

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 296

[Docket ID FEMA–2022–0037]

RIN 1660–AB14

#### Hermit's Peak/Calf Canyon Fire Assistance

**AGENCY:** Federal Emergency Management Agency, Department of Homeland Security.

**ACTION:** Final rule.

**SUMMARY:** This final rule sets out the procedures for claimants to seek compensation for injury or loss of property resulting from the Hermit's Peak/Calf Canyon Fire.

**DATES:** This rule is effective August 29, 2023.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

#### I. Executive Summary

##### A. Summary of Legal Authority

Congress enacted the Hermit's Peak/Calf Canyon Fire Assistance Act ("Act") as part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, 136 Stat. 2114 (2022), and directed FEMA to issue an Interim Final Rule ("IFR") within 45 days of enactment. Congress passed the Act to compensate those parties who suffered injury and loss of property from the Hermit's Peak/Calf Canyon Fire ("Fire"). The Act requires FEMA to design and administer a claims program to compensate victims of the Fire for injuries resulting from the Fire and to provide for the expeditious consideration and settlement for those claims and injuries. The Act further directs FEMA to establish an arbitration process for disputes regarding claims. On December 29, 2022, the Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 provided additional funding for the Act's implementation.

##### B. Summary of the IFR

On November 14, 2022, FEMA published the IFR that established the

procedures for processing and paying claims for property, business, and/or financial losses to those sustaining losses from the Fire. FEMA's procedures in the IFR were generally consistent with those established for claims associated with the Cerro Grande Fire Assistance Act.<sup>1</sup> Under the IFR procedures, a claimant initiates a claim by filing a Notice of Loss with the Office of Hermit's Peak/Calf Canyon Fire Claims ("Claims Office"). After receipt and acknowledgement by the Claims Office, the Claims Office contacts the claimant to review the claim and helps the claimant formulate a strategy for obtaining any necessary supporting documentation to complete the Proof of Loss. After coordinating with the Claims Reviewer, the claimant reviews and signs a Proof of Loss and submits it to the Claims Office. The Claims Reviewer reviews and evaluates the Proof of Loss and submits a report to the Authorized Official for review to determine whether compensation is due to the claimant. The Authorized Official's written decision is provided to the claimant. If satisfied with the decision, the claimant receives payment after returning a completed Release and Certification Form. If the claimant is not satisfied with the decision, an Administrative Appeal could be filed with the Director of the Claims Office. If the claimant is not satisfied after appeal, the dispute could be resolved through binding arbitration or heard in the United States District Court for the District of New Mexico.

##### C. Summary of Changes From the IFR to the Final Rule

FEMA is making changes from the IFR to the Final Rule to reflect the concerns raised by commenters and better adhere to the intent of the Act by addressing the needs of the communities impacted by the Fire. Given the geographic, economic, and cultural distinctions between the impacted communities of the Cerro Grande and the Hermit's Peak/Calf Canyon Fires, FEMA is revising some sections of the regulatory text to ensure the claims process is more tailored to claimants impacted by the

Fire. FEMA is revising the regulatory text in the Final Rule to eliminate the 25 percent formulas associated with reforestation and revegetation in § 296.21(c)(2) and with heightened risk reduction in § 296.21(e)(5) that were based on the Cerro Grande Fire Assistance process. FEMA recognizes the distinct geographic, economic, and cultural differences between these impacted communities and that these formulas, while an efficient way to process claims in the Cerro Grande Fire Assistance process, are not easily adapted to meet the needs of claimants injured by the Fire. FEMA agrees with the majority of commenters that removal of these formulas is essential to ensuring claimants in the Hermit's Peak/Calf Canyon Fire Assistance process are compensated for their actual compensatory damages resulting from the Fire. FEMA is modifying § 296.21(c)(3)(ii) regarding claims for a decrease in the value of real property. Distinct from Cerro Grande, the claimants impacted by this Fire have commented that they are more likely to have significant acreage damaged that has the potential for long-term natural restoration. Requiring that the property value be permanently diminished for a decrease in property value claim, as provided in the IFR, is inconsistent with the geography, economy, and real estate valuations of the impacted communities.<sup>2</sup> Based on comments received and to ensure the Final Rule accommodates the needs of claimants and impacted communities, FEMA is revising the language in 296.21(c)(3)(ii) to allow a claimant to establish that the value of the real property was "significantly" diminished "long-term" as a result of the Fire. FEMA is adding paragraph (c)(5) to incorporate language from the Act regarding physical infrastructure to ensure that claimants understand compensatory damages may be awarded for damage or destruction of physical infrastructure, including damage to irrigation infrastructure such as acequia systems. Acequia systems are unique to the communities impacted by

<sup>1</sup> The Cerro Grande Fire Assistance Act (Pub. L. 106–246 (2001)) required FEMA to design and administer a program to fully compensate those who suffered injuries resulting from the Cerro Grande Fire. The Cerro Grande Fire resulted from a prescribed fire ignited on May 4, 2000, by National Park Service fire personnel at the Bandelier National Monument, New Mexico under an approved prescribed fire plan. That fire burned approximately 47,750 acres and destroyed over 200 residential structures. The Cerro Grande Fire Assistance Act process is detailed in an Interim Final Rule (65 FR 52259 (Aug. 27, 2000)) and a Final Rule (66 FR 15847 (Mar. 21, 2001)) that is now codified at 44 CFR part 295.

<sup>2</sup> "On the flip side, economic strategies traditionally employed in the Santa Fe National Forest assessment area, typically combining ranching, acequia agriculture, wood collection and other communal land uses, appear to be less viable in the context of rising land values and declining prices for primary commodities. Consequently, many of these traditional uses are party to the transformation of land use patterns, as ranches and agricultural lands are sold for residential and second home development." University of New Mexico Bureau of Business and Economic Research, "Socioeconomic Assessment of the Santa Fe National Forest," August 2007 at pg. 99, found at [https://www.fs.usda.gov/internet/FSE\\_DOCUMENTS/fsbdev3\\_021243.pdf](https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf) (last accessed July 5, 2023).

the Fire and, just as the Act recognizes this distinction, FEMA is also recognizing it and incorporating it into the Final Rule.

In the IFR, FEMA requested additional feedback on some of the dates set relating to claims for financial losses. Based on comments received, FEMA is making changes to those dates. FEMA currently requires claimants seeking compensation for out-of-pocket expenses for treatment of mental health conditions to submit claims for treatment rendered on or before April 6, 2024. FEMA is revising this paragraph to allow claims for treatment identified on or before November 14, 2024, consistent with the timeframe for submitting a claim under the Act. FEMA recognizes that mental health treatment may extend beyond the deadline for filing a claim and claimants may reopen claims under § 296.35 for good cause. FEMA is also making a clarifying edit in the Final Rule by specifying that the treatment can be for a condition that resulted from the Fire or for conditions worsened by the Fire. Based on comments received, this edit helps clarify that treatment for conditions worsened by the Fire will also be compensated. In the IFR, FEMA allows compensation for donations provided no later than September 20, 2022. FEMA is revising § 296.21(c)(4) to allow claimants to seek actual compensatory damages for donations provided to survivors no later than November 14, 2022. FEMA is setting the date of the IFR publication as the timeframe by which donations will be considered compensable.

FEMA is modifying the language in § 296.31(a) regarding reimbursement for expert opinions. FEMA understands that claimants impacted by this Fire are more likely to need the services of experts to help better value their claims than the claimants in the Cerro Grande Fire Assistance process given the scope of the Fire and the geographic, economic, and cultural distinctions between the impacted communities. FEMA is revising the regulatory text to allow for reimbursement for expert opinions that the Claims Office deems necessary to determine the amount of the claim. This additional flexibility will help claimants and FEMA better understand and process claims.

FEMA is also revising § 296.35 of the regulatory text in the Final Rule regarding reopening a claim. The IFR provides that claimants can seek to reopen their claim to consider issues raised when the claimant closes on the sale of a home and wishes to present a claim for a decrease in the value of their real property under § 296.21(c)(3).

FEMA is revising this language in the Final Rule to allow claimants to reopen their claim when the claimant closes on the sale of real property, expanding the ability to reopen a claim beyond just a home. This change reflects the unique geographic area impacted by the Fire and the reality that claimants may sell a portion of their land without necessarily selling their home and experience a loss for which compensation should be made available. FEMA is also revising the timeline by which a request to reopen must be submitted for claims related to additional losses as part of a reconstruction in excess of those previously awarded or for good cause. Recognizing the challenges claimants face with reconstruction and other potential issues that can arise that require a claim to be reopened, FEMA is revising § 296.35 to set the deadline by which requests to reopen these types of claims must be submitted as a date in the future that the Director of the Claims Office will set and publish in the **Federal Register** and at <https://www.fema.gov/hermits-peak>.

FEMA is making some clarifying revisions in the Final Rule. Currently in § 296.1, FEMA states the purpose of the rule is to pay for actual compensatory damages for injuries suffered from the Fire (emphasis added). FEMA is revising this language, consistent with the language from the Act, to pay for actual compensatory damages for injuries resulting from the Fire (emphasis added). FEMA is making this edit to better communicate to claimants that all injuries resulting from the Fire, including injuries resulting from flooding, mudflow, mold, and debris flow in the aftermath of the Fire, are compensable. However, a claimant may not be eligible for compensation if their injuries resulted from flooding, mudflow, mold, or debris unrelated to the Fire. FEMA is also updating the definition of “subsistence resources” to include “other natural resource” gathering, consistent with how the impacted communities are engaged in subsistence activities. FEMA is updating § 296.12 regarding election of remedies. The IFR discusses how claimants waive their right to pursue claims if they accept an award. FEMA is revising this section to clarify that the claimant waives their right to pursue other claims only after acceptance of a final award, consistent with commenters’ request for additional clarity on this point and for consistency with the Act. Consistent with the Act, FEMA is incorporating language in § 296.13 to reiterate the prioritization of claims for injured

persons over subrogees. In § 296.21(a), FEMA is resolving a grammatical error by changing “Injury” to “injury” and another grammatical error by adding “that” to § 296.21(f) to read that the Act allows FEMA to compensate Injured Persons only for damages not paid, or that will not be paid, by insurance or other third-party payments or settlements.

## II. Background and Legal Authority

On September 30, 2022, President Biden signed the Act into law as part of the Continuing Appropriations and Ukraine Supplemental Appropriations Act, 2023, Public Law 117–180, 136 Stat. 2114 (2022).<sup>3</sup> Congress passed the Act to compensate those parties who suffered injury and loss of property from the Hermit’s Peak/Calf Canyon Fire. On April 6, 2022, the U.S. Forest Service initiated the Las Dispensas-Gallinas prescribed burn on Federal land in the Santa Fe National Forest in San Miguel County, New Mexico. That same day the prescribed burn, which became known as the “Hermit’s Peak Fire,” escaped the burn unit’s boundaries and was declared a wildfire, spreading to other Federal and non-Federal lands.<sup>4</sup> On April 19, 2022, the Calf Canyon Fire, also in San Miguel County, New Mexico, began burning on Federal land and was later identified as the result of a pile burn in January 2022 that remained dormant under the surface before reemerging.<sup>5</sup> The Hermit’s Peak and Calf Canyon Fires merged on April 27, 2022, and both fires were reported as the Hermit’s Peak Fire or the Hermit’s Peak/Calf Canyon Fire. By May 2, 2022, the fire had grown, causing evacuations in multiple villages and communities in San Miguel County and Mora County, including the San Miguel County jail, the State’s psychiatric hospital, the United World College, and New Mexico

<sup>3</sup> As mentioned above, Division N, Title VI of the Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459 authorized additional funding to implement the Act.

<sup>4</sup> Section 102(a)(1) and (2), Hermit’s Peak/Calf Canyon Fire Assistance Act, Public Law 117–180, 136 Stat. 2114 (2022). See also “Las Dispensas Prescribed Burn Declared Wildfire,” Apr. 6, 2022 found at <https://inciweb.nwcg.gov/incident/article/8049/68044/> (last accessed July 5, 2023 Sept. 15, 2022) and Theresa Davis, “How ‘good fires’ can turn into wildfires,” Albuquerque Journal, Apr. 30, 2022 found at <https://www.alqjournal.com/2494692/how-good-fires-can-turn-into-wildfires.html> (last accessed Sept. 15, 2022).

