costs and benefits of the Federal mandate. The Act also pertains to any regulatory requirements that might significantly or uniquely affect small governments. Before establishing any such requirements, an agency must develop a plan allowing for input from the affected governments regarding the requirements. Exemptions from the Act are found at 2 U.S.C. 1503, they include any regulation or proposed regulation that ''provides for emergency assistance or relief at the request of any State, local, or tribal government or any official of a State, local, or tribal government.'' Thus, FEMA finds this rule to be exempt from the Act.

Additionally, FEMA has determined that this rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, nor by the private sector, of $100 million or more (adjusted annually for inflation) in any one year because of a Federal mandate, and it would not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Paperwork Reduction Act of 1995

As required by the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, 109 Stat. 163, (May 22, 1995) (44 U.S.C. 3501 *et seq.*), 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.

In this proposed rule, FEMA is seeking a revision to the already existing collection of information, OMB Control Number 1660–0017. The annual cost to the Federal Government is decreasing from $1,920,626 to $1,890,650. The decrease to the cost to the Federal Government occurred since we deleted $29,976 in arbitration travel costs; as, we do not have to include them per the PRA exceptions for civil & administrative actions. See 44 U.S.C. 3518(c). This proposed rule serves as the 60-day comment period for this proposed change pursuant to 5 CFR 1320.12. FEMA invites the public to comment on the proposed collection of information.

Collection of Information

Title: PA Program.

Type of information collection: Revision of a currently approved collection.

OMB Number: 1660–0017.

Form Forms: FEMA Form 009–0–49 Request for Public Assistance; FEMA Form 009–0–91 Project Worksheet (PW); FEMA Form 009–0–91A Project Worksheet (PW)—Damage Description and Scope of Work Continuation Sheet; FEMA Form 009–0–91B Project Worksheet (PW)—Cost Estimate Continuation Sheet; FEMA Form 009–0–91C Project Worksheet (PW)—Maps and Sketches Sheet; FEMA Form 009–0–91D Project Worksheet (PW)—Photo Sheet; FEMA Form 009–0–120 Special Considerations Questions; FEMA Form 009–0–121 PNP Facility Questionnaire; FEMA Form 009–0–123 Force Account Labor Summary Record; FEMA Form 009–0–124 Materials Summary Record; FEMA Form 009–0–125 Rented Equipment Summary Record; FEMA Form 009–0–126 Contract Work Summary Record; FEMA Form 009–0–127 Force Account Equipment Summary Record; FEMA Form 009–0–128 Applicant's Benefits Calculation Worksheet; FEMA Form 009–0–111, Quarterly Progress Report; FEMA Form 009–0–141, FAC–TRAX System.

Abstract: The information collected is utilized by FEMA to make determinations for PA grants based on the information supplied by the respondents.

Affected Public: State, local, or Tribal Government.

Estimated Number of Respondents: 1,012.

Estimated Number of Responses: 398,068.

Estimated Total Annual Burden Hours: 466,025.

The proposed rule to implement section 423 arbitration would not impact the total number of responses or burden hours. FEMA proposes to add a new paragraph to 44 CFR 206.206 to add a right of arbitration for applicants. The proposed regulation would provide applicants an additional choice in FEMA's appeals and arbitration processes: Applicants must choose either submitting a second appeal or submitting a request for arbitration. Or, an applicant may select arbitration if the Regional Administrator has received a first appeal, but has not rendered a decision within 180 calendar days of receipt. There is no change to the number of responses due to the proposed rule, as applicants can only choose one option.

FEMA estimated it will take approximately 2 hours to prepare a letter for appeal or arbitration. This estimate is based on the assumption that

most of the information necessary for preparing the appeal or arbitration request is found in the existing Project Worksheet.

Recipients will also provide a recommendation per each applicant request for an appeal or arbitration. The total number of recommendations would not change because of the proposed rule. FEMA estimates it will take approximately 1 hour to prepare a recommendation.

Currently, the estimated time to complete a request and submit a letter of recommendation for an appeal is three hours. FEMA also estimates the time to complete a request and submit a letter of recommendation for arbitration would also be three hours. The applicant could re-use the same information from the request for an appeal or arbitration and the recipient would review similar information in providing its recommendation. The proposed rule would not impact the estimate of the burden hours.