<sup>5</sup> See Bill Gabbert, “Investigators determine Calf Canyon Fire caused by holdover from prescribed fire,” Wildfire Today, May 27, 2022 found at [https://wildfiretoday.com/?s=calf+canyon+holdover&apbct\\_email\\_id\\_search\\_form\\_34270=](https://wildfiretoday.com/?s=calf+canyon+holdover&apbct_email_id_search_form_34270=) (last accessed Oct. 6, 2022).

Highlands University.<sup>6</sup> At the request of New Mexico Governor Lujan Grisham, President Biden issued a major disaster declaration on May 4, 2022.<sup>7</sup> The Hermit's Peak/Calf Canyon Fire was not 100 percent contained until August 21, 2022.<sup>8</sup>

The Act provides compensation to injured persons impacted by the Fire. It requires FEMA to design and administer a claims program to compensate injured parties for injuries resulting from the Fire and to provide for the expeditious consideration and settlement for those claims and injuries. The Act further directs FEMA to establish an arbitration process for disputes regarding claims.

On November 14, 2022, FEMA published an IFR with a 60-day comment period that established the procedures for the processing and payment of claims to those injured by the Fire sustaining property, business, and/or financial losses. FEMA held public meetings during the comment period to further gather public feedback on the rule. Based on public comment, FEMA is making changes to the Final Rule to better reflect the differences between the Cerro Grande Fire and the Hermit's Peak/Calf Canyon Fire, as the Hermit's Peak/Calf Canyon Fire destroyed a significant amount of forested private lands, communities, acequias, ranches, and farms, and to further reflect the specific cultural, economic, and geographic distinctions between the areas impacted by the Hermit's Peak/Calf Canyon Fire. This rule finalizes the IFR, with changes in response to public comments received on the IFR.

### III. Discussion of Public Comments and FEMA's Responses

#### A. Summary of Public Comments

The public comment period on the IFR closed on January 13, 2023, and FEMA received 190 germane written

comments.<sup>9</sup> FEMA hosted six public meetings on the IFR and received 103 germane comments from those public meetings.<sup>10</sup> FEMA also hosted a meeting with the State of New Mexico's Department of Homeland Security and Emergency Management and supporting contract staff, and received comments during that meeting.<sup>11</sup> Commenters included individuals, State and local government entities, congressional representatives, associations, law firms, and non-profit organizations. Some commenters appreciated FEMA's effort to publish the IFR in a timely manner, arrange public meetings to listen to concerns in-person, and launch the claims process. Most commenters offered recommendations for changes to the IFR. FEMA describes the specific revisions to the Final Rule and addresses the specific concerns of commenters below.

#### B. Differences Between the Hermit's Peak/Calf Canyon Fire and the Cerro Grande Fire

Some commenters recommended changes to the IFR based on the distinctions between the Cerro Grande and Hermit's Peak/Calf Canyon Fires.

*Comment:* Several commenters stated distinctions between the two areas where the fires were located. As one commenter stated, the Hermit's Peak/Calf Canyon Fire "destroyed significant forested private lands, communities, acequias, ranches, and farms." Another commenter stated that the Cerro Grande Fire "burned a mostly urban environment of high-value homes on mostly small tracts of land" while the Hermit's Peak/Calf Canyon Fire burned "mostly rural land with relatively fewer and lower value structures."

*FEMA Response:* FEMA agrees that the challenges facing the communities and claimants impacted by the Hermit's Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. The Cerro

Grande Fire burned approximately 47,000 forested acres, causing \$1 billion in property damage with over 280 homes destroyed or damaged and 40 laboratory structures burned.<sup>12</sup> In contrast, the Hermit's Peak/Calf Canyon Fire burned more than 340,000 acres, just under 200,000 of which were privately owned, and destroyed at least 160 homes and over 900 structures.<sup>13</sup> According to the 2020 Census, Los Alamos County's population density is 178 people per square mile compared to 5.8 people per square mile in San Miguel County and 2.2 people per square mile in Mora County.<sup>14</sup> In the Socioeconomic Assessment of the Santa Fe National Forest, provided to the U.S. Forest Service by the University of New Mexico, Bureau of Business and Economic Research, approximately one third of privately held land within the Santa Fe National Forest is located in San Miguel County.<sup>15</sup> Given the Hermit's Peak/Calf Canyon Fire's scope and the type of land impacted by that fire, FEMA is proposing changes to sections 296.4, 296.21(c)(2), 296.21(c)(3)(ii), 296.21(e)(5), 296.31(a), and 296.31(c)(3) while adding § 296.21(c)(5) to address the concerns raised that are unique to those communities. Changes to each of these sections is further described below.

*Comment:* Commenters reiterated the communities impacted by the Hermit's Peak/Calf Canyon Fire also had different economic and cultural practices. One commenter stated that "FEMA is totally unfamiliar with how land management, including use of resources is conducted in an area where descendants of an individual land grant have access to and use of resources within that grant." The commenter went on to note that the Cerro Grande Fire impacted a part of the State that "has little in common with the cultural and economic practices in this area." As one commenter stated, "Individuals and businesses relied on

<sup>6</sup> See Bill Gabbert, "Calf Canyon/Hermit's Peak Fire grows to more than 120,000 acres," *Wildfire Today*, May 2, 2022 found at <https://wildfiretoday.com/2022/05/02/calf-canyon-hermits-peak-fire-grows-to-more-than-120000-acres/> (last accessed Sept. 15, 2022). See also Bryan Pietsch and Jason Samenow, "New Mexico blaze is now largest wildfire in state history," *The Washington Post*, May 17, 2022, found at <https://www.washingtonpost.com/nation/2022/05/17/calf-canyon-hermits-peak-fire-new-mexico/> (last accessed July 27, 2023).

<sup>7</sup> 87 FR 33808 (June 3, 2022).

<sup>8</sup> "Hermit's Peak/Calf Canyon Fire 100 percent contained, fire officials say," *The New Mexican*, Aug. 21, 2022 found at [https://www.santafenewmexican.com/news/local\\_news/hermits-peak-calf-canyon-fire-100-percent-contained-fire-officials-say/articles\\_5ac054fc-21a1-11ed-9401-134e852ee0a8.html](https://www.santafenewmexican.com/news/local_news/hermits-peak-calf-canyon-fire-100-percent-contained-fire-officials-say/articles_5ac054fc-21a1-11ed-9401-134e852ee0a8.html) (last accessed July 5, 2023).

<sup>9</sup> FEMA received three comments that did not address the Interim Final Rule or the claims process: One commenter asked where the regulation could be read, and FEMA contacted the commenter to provide this information; another commenter shared a poem to reflect their feelings during the holiday season after the Fire; one comment from a law firm was incomplete without attachments referenced.

<sup>10</sup> FEMA also received an inquiry on the status of another FEMA application at a public meeting. A commenter offered their services to assist with claims, filling out applications for Federal agencies, internet use, mental health assistance, etc. at two public meetings. Another commenter from the same organization also offered services during a public meeting.

<sup>11</sup> Transcripts of that meeting have been posted to the public docket at <https://www.regulations.gov/docket/FEMA-2022-0037>.

<sup>12</sup> Bill Gabbert, "Cerro Grande fire, 10 years ago today," May 10, 2010 found at <https://wildfiretoday.com/2010/05/10/cerro-grande-fire-10-years-ago-today/> (last accessed July 5, 2023).

<sup>13</sup> See New Mexico Forest and Watershed Restoration Institute, "Hermit's Peak and Calf Canyon Fire: The largest wildfire in New Mexico's recorded history and its lasting impacts" Aug. 24, 2022, found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Mar. 3, 2023).

<sup>14</sup> See <https://www.census.gov/library/stories/state-by-state/new-mexico-population-change-between-census-decade.html> (last accessed July 5, 2023).

<sup>15</sup> University of New Mexico Bureau of Business and Economic Research, "Socioeconomic Assessment of the Santa Fe National Forest," August 2007 at pg. 5, found at [https://www.fs.usda.gov/internet/FSE\\_DOCUMENTS/fsbdev3\\_021243.pdf](https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf) (last accessed Mar. 3, 2023).

the forests not just for subsistence, but also for their annual income for themselves and others in the community.” Another commenter stated, “The use of the land’s timber in small (family) enterprises is one of the keys to the livelihoods of this area. Another is the small farming enterprises consisting of small orchards, raising hay, cattle, and horses. This is not a region of city life and landscaping, but is rural, with a deep heritage of independent living and family business.”

**FEMA Response:** FEMA agrees that the losses facing the communities and claimants impacted by the Hermit’s Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. The Act requires FEMA to compensate claimants for injuries resulting from the Fire and the injuries suffered by claimants in this community are distinct from those suffered in Cerro Grande. Specifically, FEMA notes the economic differences between the two impacted communities resulted in different losses within each community. Los Alamos County has an economy “almost entirely composed of government, retail, and service sector jobs. These three sectors combined make up more than 90 percent of the county’s employment . . . Los Alamos is somewhat unique in its lack of farming and other ‘core’ industry sectors such as construction and manufacturing . . . Mora County is by far the smallest county in the region, in terms of size as well as economy . . . San Miguel County is fairly small, and farm employment makes up a larger portion of overall employment there than in any other county in the region except Rio Arriba. San Miguel and Mora County contain minor, though substantial, sections of the Santa Fe National Forest. These two counties, as the smaller and poorer economies of the region, likely rely more heavily on the benefits of the forest as a provider of primary products such as fuel wood and food, as well as land for ranching and logging.”<sup>16</sup> The communities impacted by the Hermit’s Peak/Calf Canyon Fire rely much more on the land for their economic viability than the Los Alamos County community that was impacted by the Cerro Grande Fire. Additionally, the population per square mile in the impacted communities demonstrates a much higher density in Los Alamos County compared to Mora and San

Miguel Counties and requiring FEMA to consider the differences in the residential areas impacted by the two fires.<sup>17</sup> To fully implement the intent of the Act, FEMA must consider these differences between the impacted communities and address the specific injuries suffered by the Hermit’s Peak/Calf Canyon Fire communities around the use of the land in those communities. FEMA is proposing changes to §§ 296.4, 296.21(c)(2), 296.21(c)(3)(ii), 296.21(e)(5), 296.31(a), and 296.35 while adding § 296.21(c)(5) to address the concerns raised that are unique to these communities. Changes to each of these sections are further described below.

**Comment:** Commenters stated another distinction between those impacted by the Hermit’s Peak/Calf Canyon Fire and those impacted by the Cerro Grande Fire included the number of claimants that are insured, stating more claimants in the Cerro Grande Fire were insured than in the Hermit’s Peak/Calf Canyon Fire.

**FEMA Response:** FEMA agrees that the challenges facing the claimants impacted by the Hermit’s Peak/Calf Canyon Fire are distinct and that the IFR should be revised to better reflect those distinctions. Specifically, FEMA is proposing changes to sections 296.21(c)(2), 296.21(e)(5), 296.31(a), and 296.35 while adding § 296.21(c)(5) to address the concerns raised regarding the number of uninsured claimants impacted by the fire.

**Comment:** A commenter suggested FEMA look at other wildfires beyond Cerro Grande, including the recent California wildfire involving a utility company.

**FEMA Response:** FEMA appreciates the suggestion and has reviewed some of the best practices associated with the California compensation process referenced by the commenter. That process, however, involved a bankruptcy settlement of a private corporation under California law. FEMA is required to follow the statutory framework provided in the Act. While the Claims Office is reviewing some of the best practices from the California incident, that incident and the compensation process implemented to compensate those injured thereby are factually and legally too distinct from the Act’s requirements to be considered

a full template for implementation in regulation.

### C. Comments on §§ 296.1 and 296.3, the Rule’s Purpose and Information

**Comment:** FEMA received comments stating the IFR’s purpose should be revised to reflect the Act’s purpose language. Specifically, a commenter wrote “The Hermit’s Peak/Calf Canyon Fire Assistance Act provides one of the purposes of the Act is ‘to compensate victims of the Hermit’s Peak/Calf Canyon Fire, for injuries resulting from the fire.’ . . . FEMA’s [I]nterim [F]inal [R]ule’s current phrase ‘suffered from the Hermit’s Peak/Calf Canyon Fire’ (emphasis added) could result in limiting allowable losses to solely fire damages, in violation of the Act.”

**FEMA’s Response:** FEMA agrees that the Act’s purpose as stated in section 102(b)(1) is to compensate victims for “injuries resulting from the Fire” (emphasis added) and is amending § 296.1 to state that the Claims Office will receive, evaluate, process, and pay actual compensatory damages for injuries resulting from the Hermit’s Peak/Calf Canyon Fire. This technical edit provides consistency with the language of the Act.

**Comment:** Some commenters requested FEMA change the purpose of the rule in § 296.1 to include flood damages, as well as throughout the rest of the rule.

**FEMA Response:** The Final Rule language as revised in § 296.1 as explained above is sufficiently broad to encompass a range of damages claimants may have suffered, including flood and flood-related damages. Further, the definition of “injured person” includes injuries “resulting from the Hermit’s Peak/Calf Canyon Fire” and is sufficiently broad to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may result from the Fire.

**Comment:** One commenter suggested that FEMA include specific reference to mitigation efforts in the rule’s purpose.

**FEMA Response:** Section 296.1 does not require any edits to incorporate mitigation efforts into the rule. The purposes of the Act are to compensate Fire victims for injuries resulting from the Fire and the expeditious consideration and settlement of claims for those injuries. Further, the Act requires FEMA to promulgate a regulation “for the processing and payment of claims under the Act.” Consistent with the Act, FEMA’s Final Rule states the purpose of the regulation is to “establish the Office of Hermit’s Peak/Calf Canyon Fire Claims (‘Claims Office’) to receive, evaluate, process,

<sup>16</sup> University of New Mexico Bureau of Business and Economic Research, “Socioeconomic Assessment of the Santa Fe National Forest,” August 2007 at pgs. 78–79 and 89, found at [https://www.fs.usda.gov/internet/FSE\\_DOCUMENTS/fsbdev3\\_021243.pdf](https://www.fs.usda.gov/internet/FSE_DOCUMENTS/fsbdev3_021243.pdf) (last accessed Mar. 3, 2023).

<sup>17</sup> The population per square mile in 2020 was 178 in Los Alamos County, 5.8 in San Miguel County, and 2.2 in Mora County. See U.S. Census Quick Facts—Los Alamos County, New Mexico found at <https://www.census.gov/quickfacts/losalamoscountynewmexico>, <https://www.census.gov/quickfacts/sanmiguelcountynewmexico>, and <https://www.census.gov/quickfacts/moracountynewmexico> (last accessed July 5, 2023).

and pay actual compensatory damages for injuries resulting from the Hermit's Peak/Calf Canyon Fire." The Act authorizes FEMA to compensate claimants for the "costs of reasonable efforts, as determined by the Administrator, to reduce the risk of wildfire, flood, or other natural disaster in the counties impacted by the Hermit's Peak/Calf Canyon Fire to risk levels prevailing in those counties before the Hermit's Peak/Calf Canyon Fire," and FEMA details this compensation in § 296.21(e)(5). Section 296.1 does not require revision to allow for compensation for eligible risk reduction measures.

*Comment:* Some commenters suggested FEMA amend the information and assistance section to incorporate details regarding the Claims Office addresses and phone number. One commenter suggested FEMA allow for applications, correspondence, and supporting documentation to be exchanged by postal mail. This commenter also recommended FEMA create centralized locations where northern New Mexicans can physically go to access the electronic application and receive assistance in filling out the applications in multiple languages so that the application and supporting documentation can be timely submitted.

*FEMA Response:* FEMA appreciates these suggestions and plans to provide further details regarding the Claims Office operation and opportunities for claimants to obtain assistance online at <https://www.fema.gov/hermits-peak> as explained in the regulation. Because FEMA wants to continue adapting to claimants' needs in this process, it is best to direct claimants to the website in the regulations for the latest information available on the process. FEMA will continue to provide outreach efforts to the community in addition to posting at <https://www.fema.gov/hermits-peak>.

#### D. Comments on § 296.4 Definitions

Some commenters suggested FEMA modify the definitions provided in the IFR to better reflect the unique challenges presented by the Hermit's Peak/Calf Canyon Fire.

*Comment:* One commenter recommended FEMA amend the definition of "Authorized Official's Determination" to include determinations by mail and electronically.

*FEMA Response:* FEMA does not believe edits to the regulatory text are required as "mailed" can incorporate both physical and electronic mailing. FEMA anticipates that, where applicants have provided contact information to allow for electronic

mailing of this determination, the Agency will provide the Authorized Official's determination both by mail and electronically. However, there may be instances where the claimant has not provided contact information to allow for electronic mailing and thus FEMA could only provide the determination by physical mail. To ensure flexibility in these instances, FEMA is not amending the regulatory language.

*Comment:* One commenter also recommended adding a definition of a "Claims Navigator" to the regulation, providing suggestions on how these Navigators would work with claimants in the process.

*FEMA Response:* FEMA does not believe this change is needed. The Agency is not referencing this term in the regulatory text. Terms not used in the regulatory text do not need to be defined in the definitions section of the regulation.<sup>18</sup>

*Comment:* A commenter suggested revision to the definition of "good cause" to include "or any circumstance where the Administrator determines that good cause would further the mission of the Claims Office to pay compensatory damages for injuries suffered from the Hermit's Peak/Calf Canyon Fire."

*FEMA Response:* FEMA disagrees with the comments that the additional language in the definition of "good cause" is required. The Act authorizes the Director of the Claims Office to assume the duties of the Administrator.<sup>19</sup> Adding language to the definition of "good cause" to allow the Administrator to make a good cause determination would result in a redundancy as the IFR language provides the Director discretion to make good cause determinations. As written, the IFR provides for the use of good cause in circumstances regarding deadlines or supplementing and reopening claims.

*Comment:* Some commenters also requested the definition of "good cause" be amended to include "or where damage from post-fire flooding is suffered by the claimant after filing a claim."

*FEMA Response:* FEMA disagrees that the "good cause" definition must be revised to consider flooding damage after filing a claim. As explained above, the definition of "injured person" includes injuries "resulting from the

Hermit's Peak/Calf Canyon Fire" and is broad enough to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may be considered as a result of the Fire. The current language allows for good cause "where damage is found after a claim has been submitted" and this language, read in conjunction with the definition of "injured person" addresses concerns regarding whether such damage could constitute good cause to supplement or reopen a claim.

*Comment:* One commenter raised concerns that "good cause" was too subjective.

*FEMA Response:* The application of a good cause definition requires use of discretion that by nature contains some subjectivity that cannot be fully eliminated from the determination.

*Comment:* A commenter recommended FEMA change the definition of the "Hermit's Peak/Calf Canyon Fire" to add "flooding, mudflow, mold, and debris flow resulting from the two fires." The commenter requested FEMA specifically reference flooding, mudflow, mold, and debris flow as a cause of injury and as a damage that can be compensated.

*FEMA Response:* FEMA disagrees that this change is needed to the definition of "Hermit's Peak/Calf Canyon Fire" to compensate claimants for these types of injuries resulting from the Fire. The definition of "injured person" includes injuries "resulting from the Hermit's Peak/Calf Canyon Fire" and is broad enough to encompass flooding, mudflow, mold, and debris flow, as well as other types of injuries that may be considered as a result of the Fire. Adding this language may narrow the scope of damages an injured person may seek to claim, and FEMA prefers to retain the current definition of the Fire while allowing claimants suffering injuries resulting from the Fire be allowed to present their claims.

*Comment:* Three commenters recommended that FEMA modify the definition of household "to clarify that it does not exclude the claims of owners that did not live at the property on a continuous basis" and that rather, these individuals should be included. While including them in the definition of household, the commenters recommended that these individuals "not be compensated for financial damages already paid to the primary resident." Rather, the individuals should be "eligible for compensation based on their individual loss."

*FEMA Response:* FEMA is not amending the definition of "household" as requested by these comments. Claimants can file a claim as a

<sup>18</sup> See "Writing Resources for Federal Agencies, Regulatory Drafting Guide, Definitions" found at <https://www.archives.gov/federal-register/write/legal-docs/definitions.html> (last accessed Feb. 16, 2023).

<sup>19</sup> Section 103, Definition of "Administrator" (1)(B).

household or individually in these circumstances and the Claims Office will accept the claim for review. Nothing in the current definition prohibits claims filing either as a household or individually.

*Comment:* A commenter suggested the definition of “injured person” be modified to include “acequia, land grant” immediately after “school district” in the definition.

*FEMA Response:* FEMA does not believe this amendment is required to cover the entities referenced. Rather, these entities are covered under the current definition as an “other non-Federal entity that suffered injury resulting from the Hermit’s Peak/Calf Canyon Fire.”

*Comment:* Another commenter stated FEMA should amend the definition of “injured person” to include flooding, mudflow, mold, and debris flow as a cause of injury and damage that can be compensated.

*FEMA Response:* FEMA disagrees that this edit is required to the regulatory text. The current definition provides for these types of injuries, as well as other types of injuries that may be considered an injury resulting from the Fire. Adding this language may narrow the scope of damages an injured person may seek to claim. The proposed language also conflates injuries from flooding, mudflow, mold, and debris irrespective of their connection with the Fire with injuries from flooding, mudflow, mold, and debris that are connected to the Fire. Only the latter are compensable under the Act. Therefore, FEMA prefers to retain the current definition of the Fire, which will allow claimants suffering injuries resulting from the Fire to present their claims.

*Comment:* Commenters wrote that nonprofit organizations should be considered “injured person.”

*FEMA Response:* The current definition of “injured person” includes an “other non-Federal entity that suffered injury resulting from the Hermit’s Peak/Calf Canyon Fire” and that terminology encompasses non-profit organizations. FEMA understands non-profit organizations may have suffered injuries resulting from the Fire, and FEMA believes the current definition sufficiently encompasses all types of for-profit and non-profit entities. FEMA’s website at <https://www.fema.gov/hermits-peak> provides more information explaining the regulatory text to help claimants better understand who is considered an injured person under the Act.

*Comment:* Some commenters suggested that FEMA amend the definition of “subsistence resources” to

include “and other natural resource” to reflect the types of resources gathered and the broad range of subsistence use practices of both acequia-served communities, as well as Tribal and Pueblo sovereigns.

*FEMA Response:* Consistent with these suggestions, FEMA is adding “or other natural resource” to the definition of “subsistence resources” to reflect the specific needs of the impacted communities. As explained above, the Hermit’s Peak/Calf Canyon Fire impacted an area that is economically and culturally distinct from the communities impacted by the Cerro Grande Fire. This change reflects FEMA’s understanding that other natural resources beyond firewood may be gathered for subsistence purposes.

#### *E. Comments on the Claims Process Generally*

Commenters offered comments and suggestions on a wide range of issues on the claims process. Commenters offered suggestions on ways to streamline the process and to make the process more accessible to the impacted communities. Commenters wrote of experiences with FEMA and other Federal agencies, stating how FEMA and other agencies handled their cases under other programs.