Table A.12 provides estimates of annualized cost to respondents for the hour burdens for the collection of information.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	Number of respondents	Number of responses per respondent	Total No. of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
State, Local or Tribal Government.	FEMA Form 009–0–49, Request for PA/.	56	129	7,224	0.25	1,806	$63.52	$114,717
State, Local or Tribal Government.	FEMA Form 009–0–91, Project Worksheet (PW) and a Request for Time Extension.	56	840	47,040	1.50	70,560	63.52	4,481,971
State, Local or Tribal Government.	FEMA Form 009–0–91A Project Work Sheet (PW) Damage Description and Scope of Work.	56	784	43,904	1.50	65,856	63.52	4,183,173
.....	FEMA Form 009–0–91B, Project Worksheet (PW) Cost Estimate Continuation Sheet and Request for additional funding for Cost Overruns.	56	784	43,904	1.3333	58,537	63.52	3,718,283
State, Local or Tribal Government.	FEMA Form 009–0–91C Project Worksheet (PW) Maps and Sketches Sheet.	56	728	40,768	1.50	61,152	63.52	3,884,375
State Local or Tribal Government.	FEMA Form 009–0–91D Project Worksheet (PW) Photo Sheet.	56	728	40,768	1.50	61,152	63.52	3,884,375
State, Local or Tribal Government.	FEMA Form 009–0–120, Special Considerations Questions/.	56	840	47,040	0.50	23,520	63.52	1,493,990
State, Local or Tribal Government.	FEMA Form 009–0–128, Applicant's Benefits Calculation Worksheet/.	56	784	43,904	0.50	21,952	63.52	1,394,391
State, Local or Tribal Government.	FEMA Form 009–0–121, PNP Facility Questionnaire.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–123, Force Account Labor Summary Record.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–124, Materials Summary Record/.	56	94	5,264	0.25	1,316	63.52	83,592
State, Local or Tribal Government.	FEMA Form 009–0–125, Rented Equipment Summary Record.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–126, Contract Work Summary Record/.	56	94	5,264	0.50	2,632	63.52	167,185
State, Local or Tribal Government.	FEMA Form 009–0–127, Force Account Equipment Summary Record/.	56	94	5,264	0.25	1,316	63.52	83,592
State, Local or Tribal Government.	State Administrative Plan and State Plan Amendments/No Form.	56	1	56	8.00	448	63.52	28,457
State, Local or Tribal Government.	FEMA Form 009–0–111, Quarterly Progress Report.	56	4	224	100.00	22,400	63.52	1,422,848
State, Local or Tribal Government.	Request for Appeals or Arbitrations & Recommendation/No Forms.	56	9	504	3.00	1,512	63.52	96,042
State, Local or Tribal Government.	Request for Arbitration & Recommendation resulting from Hurricanes Katrina or Rita/No Form.	4	5	20	3.00	60	63.52	3,811
State, Local or Tribal Government.	FEMA Form 009–0–141, FAC–TRAX System.	56	913	51,128	1.25	63,910	63.52	4,059,563
Total	.....	1,012	.....	398,068	.....	466,025	.....	29,601,921

Note: The ''Avg. Hourly Wage Rate'' for each respondent includes a 1.46 multiplier to reflect a fully-loaded wage rate.

Estimated Total Annual Respondent Cost: $29,601,921.

Estimated Respondents' Operation and Maintenance Costs: N/A.

Estimated Respondents' Capital and Start-Up Costs: N/A.

Estimated Total Annual Costs to the Federal Government: $1,890,650.

E. Privacy Act

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a proposed regulation will result in a system of records. A ''record'' is any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his/her education, financial transactions, medical history, and criminal or employment history and that contains his/her name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. See 5 U.S.C. 552a(a)(4). A ''system of records'' is a group of records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. An agency cannot disclose any record which is contained in a system of records except by following specific procedures.

In accordance with DHS policy, FEMA has completed a Privacy Threshold Analysis (PTA) for this proposed rule. DHS has determined that this proposed rulemaking does not affect the 1660–0017 OMB Control Number's current compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. As a result, DHS has concluded that the 1660–0017 OMB Control Number is covered by the DHS/FEMA/PIA–013 Grants Management Programs Privacy Impact Assessment (PIA). Additionally, DHS has decided that the 1660–0017 OMB Control Number is covered by the DHS/FEMA—009 Hazard Mitigation, Disaster Public Assistance, and Disaster Loan Programs System of Records, 79 FR 16015, Mar. 24, 2014 System of Records Notice (SORN).