*Comment:* One commenter stated, “Nothing in my experience with F[EMA] so far gives me faith that you are on my side or have my best interests at heart.” The comment continued “So far communication between government entities and organizations has been nonexistent or completely dysfunctional . . . I need to have more confidence in your ability to work with other entities, or even communicate within F[EMA].” Commenters provided suggestions on hiring personnel for the Claims Office, including the Claims Office Director, Claims Navigators, Claims Reviewers, and other staff, and how the agency should train the staff. Commenters also stated their anger, frustration, and mistrust of the process and requested to be treated with respect and compassion. One commenter wrote “Cataloging every single thing we lost in the fire, correlating it with a receipt, and looking up how much it will currently cost to replace it has been a full-time job for a while now, and extremely difficult emotionally.” Another commenter wrote about a recent experience with FEMA stating “it did nothing to build trust or confidence in FEMA. The end effect has been the exact opposite. And in turn, I have since prepared myself to expect more of this inappropriate treatment from FEMA in all future interactions.” A different commenter

wrote “HPFAA administrators and claims reviewers must handle all injured victim cases as though this injury to their lives and livelihoods is a direct result of a felony act of arson deliberately committed against them all. Government employees and contractors responsible for this conflagration will never truly be held accountable to receive due punishment for actions which will never even ‘officially’ be considered gross incompetence, but that doesn’t make the end result any less destructive than an act of intentional criminal arson would be.” One commenter stated “I want you to remember that this is a fire caused by the [F]ederal government and that we are the victims of this. Please treat us with respect.”

*FEMA Response:* FEMA acknowledges the unique challenges faced by the communities impacted by the Fire and how challenging it has been for claimants to recover. FEMA and the Federal government provided a range of existing programs to those impacted by the Fire, many of which were not designed to meet the needs of the impacted communities, given the extent of the injuries suffered as a result of the Fire. Those programs were not designed to provide full financial compensation to those injured by the Fire. For example, the Individuals and Households Program (IHP) provides financial and direct services to eligible individuals and households affected by a disaster, who have uninsured or under-insured necessary expenses and serious needs. IHP is not a substitute for insurance and cannot fully compensate for all losses caused by a disaster; rather, that assistance is intended to meet basic needs and supplement disaster recovery efforts.<sup>20</sup> As disaster assistance programs are not designed to fully compensate those impacted by disasters, some applicants in these communities are frustrated with and uncertain about, the Federal government’s ability to assist them. The Act’s commitment to compensate victims through the Claims Office process allows FEMA to directly provide claimants with compensation to better assist claimants and communities in more fully recovering from this devastating Fire. The Agency is committed to working with claimants and communities to ensure the Claims Office meets their needs and compensates claimants for the damages resulting from the Fire. The Claims Office hired Claims Navigators from the community to guide claimants through

<sup>20</sup> <https://www.fema.gov/assistance/individual/program> (last accessed Mar. 3, 2023).

the application process, focusing on ensuring that claimants understand the process of applying for compensation, what compensation is available for their losses, and what documentation is needed to obtain this compensation.

The Claims Office operates independently of FEMA's other programs, and it provides a great deal more flexibility in the process of applying for and receiving compensation than these more traditional grant programs. Unlike FEMA's Individual Assistance and Public Assistance, which provide disaster assistance to individuals and households impacted by declared disasters, the Claims Office is not subject to any caps on the amount of assistance it can provide. Unlike FEMA's Public Assistance Program, which provides grants to States, Federally recognized Tribal governments, U.S. territories, local governments, and certain private non-profit (PNP) organizations, the Claims Office does not have any cost share requirements, and there are no conditions placed on receipt of the compensation.

#### 1. Comments on the Claims Office Administrator

*Comment:* Commenters made specific requests regarding the appointment of the Claims Office Administrator. Commenters requested that an Independent Claims Administrator be appointed. One commenter stated that the broad "make whole" compensation approach of the Act was different from FEMA's normal disaster relief operation and Congress recognized this by providing for the appointment of an Independent Claims Administrator in the Act. This commenter stated the number of potential claimants and broad scope of the harm they have suffered required the appointment of an Independent Claims Administrator with experience in "make whole" compensation processes. A different commenter wrote that these claims processes are extremely complex, with many moving parts and unique issues, and would be best overseen by a claims manager familiar with fire-related claims processes. Another commenter suggested an independent trustee or claim administrator be appointed to manage and stated FEMA should not be in charge of administration.

*FEMA Response:* Section 104(a)(3) gives the Administrator the option to appoint an Independent Claims Manager to head the Claims Office. In her discretion, the Administrator selected a Claims Office Director with over 15 years of experience building and

managing Federal programs to start up the Claims Office and did not opt to appoint an Independent Claims Manager. FEMA understands the commenters' desire to have an Independent Claims Manager appointed. Given the short timelines that the Agency had to publish the IFR and begin processing claims, FEMA determined it was both efficient and effective to select a candidate with extensive experience in government assistance programs to lead the Claims Office. FEMA also understands concerns that other FEMA programs do not operate in the same way in which the Act requires the Claims Office to operate. However, FEMA was tasked with the implementation of the Act, including operation of the Claims Office for this Fire, and further has prior experience in operating a Claims Office in New Mexico for the Cerro Grande Fire in 2000. FEMA recognizes the distinctions between the two fires, but also believes the Agency can build on best practices and incorporate principles of equity, as well as lessons learned from the Cerro Grande Claims Office, to implement a Claims Office for the Hermit's Peak/Calf Canyon Fire Assistance Act that will acknowledge the differences between the two fires and best serve the claimants and communities impacted by the Hermit's Peak/Calf Canyon Fire.

*Comment:* In addition to requesting an independent claims administrator, several commenters requested the claims administrator be a New Mexico attorney and/or retired judge.

*FEMA Response:* As explained above, the Administrator has exercised her discretion and selected the Director of the Claims Office. The Director has extensive experience building and managing Federal assistance programs and will lead the Claims Office in these nascent stages. FEMA appreciates commenters' concerns that the Claims Office be led by someone with familiarity with New Mexico law, as well as the unique political, economic, and cultural institutions of the impacted communities. FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed. FEMA believes that local hiring at all other levels of the Claims Office will better serve to meet the needs of claimants and communities rather than a single hire at the Director level. Additionally, FEMA is making changes in the Final Rule to better reflect the needs of the impacted communities.

*Comment:* One commenter suggested another commenter be appointed as the Independent Claims Office Administrator.

*FEMA Response:* As explained above, the Administrator has exercised her discretion to hire the Director of the Claims Office with extensive experience building and managing Federal programs to lead the Claims Office.

#### 2. Comments on the Claims Office

Commenters offered suggestions on how to staff and manage the Claims Office.

*Comment:* Commenters suggested that FEMA hire members of the local community to increase trust in the claims process. Some commenters stated the importance of hiring New Mexicans familiar with *acequias*.

*FEMA Response:* FEMA agrees with these comments. As explained above, FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed.<sup>21</sup> FEMA believes that hiring local applicants at all other levels of the Claims Office will better serve to meet the needs of claimants and communities by helping to ensure the Claims Office is staffed with individuals familiar with the specific needs of the communities impacted by the Fire. As of April 10, 2023, almost 70 percent of the permanent Claims Office team are local staff.<sup>22</sup> Local staff work out of Claims Offices in Santa Fe, Las Vegas, and Mora, New Mexico, and serve in multiple capacities ranging from the Deputy Director, Advocate and Claims Navigators, to external affairs and facility support. Additionally, FEMA is making changes in the Final Rule to better reflect the needs of the impacted communities.

*Comment:* A commenter suggested FEMA stay alert to favoritism "infiltrating the ranks of claims reviewers hired from the local population."

*FEMA Response:* FEMA appreciates the commenter's concerns regarding favoritism. Federal employees are held to certain basic obligations of public

<sup>21</sup> FEMA hosted a Hiring Fair on January 10, 2023, in Mora, NM and provided Federal Resume Writing webinars on December 29, 2022, and January 3, 2023. Details regarding the available positions were also posted to <https://www.fema.gov/fact-sheet/hermits-peakcalf-canyon-claims-office-now-hiring> (last accessed Feb. 16, 2023).

<sup>22</sup> FEMA notes that given the permanent positions in the Claims Office are located in Mora, Las Vegas, and Santa Fe, New Mexico, most applicants seeking these positions were local.



service that require employees to “act impartially and not give preferential treatment to any private organization or individual.”<sup>23</sup> As part of the hiring and onboarding process, these obligations are explained, and training is provided to ensure employees understand the obligations of public service. FEMA also is coordinating with the Department of Homeland Security Office of Inspector General and the FEMA Fraud unit to ensure vigilant oversight.

*Comment:* Some commenters suggested FEMA hire a specific contractor to assist the manager and FEMA to process claims.

*FEMA Response:* Consistent with the Federal Acquisition Regulation,<sup>24</sup> FEMA awarded multiple competitive contracts to provide support services to the Claims Office. Services include consulting, claims processing, systems analysis, operation, and data analysis support. Each contractor shall, to the maximum extent possible, create opportunities for the utilization of local small businesses, including the utilizing of businesses from underserved communities and develop a plan to utilize local firms and/or hire local residents.

*Comment:* One commenter suggested FEMA hire an experienced claims processor that can start handling claims immediately stating FEMA would need to figure out how to handle claims first.

*FEMA Response:* The Claims Office engaged in a competitive hiring action to hire an experienced Claims Chief. This position oversees the claims process from the completion of the Notice of Loss to the final payout on the claim. The Claims Office also hired a number of experienced contract claims examiners with insurance adjusting experience to review and make recommendations on claims. The Claims Chief oversees Claims Reviewers at the main Claims Office, as well as at least three public-facing claims offices in Mora, San Miguel, and Las Vegas, New Mexico.

*Comment:* A commenter suggested FEMA take the time that is required to provide substantial training for newly hired staff.

*FEMA Response:* FEMA agrees that training will be critical for all newly hired staff for the Claims Office. FEMA intends to provide standard onboarding training for all new employees, as well as specialized training for all Claims Office employees to fully understand the claims process and the Act's requirements. Training includes roles

and responsibilities, claims processes and operations, cultural awareness, statutes and regulations, customer service and customer experience, risk reduction practices, coordination with State agencies, and other related trainings.

*Comment:* One commenter provided a recent experience with a field inspector that inspected their homestead for potential disaster relief and stated that “the person you chose to do this inspection is an incompetent at such work as this.” The commenter suggested FEMA be very careful in their hiring practices and contracting of third parties for claims office operations to prevent “such outrageous incidents” as described in their experience.

*FEMA Response:* FEMA appreciates the commenter's honesty and willingness to share their experience. FEMA intends to staff the Claims Office with local hires that can better understand the unique political, economic, and cultural institutions of the communities impacted by the Fire, as well as claimants seeking compensation under the Act, in addition to experienced contract employees. As explained above, FEMA plans to provide training for all Claims Office employees to fully understand the claims process and the Act's requirements.

*Comment:* One commenter provided a memorandum with a seven-step process on how the Claims Office can develop a mindset to get to yes and serve clients effectively. This individual also submitted comments on the culture of the Claims Office. The comment “focus[ed] on a seven-step plan to help this program transform its approach as it processes the regulation comments, from a denial-based approach to a positive, effective process for those it is meant to serve.”

*FEMA Response:* FEMA appreciates the commenter's detailed suggestions. As pointed out by the commenter, the Claims Office process will be different from FEMA's disaster relief programs, and it will be important for employees of the Claims Office to acknowledge and embrace those differences in process and implementation efforts. Based on the comments received, FEMA established a set of guiding principles for the Claims Office culture needed to deliver this mission.<sup>25</sup> FEMA will work to ensure a full understanding by the entire Claims Office staff of the claims process and the Act's requirements and the importance of focusing on the needs of claimants and communities impacted by the Fire. With that in mind, the

Claims Office provides each claimant with an assigned Navigator. The Claims Navigator works directly with the claimant and Claims Reviewers, asking questions, helping claimants obtain documentation, helping claimants complete the Notice of Loss and Proof of Loss, and shepherding the claimant through the process to better ensure that the claimant is fully compensated for their loss.

The Claims Office has also established an independent Claims Office Advocate. The Claims Office Advocate responds to, manages, and recommends solutions to issues with the process itself, whether those issues be with the Claims Navigators and Claims Reviewers, the claims process itself, or how the process is being implemented. The Claims Office Advocate is responsible for identifying issues with the claims process and addressing those issues on the claimant's behalf. The Claims Office Advocate serves as an additional resource to claimants by helping to improve their understanding of the claims process and providing guidance about the steps in that process and the associated requirements.

The Claims Office Advocate also identifies issues, risks, and opportunities for improvement and develops recommendations for claims process enhancements that will address these and deliver a better, fairer claims process that is accessible to all claimants. While the Claims Navigators and Claims Reviewers report to a Team Lead, the Advocate reports directly to the Director of the Claims Office. As such, the Claims Office Advocate has a direct line of communication with the Director of the Claims Office, and the Advocate is positioned to advocate on behalf of claimants and to make recommendations for enhancements to the claims process.

*Comment:* One commenter suggested that State Case Managers be integrated into the program and trained as Navigators.

*FEMA Response:* FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. However, the Claims Office is implementing procedures to coordinate with the State of New Mexico as appropriate.

*Comment:* One commenter asked how many claims would be covered by each Claims Reviewer.

*FEMA Response:* FEMA does not have an estimate on the volume of claims per Claims Reviewer at this time. FEMA anticipates Claims Reviewers will have a workload balance reflective of both

<sup>23</sup> 5 CFR 2635.101(b)(8).

<sup>24</sup> See <https://www.acquisition.gov/browse/index/far>.

<sup>25</sup> See <https://www.fema.gov/hermits-peak>.



claim volume and claim complexity to ensure claimants' needs are effectively met by the Claims Office.

### 3. Comments on the Use of Funds

*Comment:* Commenters sought clarification on how FEMA would use the funds provided by the Act between administrative costs and claims payments to claimants. Some commenters wrote about experiences with administrative costs with one commenter stating that "to provide a trailer for a family it can cost 300k with much of this money going to pay FEMA workers and for admin costs." Commenters asked what the administrative costs would be and how much of the available appropriated funding would go to administrative costs and how much funding would go to claimants. One commenter wrote "how much of the available funds will go to administration and how much will go to victims?". Another commenter stated, "I wonder what the administrative costs are if they are going to come out of this \$2.5 billion of it is gone before any money goes to anybody in this room and maybe that's necessary."

*FEMA Response:* Section 104(a)(2)(C)(i) of the Act states that "The Office shall be funded from funds made available to the Administrator for carrying out this section." FEMA is required to use the funding provided under the Act for the administrative costs to run the Claims Office. FEMA has a general obligation to spend Federal funds wisely and Congress required FEMA to provide quarterly reports to the Committee on Appropriations of the Senate and House of Representatives on the obligations and expenditures of the funds made available under the Act.<sup>26</sup> Congress also directed a portion of the funding to the Department of Homeland Security Inspector General to fund program oversight. FEMA intends to comply with this Congressional reporting requirement regarding the use of funding under the Act. This transparency will help allay the commenters' concerns about the total administrative costs for the Claims Office.

*Comment:* Commenters suggested FEMA provide transparency in how the funds appropriated under the Act were spent. One commenter suggested that information about how the funds were being spent be shared publicly in real time via an online dashboard. Such a tool would help prevent internal fraud

and help FEMA identify external fraud and program favoritism while also allowing everyone the ability to be alerted to something suspicious happening with funds. Another commenter agreed, recommending that FEMA allow the public to review the overall project budget and other transparency related to fiscal accountability. One commenter wrote that "FEMA should provide full transparency of cost, budget, expenditures, etc. including administrative costs, operational costs, total payouts, total denials, etc. to not only to the [Department of Homeland Security's Office of the Inspector General] but also to the State—without violation of the Privacy Act."

*FEMA Response:* As explained above, Congress required FEMA to provide quarterly reports to the Committee on Appropriations of the Senate and House of Representatives on the obligations and expenditures of the funds made available under the Act.<sup>27</sup> FEMA intends to comply with this Congressional reporting requirement regarding the use of funding under the Act. This transparency will help allay the commenters' concerns about the total administrative costs for the Claims Office. In addition, the Claims Office Advocate will be creating easily understandable reports with program metrics to be shared on <https://www.fema.gov/hermits-peak> and through other communications channels.

*Comment:* Commenters also provided recommendations on ways to use and/or distribute the funding appropriated. One commenter suggested funding be dedicated to the reintroduction of beavers to the region to help repair the land.

*FEMA Response:* FEMA does not have the authority under the Act to dedicate funding as recommended by the commenter as claimants must submit claims demonstrating their injuries resulting from the Fire to obtain compensation. Funding for activities like reintroduction of beavers may be eligible as a nature-based solution to reduce the heightened risk of wildfire, flood, or other natural disaster and claimants seeking compensation must demonstrate that this claim is clearly tied to an increased risk that resulted from the Fires.

*Comment:* A commenter wrote suggesting that FEMA "create a grid system on a map with a baseline payment scale using at least 1.5 billion dollars to be distributed equally where

the [F]ire/flooding/damaged areas are the epicenter with the highest baseline (\$250,000) payment and the areas with lesser damage (such as minimal property damage, *i.e.*, smoke damage or food loss) still receive baseline funding at a lesser significant (over \$2,500) amount." The commenter wrote that none of the funding provided should be taxable income. The commenter stated this proposal is to "ensure that all landowners in the affected areas get a baseline of funding." The commenter also suggested "[S]2 billion in funding go to the public entities to prevent future disasters such as monies allocated to public safety." The commenter suggested "another [\$]1 billion to public utility infrastructure and public communications." The commenter wrote that the rest of the funding could be used for "paying out and making individuals with losses whole and covering gaps missed in my proposed comments above."

*FEMA Response:* FEMA is authorized under the Act to pay claimants for actual compensatory damages for injuries resulting from the Fire.<sup>28</sup> FEMA does not have the authority under the Act to establish the type of funding system recommended by the commenter as claimants must submit claims demonstrating their injuries resulting from the Fire to obtain compensation. FEMA further did not receive sufficient funding under the Act to implement the payment plan proposed by the commenter. FEMA notes that the Act at section 104(h)(4) provides that the value of compensation provided under the Act "shall not be considered income or resources for any purpose under any Federal, State, or local laws, including laws relating to taxation . . ." FEMA cannot advise individual claimants on their individual tax obligations, however, and encourages claimants to consult with their tax advisers if they have questions related to tax obligations.

*Comment:* A commenter asked whether the funding provided under the Act covered the costs for the matching funds requirement waiver in section 104(k) of the Act or if the funding under the Act was exclusively reserved for claims.

*FEMA Response:* The Act does not authorize FEMA to utilize the funds appropriated to cover the matching funds requirement waiver in section 104(k). These additional matching funds to meet the 100 percent cost share will have to be provided from the funding provided for those programs generally, not the funding provided by the Act.

<sup>26</sup> Public Law 117–180, Division A, Section 136 (2022).

<sup>27</sup> Public Law 117–180, Division A, Section 136 (2022).

<sup>28</sup> See Sections 102(b) and 104(c) of the Act.

*Comment:* Commenters suggested ways in which the funding appropriated under the Act should not be used.

Commenters suggested administrative costs be paid out of a separate budget rather than the appropriated funding. One commenter suggested administrative costs should be paid for out of a separate FEMA budget.

*FEMA Response:* As explained above, section 104(a)(2)(C)(i) requires FEMA to use the funding made available under the Act to fund the Claims Office. FEMA is required to follow the Act's requirement to fund the Claims Office from the Act's funding.

*Comment:* One commenter requested FEMA Claims Reviewers tour the entire burn scar area and not to use the funding appropriated for that tour.

*FEMA Response:* FEMA appreciates the request, the value placed in seeing the devastation resulting from the Fire first-hand, and the need for Claims Office staff to fully comprehend the extent of injuries suffered. FEMA plans to provide training to all Claims Office staff that will include extensive background information on the Fire and its impacts. FEMA believes that Claims Reviewers should be aware of the devastation to help comprehend the losses and spend their time focused on assisting claimants with their claims, not taking tours of the entire burn scar area.

*Comment:* Commenters stated the funding appropriated was not sufficient to fully compensate claimants. One commenter suggested the total \$3.9 billion appropriated will not cover the cost of recovery from the level of destruction caused by the Fire. This commenter stated more destruction was guaranteed from the Fire and argued it would be worse if people rebuilt in the wrong places before the land stability is restored. Other commenters agreed that the amount appropriated was not sufficient to cover the damages and one of those commenters stated that the lack of sufficient funding would result in denying people compensation.

*FEMA Response:* The Act and subsequent legislation appropriated \$3.95 billion in funding. FEMA is obligated to provide quarterly reports to Congress on the use of funds under the Act and these reports ensure transparency of the use of funds and the sufficiency of funding under the Act.

*Comment:* To combat fraud, one commenter recommended FEMA review fire-affected county audits performed by the New Mexico State Attorney General's Office to anticipate where and how acts of fraud will occur. Another commenter stated in their comment the New Mexico State Auditor performs

these audits, providing links to recent reports.

*FEMA Response:* FEMA appreciates the concerns regarding potential fraud and is incorporating fraud awareness and detection training into the comprehensive training provided to all Claims Office staff. FEMA notes that Congress provided appropriations for the Department of Homeland Security's Office of the Inspector General for oversight of activities authorized by the Act.<sup>29</sup>

*Comment:* A commenter stated that insurance companies would demand compensation for the amounts they have paid or will pay to insured claimants.

*FEMA Response:* Insurance companies are eligible for compensation as injured persons under the Act. Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. As explained below, FEMA is amending § 296.13 in the Final Rule to add language from the Act specifically to clarify the claims prioritization required. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid and that will not be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 in this Final Rule, will help ensure that the compensation is first made available to injured persons that are not insurance companies.

*Comment:* Finally, commenters suggested other funds outside of those appropriated be used to pay for compensation under the Act. One commenter stated that FEMA "not use taxpayer dollars to compensate victims, but instead seize the assets of the oil and gas companies whose industry has created global warming and red flag conditions all over the country and use those assets to compensate victims." One commenter suggested those responsible for causing the Fire should donate their retirement funds to those impacted by the Fire.

*FEMA Response:* Congress appropriated \$3.95 billion for implementation of the Act and FEMA is required to use that appropriated funding to implement the Act and pay claimants actual compensatory damages for injuries resulting from the Fire.

<sup>29</sup> See Public Law 117–180, Division A, Section 136 (2022).

#### 4. Comments on § 296.5 Overview of the Claims Process

*Comment:* One commenter suggested FEMA set up remote assistance given COVID, RSV, and influenza infection concerns. Another commenter stated that claimants should be allowed to meet remotely with claims reviewers as it was unreasonable for FEMA to expect victims to travel long distances. One commenter suggested FEMA set up mobile claim offices in southwest Colfax County and south Taos County. One commenter stated that "60 to 70 percent of the people up in Mora [County] are Hispanic and a lot of people don't even have access to computers." The commenter suggested FEMA "try to get somebody who can speak Spanish to go with these people because that's what we need." Commenters also suggested FEMA get out into the community as part of the claims process and outreach to the community.

*FEMA Response:* FEMA plans to offer opportunities for one-on-one engagement through Claims Reviewers who will work to engage claimants in ways to meet their needs whether in person or via remote technology. Claims Office Navigators are trained to accommodate the needs of claimants and are prepared to meet them in the satellite Claims Offices in Las Vegas, Mora, and Santa Fe, New Mexico at claimants' homes or offices, or any place convenient to claimants, taking into account health and safety concerns. Note that FEMA will provide services both at set office locations for the Claims Office, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions. FEMA recognizes the importance of having claims staff, who interact with claimants and help facilitate the claims process, that are able to speak both Spanish and English. FEMA locally hired bilingual speakers to ensure that claims staff can communicate with claimants in their preferred language.

*Comment:* Several commenters wrote that attorneys should be notified during the process when claimants are represented by counsel.

*FEMA Response:* With an appropriate Privacy Act waiver, FEMA will ensure contact is made with both claimants and their attorneys. The Claims Office has included consent language necessary to comply with the Privacy Act in the standard Notice of Loss form. The

consent is needed for an attorney or other third-party representative to have access to a claimant's privacy information maintained in the Claims Office system of records. In addition to providing basic information about the claimant and representative, the claimant must sign the consent section if they choose to be represented by a third party.