F. National Environmental Policy Act of 1969 (NEPA)

Section 102 of the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*) requires agencies to consider the impacts of their proposed actions on the quality of the human environment. The Council on Environmental Quality's (CEQ) procedures for implementing NEPA, 40 CFR parts 1500 through 1508, require Federal agencies to prepare Environmental Impact Statements (EISs) for major Federal actions significantly affecting the quality of the human environment. Each agency can develop categorical exclusions (catexes) to cover actions that have been demonstrated to not typically trigger significant impacts to the human environment individually or cumulatively. Agencies develop environmental assessments (EAs) to evaluate those actions that are ineligible for an agency's catexes and which have the potential to significantly impact the human environment. At the end of the EA process, the agency will determine whether to make a Finding of No Significant Impact (FONSI) or whether to initiate the EIS process.

Rulemaking is a major Federal action subject to NEPA. The list of catexes at DHS Instruction Manual 023–01–001–01 (Revision 01), ''Implementation of the National Environmental Policy Act (NEPA),'' Appendix A, includes a catex for the promulgation of certain types of rules, including rules that implement, without substantive change, statutory or regulatory requirements and rules that interpret or amend an existing regulation without changing its environmental effect. (Catex A3(b) and (d)).

The purpose of this rule is to propose regulations to implement the new right of arbitration authorized by the DRRA, and to revise FEMA's regulations regarding first and second PA appeals. These changes are to implement statutory requirements and to amend existing regulation without changing its environmental effect, consistent with Catex A3, as defined in DHS Instruction Manual 023–01–001–01 (Rev. 01), Appendix A. No extraordinary circumstances exist that will trigger the need to develop an EA or EIS. See DHS Instruction Manual 023–01–001–01 V(B)(2). An EA will not be prepared because a catex applies to this rulemaking action and no extraordinary circumstances exist.

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

Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments,'' 65 FR 67249, Nov. 9, 2000, applies to agency regulations that have Tribal implications, that is, regulations that have substantial direct effects 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. Under this Executive Order, to the extent practicable and permitted by law, no agency will promulgate any regulation that has Tribal implications, that imposes substantial direct compliance costs on Indian Tribal governments, and that is not required by statute, unless funds necessary to pay the direct costs incurred by the Indian Tribal government or the Tribe in complying with the regulation are provided by the Federal Government, or the agency consults with Tribal officials.

The purpose of this rule is to propose regulations to implement the new right of arbitration authorized by 42 U.S.C. 5189a(d) and to revise FEMA's regulations regarding first and second PA appeals. Current regulations at 44 CFR 206.206 only provide regulatory guidance on a first and second PA appeal process, but not arbitration. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall timeframe limits for first and second appeals.

Under the proposed rule, Indian Tribes have the same opportunity to participate in arbitrations as other eligible applicants; however, given the participation criteria required under 42 U.S.C. 5189a(d) and its voluntary nature, FEMA anticipates a very small number, if any Indian Tribes, will participate in the new proposed permanent right of arbitration. FEMA also anticipates a very small number of Indian Tribes will be affected by the other major revisions to 44 CFR 206.206. As a result, FEMA does not expect this proposed rule to have a substantial direct effect on one or more Indian tribes or impose direct compliance costs on Indian Tribal governments. Additionally, since FEMA anticipates a very small number, if any Indian Tribes will participate in the arbitration portion of the proposed rule nor will be affected by the rest of the proposed revisions to 44 CFR 206.206, FEMA does not expect the regulations to have substantial direct effects 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.

H. Executive Order 13132, Federalism

A rule has implications for federalism under Executive Order 13132 ''Federalism'' (64 FR 43255, Aug. 10, 1999), if it has a substantial direct effect 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. FEMA has analyzed this proposed rule under Executive Order 13132 and determined that it does not have implications for federalism.

I. Executive Order 12630, Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, ''Governmental Actions and Interference With Constitutionally Protected Property Rights'' (53 FR 8859, Mar. 18, 1988).