*Comment:* One commenter wrote that information on claim status and timeline to receive payment should also be easily accessible at the claimant level. Two commenters suggested FEMA provide an online method of checking the status of their claim and hard copies of documents for those claimants without internet access.

*FEMA Response:* FEMA is currently developing an online claims system that will provide claimants with real time access to claim status in addition to providing status information by phone or mail (electronic and/or physical). FEMA anticipates this system will be rolled out in the near future and will provide outreach to the community when the system is available for use to help claimants understand and utilize the system.

*Comment:* One commenter asked that State Case Managers be integrated into the program and trained as Navigators to serve as a single point of contact to help claimants throughout the process.

*FEMA Response:* As explained above, FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. In the event a claimant has unmet needs or otherwise requests a Disaster Case Manager, the standard Notice of Loss form includes a section for the claimant to consent to sharing claim data maintained in the system of record with Disaster Case Managers.

*Comment:* Several commenters suggested that FEMA streamline the claims process. One method for streamlining the process suggested by commenters related to access to available Federal programs. Commenters suggested that FEMA streamline access to available Federal programs and, in addition to funds appropriated under the Act, to utilize other Federal funding opportunities when and where available.

*FEMA Response:* FEMA agrees with this suggestion and is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other

Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is consulting with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process and provide for local concerns. To preserve funding from the Hermit's Peak/Calf Canyon appropriations to pay eligible claims, FEMA requires applicants eligible for FEMA's Public Assistance program to exhaust available public assistance funds before seeking compensation from the Claims Office.

*Comment:* Another suggestion involved preparing formulas for compensation. One commenter asked how FEMA would compensate claimants for a variety of damages and requested transparency and a formula that should be shared with claimants. Another commenter suggested that FEMA move forward with developing estimates to help reduce the wait for compensation. One commenter asked how claims would be made equitable and if there would be standard reimbursement rates for similar claims. Two commenters suggested monetary thresholds be established to ensure time and effort are proportionate to the claim values being made. As one of the commenters explained, there are thresholds throughout many other Federal programs where the burden of proof is significantly less based on the overall claim value. Another commenter, however, stated that "no two claims will be alike, and the process cannot be developed or allowed to become an assembly line approach."

*FEMA Response:* FEMA recognizes the need for an efficient, streamlined process through the use of a damage calculation formula, while also balancing the unique types of claims being presented under the Act and ensuring claimants are paid actual compensatory damage as required by the Act. FEMA anticipates developing some damage calculation formulas, such as providing for a certain dollar amount of compensation per acre of land damaged, so that claimants have the option to leverage one of those formulas or present their individual claim and request for specific damage amounts. FEMA believes this optionality will best balance the need for an efficient process with the individual needs of claimants, as claimants will be able to make the choice in presenting their claim for compensation.

## 5. Comments on § 296.10 Filing a Claim Under the Act

*Comment:* One commenter suggested FEMA allow claimants to file a Notice of Loss in person consistent with the IFR. Another commenter stated that FEMA should allow claimants to file claims in person, as well as via mail, email, and a web-based portal system to ensure accessibility. A commenter suggested FEMA allow for applications, correspondence, and supporting documentation to be exchanged by postal mail. This commenter also recommended FEMA create centralized locations where northern New Mexicans can physically go to access the electronic application and receive assistance in filling out the applications in multiple languages so that the application and supporting documentation can be submitted in a timely manner.

*FEMA Response:* FEMA appreciates these suggestions. FEMA does not believe changes to the Final Rule are necessary to implement these suggestions, but rather that as the Claims Office continues to expand operations, the information would be made available to the public via <https://www.fema.gov/hermits-peak> and other resources including direct community outreach. FEMA is currently accepting Notice of Loss forms in person at the claim's office locations in Santa Fe, Mora, and Las Vegas, New Mexico and those office addresses can be found at <https://www.fema.gov/hermits-peak>. FEMA will provide services both at set office locations for the Claims Offices, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions.

## 6. Comments on § 296.11 Deadlines

*Comment:* Several comments were received regarding the two-year deadline for filing a claim detailed in § 296.11 of the IFR, with most commenters stating that a two-year period to file a claim was insufficient. Commenters suggested extending the deadline based on an inability to determine damages because of the current inability to access their property, the potential for future impacts from flooding, and/or the long-term health and environmental effects given the size and scope of the Fire. A commenter suggested extending the deadline to three years for mitigation

efforts. Some commenters asked FEMA to be flexible in granting extensions. One commenter asked that extensions be granted in cases where knowledge of damages, recovery efforts, etc. are hindered by cooperation with government agencies.

**FEMA Response:** Some deadlines in the rule are beyond FEMA's control. Section 104(b) of the Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR was promulgated. FEMA was required by the Act to publish the IFR within 45 days of the Act's passage and the IFR was published 45 days after the Act's passage.<sup>30</sup> FEMA has built in extensions of the claim processing timeline after receipt of the Notice of Loss for good cause, recognizing the realities of the Fire's impact. Sections 296.34 and 296.35 establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. Whether a claimant tells FEMA about an injury in the initial Notice of Loss or an amendment under § 296.34, FEMA must know about the injury by November 14, 2024. For heightened risk reduction efforts, a claimant must include the claim in their Notice of Loss by November 14, 2024, or an amended Notice of Loss filed no later than November 14, 2025. See § 296.21(e)(5).

**Comment:** One commenter indicated the two-year period did not end on November 14, 2024, because the Final Rule had not been promulgated and it would not be promulgated until 60 days after filing in the **Federal Register**.

**FEMA Response:** FEMA disagrees with this characterization of the two-year period and rule promulgation. Specifically, Section 104(f)(1) of the Act requires FEMA to "promulgate and publish in the **Federal Register** interim final regulations for the processing and payment of claims under this Act." Publication of an IFR constitutes promulgation of a rule, as the rule was effective upon publication, and comments were requested post-promulgation. This sequence of events, publication of the interim final rule, followed by a public comment period, occurred here. Consistent with the Act's purpose at section 102(b), the immediate effective date of the rule ensures FEMA was able to begin accepting and processing claims on the date of publication.

#### 7. Comments on § 296.12 Election of Remedies

**Comment:** Commenters sought clarifications about how the election of

remedies worked. One commenter asked what would happen if the claimant did not accept the final determination by the Claims Office. Another commenter asked if people did not want to go through FEMA, whether they could sue and if there were multiple owners of a single property whether some could go through FEMA and also sue.

**FEMA Response:** As explained in the IFR's preamble, the Act provides that an injured person who accepts an award under the Act waives the right to pursue any claims arising out of or relating to the same subject matter under the Federal Tort Claims Act (FTCA) or a civil lawsuit. Similarly, those claimants who accept an award under the FTCA or a civil lawsuit waive the right to pursue claims under the Act. Until the final award payment is accepted, the claimant may pursue any and/or all of the options available. This flexibility allows injured persons to pursue different avenues of compensation until a final award is accepted. The IFR language states that an injured person who accepts *an award* under the Act or through a FTCA or civil action waives their right to pursue all claims for injuries arising out of or related to the same subject matter. To ensure this is clear in the Final Rule, FEMA is revising paragraphs § 296.12(a) and (b) to clarify that the injured person only waives the right to pursue all claims upon acceptance of a *final* award through the Act, the FTCA, or through a civil action.

**Comment:** A commenter stated that a claimant's right to civil action or other redress should not be waived or limited until a final payment has been agreed upon with FEMA, and that it must be clear to claimants at what point(s) in the process they are waiving their rights to further legal action, as well as how they can retain their right to further legal action for different types of subject matter. Another commenter agreed and recommended FEMA clarify that the waiver of the right to pursue claims under the FTCA or a civil action only applies to final awards, and when the claimant has signed a Release and Certification Form.

**FEMA Response:** FEMA agrees and as explained above, is revising § 296.12(a) and (b) in the Final Rule to clarify that the injured person only waives the right to pursue all claims upon acceptance of a final award.

**Comment:** One commenter wrote on the feasibility of waiving future claims given the extent of damages, losses, and expenses may not be fully known at the time of the award. The commenter suggested a lump sum payment of 15 percent of all injury, damages, losses,

and expenses be added to each claim to cover these future unknown items.

**FEMA Response:** FEMA understands the concerns with waiving rights to pursue further claims after accepting a final award. The Act at section 104(b) requires claims to be submitted within two years and requires a waiver of rights to pursue further claims upon acceptance of a final award. Claims related to future losses as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages.

**Comment:** Commenters stated the Federal government committed crimes and that the Act did not preclude criminal charges. These commenters recommended allowing claimants the ability to apply for crime victim compensation.

**FEMA Response:** As explained above, the Act sets forth means for claimants to seek compensation for injuries suffered as a result of the Fire. Section 104(h) of the Act offers claimants three options to seek compensation from the Federal government for injuries resulting from the Fire: (1) a claim under the Act; (2) a FTCA claim or civil action; or (3) an authorized civil action under any other provision of law. The Act does not expand the scope of the FTCA or other civil actions under any other provision of law. The Act does not provide for criminal prosecution or other remedies. The Act also does not provide for crime victim compensation. Rather, section 104(c)(3) of the Act provides for payment of actual compensatory damages. FEMA is not authorized under the Act to pay additional compensation beyond actual compensatory damages.

**Comment:** One commenter stated the Federal government "should not be allowed to dictate limits on compensation to victims they violated. The victims should be allowed to state what will make them individually whole and what will be required for their healing for the next several years, or however long it takes, to recover from the offending actions as only the victim will know what that is and what it will take for them to heal." The commenter further stated that claimants should not be required to use other Federal programs.

**FEMA Response:** As explained above, Section 104(h) of the Act offers claimants three options to seek compensation from the Federal government for injuries resulting from

<sup>30</sup> 87 FR 68085 (Nov. 14, 2023).

the Fire: (1) a claim under the Act; (2) a FTCA claim or civil action; or (3) an authorized civil action under any other provision of law. Claimants may choose among these remedies to address their personal circumstances and needs, taking into account timely resolution and costs of each option. Only upon acceptance of a final compensation award under one of these options will claimants release the Federal government from further claims arising out of or relating to the same subject matter. The Act further requires in section 104(d)(1)(B) that FEMA make determinations as to whether the claimant is an injured person under the Act; the injury resulted from the Fire, whether the claimant is otherwise eligible to receive payment, whether sufficient funds are available for payment, and the amount to be allowed and paid under the Act. The Act only authorizes FEMA to make these determinations and sets the framework for how FEMA must make them. The Act does not authorize FEMA to honor and accept all requests for compensation.

#### 8. Comments on § 296.13 Subrogation

*Comment:* Three commenters suggested FEMA delete references to insurance companies in the regulation. One commenter stated that insurance companies will demand compensation for the amounts they have paid or will pay to insured claimants and found that to be fair. However, the commenter stated that greed may influence the insurers' claims and those claims would then negatively affect claimant compensation. Two other commenters stated that this section should be revised to reflect the Act's prioritization of injured persons over subrogees.

*FEMA Response:* As explained above, insurance companies are injured persons under the Act. FEMA does not believe it is appropriate to delete references to insurance companies in the regulation, as the Act's references to them requires FEMA to discuss them in the regulation. Section 104(d)(1)(A)(ii) requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. The IFR does not, however, include the prioritization language from the Act. Given the confusion and concerns with this section, FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act in the Final Rule

by requiring that subrogation claims from insurance companies will be paid only after paying claims submitted by injured persons that are not insurance companies seeking payment as subrogees.

#### 9. Comments on § 296.14 Assignments

*Comment:* Several commenters stated that assignment of rights could not be prohibited. Commenters stated that New Mexico law allowed for assignment of rights. A commenter stated that "New Mexico law allows lawyers to recover their fees by way of liens, and FEMA regulations should not seek to interfere with the lawyer and client relationship nor with the ability of the claimant's lawyer to recover their fee." The commenter also wrote that the FTCA has no prohibition on assignments.

*FEMA Response:* FEMA disagrees that the assignment of rights cannot be prohibited. Federal law generally prohibits assignment of claims against the Federal government. The Assignment of Claims Act prohibits the assignment of a claim against the Federal government unless the claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.<sup>31</sup> The Assignment of Claims Act requires that the assignment must specify the warrant and the assignment must be made freely and attested to by two witnesses.<sup>32</sup> The person making the assignment must acknowledge it before an official who may acknowledge a deed, that official must certify the assignment, and the certificate issued by the official must state that the official explained the assignment when it was acknowledged.<sup>33</sup> Thus, FEMA can only allow for an assignment of a claim after the Authorized Official's Determination has been issued and accepted by the claimant and the claimant has completed the other steps in the process required under the Federal law to have the assignment reference FEMA's award determination. The process includes being attested to by two witnesses and acknowledged by an official who will certify the assignment and their explanation of the assignment to the claimant. This extensive process is contrary to the authorizing Act's purpose and the requirements placed on FEMA by the Act to compensate victims of the Fire and expeditiously settle claims for those injured. Prohibiting assignment of claims under the Act is consistent with the purpose of the Act and other Federal law. The Final Rule

will not include amendments to the assignment of rights. FEMA notes that assignments are generally not allowed under the Federal Tort Claims Act.<sup>34</sup> Also, to the extent that a lien does not involve an assignment, it is a question of State law to be resolved between the lien holder and the claimant.

*Comment:* Three commenters suggested that assignment be allowed in instances of death, with one other commenter also requesting a process by which compensation can be provided to surviving heirs if a claimant passes away. These commenters stated that if the claim is legitimate, the owner's right to assign for a variety of reasons should not be limited. Another commenter suggested provisions be made for dependent family members and property co-owners to receive full compensation in situations where a claimant dies.

*FEMA Response:* Claimants who pass away during the claims process can continue to pursue claims through their surviving heirs under applicable New Mexico estate law.<sup>35</sup> An assignment of rights is not required for surviving heirs to pursue a claim under the Act. FEMA notes that some claimants may wish to have family members pursue the claim on their behalf and some commenters during public meetings stated they were pursuing claims on behalf of relatives. The current regulatory text allows a claimant to authorize a relative or other third party to have access to claims information and to represent them on the claim by executing the appropriate section in the Notice of Loss. The authority to represent a claimant does not require an assignment of benefits.

*Comment:* A commenter stated FEMA did not have the authority under the Act or New Mexico law to restrict assignment of property, stating claimants should have the right to sell their property and the new property owner should be able to recover damages to the property as well as family assignment in case of death. Another commenter requested that they be able to assign their claim if they want to sell their property or have someone inherit their claim.

*FEMA Response:* FEMA disagrees that the assignment of rights cannot be prohibited. As explained above, Federal law generally prohibits assignment of claims against the Federal government.<sup>36</sup> The extensive process required to assign claims against the

<sup>31</sup> 31 U.S.C. 3727(b).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> See *United States v. Shannon*, 342 U.S. 288 (1952).

<sup>35</sup> See Uniform Probate Code, Chapter 45, New Mexico Statutes Annotated (2021).

<sup>36</sup> 31 U.S.C. 3727(b).

Federal government is contrary to the authorizing Act's purpose and the requirements placed on FEMA by the Act to compensate victims of the Fire and expeditiously settle claims for those injured. Prohibiting assignment of claims under the Act is consistent with the purpose of the Act and other Federal law and is not amending the Final Rule. The Final Rule will not include amendments to the assignment of rights.

*Comment:* One commenter said that claimants should have the ability to assign rights to family members or friends but stated "assignment of rights cannot be to the detriment of the individual signing it away or to the benefit of the person who is trying to get it." This commenter further stated that they "want to see representation for people who need it but not necessarily assign the rights over."

*FEMA Response:* FEMA appreciates the commenter's concerns and believes that assigning rights in the context of a claim under the Act could result in unscrupulous activity. The extensive process required by the Assignment of Claims Act to assign a claim against the Federal government was put in place for several reasons, one of which was to reduce concerns about predatory assignments.<sup>37</sup> FEMA seeks to avoid situations where predatory assignments could occur. Consistent with Federal law and the reasons stated above, FEMA is not amending the Final Rule.

*Comment:* A commenter wrote that FEMA should modify this section to allow the State of New Mexico to file a claim on behalf of residents solely for private property debris removal work not eligible for Category A/B reimbursements under the Public Assistance Program. Another commenter wrote of a shortage of available contract resources impacting the cost and timing of rebuilding efforts and recommending FEMA allow individuals to permit State agencies to act on their behalf to address debris removal and damage through a opt in assignment. Other commenters stated concerns with the effective use of funds for debris removal generally.

<sup>37</sup> See generally *Spofford v. Kirk*, 97 U.S. 484, 489 (1878) "the question remains, whether the act of Congress was not intended to render all claims against the government inalienable alike in law and in equity, for every purpose, and between all parties. The intention of Congress must be discovered in the act itself. It was entitled 'An Act to prevent frauds upon the treasury of the United States.' It may be assumed, therefore, that such was its purpose. What the frauds were against which it was intended to set up a guard, and how they might be perpetrated, nothing in the statute informs us. We can only infer from its provisions what the frauds and mischiefs had been, or were apprehended, which led to its enactment."

*FEMA Response:* FEMA recognizes the challenges presented with debris removal on private property and the concerns with ensuring funding is effectively utilized under the Act. Under the Act, the Claims Office is authorized to compensate injured persons for their injuries resulting from the Fire. The Office recognizes that due to the timing of debris removal, as well as other elements of a claim, a claimant may require funds quickly and is prepared to make partial payments to claimants for severable elements of a claim, including debris removal, allowing claimants to choose who clears the debris.

#### *F. Comments on § 296.21(a) Allowable Damages*

##### 1. Comments on Allowable Damages Generally

*Comment:* Several commenters suggested FEMA cover specific types of damages and detail them further in the regulation. Commenters frequently requested that the claims process "make them whole." One commenter often recited specific types of damages for which FEMA should be prepared to compensate (to make whole) to include those damages they considered to be "immeasurable" or "unseen." One commenter stated that "FEMA must compensate injured victims for immediately measurable losses (*i.e.* destroyed homes, buildings and their contents, property infrastructures, forestland resources, croplands and crops, and domestic water conveyances and storage facilities, etc.) and for intangible losses as well (*i.e.* destroyed sentimental items which can never be replaced, mental and emotional tolls regardless of the extent of professional treatment received, and future potential value of everything damaged and lost)." One commenter stated that, in addition to damage caused as a result of the Fire, "there is more damage continuing to happen to injured victims each day on a level which cannot be seen, measured, or described by any metric" and further that the Act's "reconciliations should go far beyond mere recovery to day-before-the-fire life conditions for every injured victim because the damage runs far deeper and much wider than what actually burned in the fire. It has severely, irreversibly damaged injured victims' souls, and they deserve to be compensated for that too."

*FEMA Response:* FEMA recognizes the significant injuries suffered by claimants and the long-term recovery needed for the communities impacted by the Fire. The Act at section 104(c)(3)(A) limits payment to "actual compensatory damages measured by

injuries suffered." Section 104(d)(4) of the Act limits allowable damages to uncompensated damages for loss of property, business loss, and financial loss; and therefore, limits the actual compensatory damages FEMA may provide to economic damages. This limitation of the Act with respect to allowable damages excludes non-economic damages such as pain and suffering. FEMA recognizes that making people whole for the full scope of loss after a devastating fire may not be possible. The Act authorizes payment of damages, and money cannot restore the full array of the human experience. Section 296.21(e)(3) does authorize payment for out-of-pocket mental health treatment expenses, which can help alleviate the emotional suffering and enable affected individuals to recover. Where New Mexico law allows pain and suffering and non-economic damages in limited circumstances primarily involving personal injuries, a claimant that suffered personal injury may choose to pursue a judicial remedy against the United States Forest Service under the Federal Tort Claims Act or other civil law. The Act provides the claimant with considerable flexibility and allows the claimant to opt out of the Claims Office option and into litigation at any time up until acceptance of a final offer.

##### 2. Comments on Non-Economic Damages

Several commenters wrote that non-economic damages must be considered allowable damages.

*Comment:* One commenter wrote that claimants were entitled to claims for nuisance and trespass for fire damage to their property under New Mexico law. Another commenter expanded on the nuisance theory stating "A wildfire likely qualifies [as] a private or mixed public/private nuisance, and therefore is actionable either way, at least for those who suffered damage to their real or personal property. Noneconomic damages are recoverable for a nuisance claim for 'annoyance, discomfort, and inconvenience.' Notably, a plaintiff need not prove economic damages (*e.g.*, a diminution in property value) to recover damages for 'annoyance, discomfort, and inconvenience.'"

*FEMA Response:* The Act does not authorize FEMA to provide non-economic damages for nuisance and trespass.

*Comment:* A different commenter also noted the potential trespass claim, writing "A defendant commits common-law trespass in New Mexico by redirecting a foreign substance onto the plaintiff's property. . . . Under this

reasoning a wildfire that spreads onto a plaintiff's property would also constitute a trespass. Although a plaintiff may recover damages for 'annoyance, discomfort, and inconvenience' caused by a private nuisance, there is no New Mexico authority expressly allowing similar damages on trespass claims. That said, many jurisdictions allow damages for annoyance, discomfort, and distress proximately caused by a trespass. Some of these distinguish between those damages and emotional distress, while others appear to conflate the two. New Mexico would likely strictly limit recovery to 'annoyance, discomfort, and distress' and not allow true emotional-distress damages."

**FEMA Response:** The Act does not provide for non-economic damages for nuisance and trespass.

**Comment:** Several commenters stated emotional distress, disturbance, annoyance, and other non-economic losses for those with real and/or personal property losses from the Fire regardless of whether or not the claimant suffered a physical injury as well as those same losses for those claimants who suffered a reasonable fear of death or serious bodily injury as a result of their proximity to the zone of fire danger, regardless of whether the claimant suffered a physical injury should be compensated.

**FEMA Response:** The Act does not provide for non-economic damages for emotional distress, disturbance, and annoyance.

**Comment:** Three commenters supported the expansion of allowable damages to include non-economic damages, including loss of enjoyment, loss of lifestyle, as well as mental and emotional distress, sentimental losses, and disturbance and annoyance damages. These commenters stated that these losses may be greater and more important than the financial loss.

**FEMA Response:** The Act does not authorize FEMA to provide non-economic damages for loss of enjoyment, loss of lifestyle, mental and emotional distress, sentimental losses, or disturbance and enjoyment.,

### 3. Comments on Emotional Distress/ Mental Health Damages

Some commenters stated the specific non-economic damages for which they suggested compensation should be available under the Act.

**Comment:** One commenter wrote suggesting claimants could assert a claim for intentional infliction of emotional distress, stating "those individuals who were within the fire's zone of danger and had a reasonable,

objective fear of death or serious bodily injury should be able to recover non-economic, emotional distress damages as well . . . Emotional distress is available under New Mexico law when there is a physical injury . . . These victims suffered smoke inhalation, which is a physical injury, and thereby makes them eligible for emotional distress damages under New Mexico law."

**FEMA Response:** The Act does not authorize FEMA to provide non-economic damages for intentional infliction of emotional distress.

**Comment:** A commenter wrote that New Mexico law recognizes claims for both negligent and intentional infliction of emotional distress. The commenter discussed negligent infliction of emotional distress and intentional infliction of emotional distress, stating that claimants may be able to allege an intentional infliction of emotional distress claim by "showing the defendant's conduct was reckless and outrageous enough to warrant liability." The commenter further noted that claimants prevailing on either claim for infliction of emotional distress would be entitled to damages for "physical pain, nervousness, grief, anxiety, worry, and shock." The commenter added that the Federal government had a special relationship with claimants given their responsibility for the control of the forests and had neglected that special relationship, ignored its own regulations, and caused much emotional distress.

**FEMA Response:** The Act does not authorize FEMA to provide non-economic damages for negligent and intentional infliction of emotional distress.