J. Executive Order 12898, Environmental Justice

Executive Order 12898 ''Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, Feb. 16, 1994), mandates that Federal agencies identify and address, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and

low-income populations. It 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 propose regulations to implement the new right of arbitration authorized by the DRRA in 42 U.S.C. 5189a(d) and to revise FEMA's regulations regarding first and second PA appeals. Current regulations, at 44 CFR 206.206, only provide regulatory guidance on a first and second PA appeal process, but not arbitration. The other major proposed revisions to 44 CFR 206.206 include adding definitions; adding subparagraphs to clarify what actions FEMA may take and will not take while an appeal is pending and state that FEMA may issue separate guidance as necessary, similar to current 44 CFR 206.209(m); adding a finality of decision paragraph; requiring electronic submission for appeals and arbitrations documents; and clarifying overall timeframe limits for first and second appeals. There are no adverse effects and no disproportionate effects on minority or low-income populations.

K. Executive Order 12988, Civil Justice Reform

This proposed 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.

L. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

This proposed rule will not create environmental health risks or safety risks for children under Executive Order 13045, ''Protection of Children From Environmental Health Risks and Safety Risks'' (62 FR 19885, Apr. 23, 1997).

M. Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking Act (CRA), 5 U.S.C. 801–808, before a rule can take effect, the Federal agency promulgating the rule must submit to Congress and to the Government Accountability Office (GAO) a copy of the rule; a concise general statement relating to the rule, including whether it is a major rule; the proposed effective date of the rule; a copy of any cost-benefit analysis; descriptions of the agency's actions under the Regulatory Flexibility Act and the Unfunded Mandates Reform Act; and any other information or statements required by relevant executive orders.

FEMA will send this rule to the Congress and to GAO pursuant to the CRA, if the rule is finalized. The rule is not a ''major rule'' within the meaning of the CRA. It will not have an annual effect on the economy of $100,000,000 or more; it will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and 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 in domestic and export markets.

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:

PART 206—FEDERAL DISASTER ASSISTANCE

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

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 through 5207; Homeland Security Act of 2002, 6 U.S.C. 101 *et seq.;* Department of Homeland Security Delegation 9001.1.

■ 2. Revise § 206.206 to read as follows:

§ 206.206 Appeals and arbitrations.

(a) *Definitions.* The following definitions apply to this section:

Administrator means the Administrator of the Federal Emergency Management Agency.

Amount in dispute means the difference between the amount of financial assistance sought for a Public Assistance project and the amount of financial assistance for which FEMA has determined such Public Assistance project is eligible.

Applicant refers to the definition at § 206.201(a).

Final agency determination means:

(1) The decision of FEMA, if the applicant or recipient does not submit a first appeal within the time limits provided for in paragraph (b)(1)(ii)(A) of this section; or

(2) The decision of FEMA, if the applicant or recipient withdraws the pending appeal and does not file a request for arbitration within 30 calendar days of the withdrawal of the pending appeal; or

(3) The decision of the FEMA Regional Administrator, if the applicant or recipient does not submit a second appeal within the time limits provided for in paragraph (b)(2)(ii)(A) of this section.

Recipient refers to the definition at § 206.201(m).

Rural area means an area with a population of less than 200,000 outside an urbanized area.

Urbanized area means the area as identified by the United States Census Bureau.

(b) *Appeals and Arbitrations.* An eligible applicant or recipient may appeal or an eligible applicant may arbitrate any determination previously made related to an application for or the provision of Public Assistance according to the procedures of this section.

(1) *First Appeal.* The applicant must make a first appeal in writing and submit it electronically through the recipient to the Regional Administrator. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's first appeal to the Regional Administrator. The recipient may make recipient-related appeals to the Regional Administrator.

(i) *Content.* A first appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits.* (A) The applicant may make a first appeal through the recipient within 60 calendar days from the date of the FEMA determination that is the subject of the appeal and the recipient must electronically forward to the Regional Administrator the applicant's first appeal with a recommendation within 120 calendar days from the date of the FEMA determination that is the subject of the appeal. FEMA will deny all first appeals it receives from the recipient more than 120 calendar days from the date of the

FEMA determination that is the subject of the appeal.

(B) Within 90 calendar days following receipt of a first appeal, if there is a need for additional information, the Regional Administrator will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Regional Administrator will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Regional Administrator will provide electronic notice of the disposition of the appeal to the applicant and recipient within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information.

(iii) *Technical Advice.* In appeals involving highly technical issues, the Regional Administrator may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Regional Administrator will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Regional Administrator, subject to the exceptions in paragraph (b)(1)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(1)(iv)(A) of this section, FEMA may:

(1) Suspend funding (see 2 CFR 200.338);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Regional Administrator grants an appeal, the Regional Administrator will take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(1) of this section.

(2) *Second Appeal.* If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal in writing and submit it electronically through the recipient to the Assistant Administrator for the Recovery Directorate. The recipient must include a written recommendation on the applicant's appeal with the electronic submission of the applicant's second appeal to the Assistant Administrator for the Recovery Directorate. The recipient may make recipient-related second appeals to the Assistant Administrator for the Recovery Directorate.

(i) *Content.* A second appeal must:

(A) Contain all documented justification supporting the applicant or recipient's position;

(B) Specify the amount in dispute, as applicable; and

(C) Specify the provisions in Federal law, regulation, or policy with which the applicant or recipient believes the FEMA determination was inconsistent.

(ii) *Time Limits.* (A) If the Regional Administrator denies a first appeal in whole or in part, the applicant may make a second appeal through the recipient within 60 calendar days from the date of the Regional Administrator's first appeal decision and the recipient must electronically forward to the Assistant Administrator for the Recovery Directorate the applicant's second appeal with a recommendation within 120 calendar days from the date of the Regional Administrator's first appeal decision. FEMA will deny all second appeals it receives from the recipient more than 120 calendar days from the date of the Regional Administrator's first appeal decision.

(B) Within 90 calendar days following receipt of a second appeal, if there is a need for additional information, the Assistant Administrator for the Recovery Directorate will provide electronic notice to the recipient and applicant. If there is no need for additional information, then FEMA will not provide notification. The Assistant Administrator for the Recovery Directorate will generally allow the recipient 30 calendar days to provide any additional information.

(C) The Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant within 90 calendar days of receipt of the appeal or within 90 calendar days following the receipt of additional information or following expiration of the period for providing the information.

(iii) *Technical Advice.* In appeals involving highly technical issues, the Assistant Administrator for the Recovery Directorate may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 calendar days of receipt of the report, the Assistant Administrator for the Recovery Directorate will provide electronic notice of the disposition of the appeal to the recipient and applicant.

(iv) *Effect of an Appeal.* (A) FEMA will take no action to implement any determination pending an appeal decision from the Assistant Administrator for the Recovery Directorate, subject to the exceptions in paragraph (b)(2)(iv)(B) of this section.

(B) Notwithstanding paragraph (b)(2)(iv)(A) of this section, FEMA may

(1) Suspend funding (see 2 CFR 200.338);

(2) Defer or disallow other claims questioned for reasons also disputed in the pending appeal; or

(3) Take other action to recover, withhold, or offset funds if specifically authorized by statute or regulation.

(v) *Implementation.* If the Assistant Administrator for the Recovery Directorate grants an appeal, the Assistant Administrator for the Recovery Directorate will direct the Regional Administrator to take appropriate implementing action(s).

(vi) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(2) of this section.

(3) *Arbitration.* (i) *Applicability.* An applicant may request arbitration from the Civilian Board of Contract Appeals (CBCA) if:

(A) There is a disputed agency determination arising from a major disaster declared on or after January 1, 2016; and

(B) The amount in dispute is greater than $500,000, or greater than $100,000 for an applicant for assistance in a rural area; and

(C) The Regional Administrator has denied a first appeal decision or received a first appeal but not rendered a decision within 180 calendar days of receipt.

(ii) *Limitations.* A request for arbitration is in lieu of a second appeal.

(iii) *Request for Arbitration.* (A) An applicant may initiate arbitration by submitting an electronic request simultaneously to the recipient, the CBCA, and FEMA. See 48 CFR part 6106.

(B) *Time Limits. (1)* An applicant must submit a request for arbitration within 60 calendar days from the date of the Regional Administrator's first appeal decision; or

(2) If the first appeal was timely submitted, and the Regional Administrator has not rendered a decision within 180 calendar days of

receiving the appeal, an applicant may electronically submit a withdrawal of the pending appeal simultaneously to the recipient, the FEMA Regional Administrator, and the CBCA. The applicant may then submit a request for arbitration within 30 calendar days from the date of the withdrawal of the pending appeal.

(C) *Content of request.* The request for arbitration must contain a written statement that specifies the amount in dispute, all documentation supporting the position of the applicant, the disaster number, and the name and address of the applicant's authorized representative or counsel.

(iv) *Expenses.* Expenses for each party will be paid by the party who incurred the expense.

(v) *Guidance.* FEMA may issue separate guidance as necessary to supplement paragraph (b)(3) of this section.

(c) *Finality of decision.* A FEMA final agency determination or a decision of the Assistant Administrator for the Recovery Directorate on a second appeal constitute a final decision of FEMA. In the alternative, a decision of the majority of the CBCA panel constitutes a final decision, binding on all parties. See 48 CFR 6106.613. Final decisions are not subject to further administrative review.

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 204, 209, 212, 213, and 252

[Docket 2020–0027]

RIN 0750–AK44

Defense Federal Acquisition Regulation Supplement: Use of Supplier Performance Risk System (SPRS) Assessments (DFARS Case 2019–D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to update the policy and procedures for use of the Supplier Performance Risk System.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 30, 2020, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2019–D009, using any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Search for ''DFARS Case 2019–D009.'' Select ''Comment Now'' and follow the instructions provided to submit a comment. Please include ''DFARS Case 2019–D009'' on any attached document.
- *Email: osd.dfars@mail.mil.* Include DFARS Case 2019–D009 in the subject line of the message.
- *Fax:* 571–372–6094.
- *Mail:* Defense Acquisition Regulations System, Attn: Heather Kitchens, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301–3060.

Comments received generally will be posted without change to *http://www.regulations.gov,* including any personal information provided. To confirm receipt of your comment(s), please check *www.regulations.gov,* approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, telephone 571–372–6095.

SUPPLEMENTARY INFORMATION:

I. Background

The Supplier Performance Risk System (SPRS) is a DoD enterprise application that retrieves quality and delivery data from Government systems to calculate ''on time'' delivery scores and quality classifications. Contracting officers will use the overall risk assessment generated by the SPRS module to evaluate quotes and offers received under all solicitations for supplies and services, including solicitations using part 12 procedures for the acquisition of commercial items. The system generates three risk assessments using the SPRS Evaluation Criteria and calculations at *https://www.sprs.csd.disa.mil/pdf/SPRS_DataEvaluationCriteria.pdf.* These risk assessments are described as follows:

- *Item Risk.* SPRS collects data to generate the probability that a product or service, based on intended use, will introduce counterfeit or nonconforming material entering the DoD supply chain, which can result in significant personnel safety issues, mission degradation, or monetary loss. SPRS ''flags'' items identified by Government sources as ''high risk'' and provides suggested mitigations, or as ''not high risk''.
- *Price Risk.* SPRS collects historical pricing data from Government sources and applies a common statistical method to calculate the average price paid for a product or services, generating a price range that contracting officers can use in the evaluation of fair and reasonable pricing. Price Risk determines whether ''a proposed price is consistent with historical prices paid for that item and is depicted by high, low, or within range''.
- *Supplier Risk.* SPRS calculates a supplier risk score, for contracting officers to compare competing suppliers. This score includes three years of relevant supplier performance information from existing Government data sources.

II. Discussion and Analysis

The proposed rule amends the DFARS to: (1) Move coverage of the Supplier Performance Risk System (SPRS) from part 213, Simplified Acquisition Procedures, to a new subpart 204.7X, Supplier Performance Risk System; and (2) replace DFARS clause 252.213–7000, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Past Performance Evaluations, with DFARS provision 252.204–70XX, Notice to Prospective Suppliers on Use of Supplier Performance Risk System in Performance Evaluations, to enhance the use of SPRS in the evaluation of a supplier's performance through the introduction of SPRS system-generated item, price, and supplier risk assessments.

In the new subpart, at 204.7X01, definitions are added for item, price, and supplier risk. Section 204.7X02, Applicability, provides that the use of SPRS is required to be used to evaluate quotes and offers in response to all solicitations for supplies and services, including solicitations using FAR part 12 procedures for the acquisition of commercial items. Language is added at 204.7X03, Procedures, to provide guidance to the contracting officer on how SPRS risk assessments shall be considered during award decisions, how to respond to risk assessment ratings, and what mitigating strategies shall be considered for risk assessments prior to award. A prescription for use of the new solicitation provision at 252.204–70XX is added at 204.7X04.

The proposed rule amends the DFARS by requiring contracting officers to use the supplier risk assessments available in SPRS as a factor in determining