**Comment:** One commenter stated that the FTCA includes damages for emotional distress and that New Mexico law also provided the authority to award emotional distress damages. The commenter also stated that disturbance and annoyance damages for the interference of real property, which are non-economic damages, are recoverable. The commenter also cited to *Castillo v. City of Las Vegas*<sup>38</sup> as another source for recoverable non-economic damages including emotional or sentimental damages.

**FEMA Response:** The Act does not authorize FEMA to provide non-economic damages for emotional distress. If a claimant believes they are eligible for non-economic damages under New Mexico law and the Federal Tort Claims Act, they may choose to file a civil claim against the United States

Forest Service in Federal court. They may file suit at any time prior to acceptance of a final determination.

**Comment:** One commenter stated that FEMA should provide reimbursement for the physical, the mental, and the emotional stress caused by the Fire and referenced the Camp Fire in California as an example of where these types of damages were paid.

**FEMA Response:** The Act does not authorize FEMA to provide non-economic damages for physical, mental, and emotional distress. The Camp Fire claims were adjudicated applying California law, which differs significantly from the Hermit's Peak/ Calf Canyon Fire Assistance Act. The Camp Fire claims also involved claims asserted in a bankruptcy proceeding against a private company, not the Federal government.

### 4. Comments on Other Damages

Commenters also raised compensation for future work and loss of opportunity, future potential land use plans, sentimental value, and loss of wildlife.

**Comment:** One commenter asked how claimants would be compensated for the conservation practices of the area, including grazing and thinning out dense forest lands and making habitat for wildlife. The commenter also asked how claimants would be compensated for future work and loss of opportunity for those conservation practices.

**FEMA Response:** Congress established the Claims Office to provide actual compensatory damages to injured persons that suffered injury resulting from the Fire. To the extent that individual claimants establish injury from the Fire, the Claims Office will work with them to identify appropriate measures of damage. The Claims Office is prepared to work with claimants to identify and hire experts to assist in valuing complex or unusual claims. Under the Act, other Federal agencies with particular expertise also can be engaged to assist.

**Comment:** Another commenter wrote suggesting FEMA consider future land use plans to properly compensate claimants, detailing their own plans for development of their property impacted by the Fire.

**FEMA Response:** Under the Act, the Claims Office provides provide actual compensatory damages to injured persons that suffered injury resulting from the Fire. Some claims may be too speculative to be eligible for tort compensation under applicable law, but all potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims.

<sup>38</sup> 145 N.M. 205 (2008).



*Comment:* One commenter wrote that New Mexico law allows recovery of sentimental value for personal and real property and stated that victims are not made whole unless they recover both the economic value of contents, structures, and trees, plus their sentimental value.

*FEMA Response:* Under the Act, the Claims Office provides actual compensatory damages to injured persons that suffered injury resulting from the Fire, but not for non-economic damages. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Office will work with claimants to identify eligible economic losses and to properly value claims. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

In addition to specific damages, commenters suggested FEMA provide compensation for specific reimbursements associated with damages.

*Comment:* Two commenters suggested FEMA compensate for property taxes, either to the local government or individual property owners. One of these commenters suggested property taxes be addressed by the New Mexico legislature, as it was for the Cerro Grande Fire, and that Federal funds should pay State and local governments the difference in property tax funds.

*FEMA Response:* Under the Act, the Claims Office provides actual compensatory damages to injured persons that suffered injury resulting from the fire. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Office will work with claimants to identify eligible economic losses and to properly value claims. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

*Comment:* One commenter suggested FEMA pay for indirect damage, including damages resulting from mandatory evacuation, burn scar flooding, and contractor damages.

*FEMA Response:* To the extent that damage resulted from the Fire, damages are compensable under the regulation as written. Specifically mandatory evacuation expenses and burn scar flooding can be compensable if resulting from the Fire. Contractor damages may not be compensable, but the Claims

Office encourages claimants to submit all possible losses to be evaluated. As previously explained, the regulation provides types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act.

*Comment:* Other commenters suggested that FEMA provide air and water quality testing/monitoring.

*FEMA Response:* FEMA understands the concerns regarding water and air quality and the need for testing and monitoring. These types of expenses might be compensable as expert opinion expenses under § 296.31(a) or as part of the lump sum incidental expenses for claims expenses reimbursement under § 296.31(b).

*Comment:* Two commenters suggested funding to address economic development as the population (per capita) had decreased since the Fire, as either business and/or financial loss under the Act.

*FEMA Response:* Economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss and that such loss was a result of the Fire. As explained above, the regulation provides types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation should still submit a claim for compensation under the Act. For this type of claim, claimants can work with their Claims Navigator and Claims Reviewer to demonstrate that such damages would be considered actual compensatory damages for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

*Comment:* One commenter suggested an additional amount be awarded where the claimant dies to compensate for the further injury inflicted as a result of delays in compensation.

*FEMA Response:* FEMA disagrees with this commenter. This proposed claim would not be for actual compensatory damages for injuries resulting from the Fire and is not authorized.

## 5. Comments on Flood Damages

*Comment:* One commenter suggested FEMA add flood damage to § 296.21(a) writing that it was “illogical to provide compensation for flood insurance as a financial loss in § 296.21(e)(2) but not for flood damage.” A different commenter stated that claimants face risks of further injury from flooding, landslide/mudslide, and debris flow and that full cooperation from owners of all affected property parcels located upstream and upslope was essential to recovery. The commenter requested FEMA acknowledge, address, and compensate for those long-term risks.

*FEMA Response:* FEMA is revising the purpose of the regulation in § 296.1 to incorporate language to address this issue. By changing the current regulatory text addressing the compensable injuries from “suffered from” to “resulting from” the Fire, this change addresses the commenters’ concerns with whether flood damage is an allowable damage. Further, the definition of “injured person” includes injuries “resulting from the Hermit’s Peak/Calf Canyon Fire” and is broad enough to encompass flooding as well as other types of injuries that may be considered to be resulting from the Fire.

## 6. Comments on Personal Injury Damages

*Comment:* Commenters suggested that FEMA clarify that personal injury is an allowable damage.

*FEMA Response:* Section 296.21(a) allows for payment of actual compensatory damages for injury and “injury” is defined in § 296.4 to include personal injury. All potential claimants are encouraged to submit a Notice of Loss to enable the Claims Office to evaluate individual claims. The Claims Office will work with claimants to identify eligible economic losses, which could include compensation for economic losses associated with personal injury such as medical bills, on-going therapy, and the like and to properly value claims.

*Comment:* One commenter suggested that FEMA provide compensation for health issues for residents and animals affected by compromised water and air quality issues.

*FEMA Response:* FEMA agrees these types of damages are generally compensable under the Act as personal injury damages and damage to property. These health issues, if resulting from the Fire, could be considered injuries under the Act’s definition and compensable as such.

## 7. Comments on Calculation of Damages

*Comment:* One commenter noted that the legal precedent in New Mexico does not require claimants to adhere to a strict formula to calculate damages. Another commenter agreed, citing to *Maestas v. Medina*.<sup>39</sup> A different commenter asked which New Mexico laws were being used to calculate damages.

*FEMA Response:* In paragraph 296.21(a) FEMA states, consistent with the Act, that the agency will apply New Mexico law to the calculation of damages. The Claims Office will work with claimants to identify an appropriate measure of damages consistent with applicable law.

## 8. Comments on Reasonable Damages

*Comment:* Finally, commenters discussed the requirement that damages must be reasonable in amount in the IFR. Some commenters suggested that FEMA delete the requirement that damages must be reasonable in amount while others recommended it be changed to actual damages supported. One commenter stated that FEMA should give claimants the autonomy to define reasonableness for themselves.

*FEMA Response:* The Act limits compensation to actual damages incurred by the claimant. To better ensure that the claimant is only being compensated for the actual damages incurred and that claimant is not being compensated in amounts that exceed the actual damages incurred, FEMA requires that the damages be reasonable in amount.

## G. Comments on § 296.21(b) Exclusions

### 1. Comments on Punitive Damages

*Comment:* Two commenters suggested claimants be allowed to seek punitive damages.

*FEMA Response:* Section 104(c)(3)(B)(ii) of the Act specifically excludes punitive damages from the compensation available under the Act. It is thus beyond FEMA's statutory authority to compensate for these damages.

### 2. Comments on Criminality

*Comment:* One commenter wrote "Essentially, the USFS committed a crime when—against all experience-informed protests from local citizens—its agents (the district ranger, burn boss and all commanding managers above them) made the decision to begin the Dispensas Prescribed Burn which rapidly and irreversibly exploded into the catastrophe now known as the

Hermit's Peak Fire. They also committed a crime of negligence when they failed to properly monitor burn piles which reignited and caused the Calf Canyon Fire which merged with the Hermit's Peak Fire to cause widespread devastation now wreaking havoc for victims of the fire."

*FEMA Response:* FEMA is not authorized under the Act to pursue these types of claims. In the Act, the United States accepted responsibility for damage resulting from the Fire and waived sovereign immunity to compensate victims in tort. By excluding punitive damages, the Act makes clear that damages for intentional and other behavior otherwise giving rise to heightened liability are not compensable. FEMA is not revising the Final Rule.

### 3. Comments on Attorneys' and Agents' Fees

While one commenter specifically expressed support for this provision,<sup>40</sup> a large number of commenters wrote that FEMA should pay attorneys' and agents' fees associated with the claims process.

*Comment:* One commenter wrote that the Administrator had the discretion to pay legal fees under the Act because the Act allows the award of financial losses of "any other loss that the Administrator determines to be appropriate for inclusion as financial loss." The commenter stated that claimants using lawyers are likely to have more complete and better documented claims and that FEMA should want and encourage claimants to have complete and well documented claims. The commenter also noted that if claimants pay the financial expense of a lawyer the victims will not be made 100 percent whole unless they recover both 100 percent of losses and 20 percent for legal fees. A different commenter also stated that FEMA should encourage the efficiency and assistance that will result from allowing claimants to obtain attorney assistance and be made whole by allowing claimants to recover their attorney's fees.

*FEMA Response:* The Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>41</sup> While the Act places

limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the "American Rule," generally applicable in civil litigation and accepted by the United States Supreme Court initially in the case of *Arcambel v. Wiseman*,<sup>42</sup> provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

*Comment:* A commenter wrote "The Fire Victim Trust in California added legal fees to gross economic awards, and it has been a tremendous benefit as around 90 [percent] of claimants hired lawyers."

*FEMA Response:* As noted, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>43</sup> While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. FEMA is applying the generally accepted American Rule for attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required. Also as noted, the Fire Victim Trust in California involved a private party defendant under the oversight of a bankruptcy court applying California law and does not present a useful

grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>42</sup> 3 U.S. (3 Dall.) 306 (1796). See also *Peter v. NantKwest, Inc.*, 140 S.Ct. 365 (2019), *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717 (1982).

<sup>43</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>40</sup> The commenter wrote "Subpart C Section 296.21(b) Excludes reimbursement for attorney's fees and agents' fees, plus claimant's cost of prosecuting a claim. This should stay. We want all of the money to go to the people injured in any way by the Hermit's Peak/Calf Canyon Fire."

<sup>41</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other

<sup>39</sup> 2011 N.M. App. Unpub. LEXIS 276 (2011).

paradigm for the Hermit's Peak/Calf Canyon Fire.

*Comment:* A commenter wrote that Congress only prevented the award of punitive damages and interest in the Act, not the award of legal fees.

*FEMA Response:* As noted, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>44</sup> While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. FEMA is applying the generally accepted American Rule for attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Also as noted, the Act is a limited waiver of sovereign immunity, and similar to cases decided under the Federal Tort Claims Act,<sup>45</sup> the Act does not waive sovereign immunity to allow payment of attorney fees.

*Comment:* Several commenters stated the process was too complicated and required professional and/or legal assistance to navigate and that payment of these fees would help to make them whole.

*FEMA Response:* One purpose of the Act is to provide for expeditious consideration and settlement of claims from the Fire. The Claims Office interprets this to require an approach to settling claims that claimants can complete without engaging the services of attorneys or other professionals. To achieve this goal, FEMA hired a number of Claims Navigators from the local community, trained these Claims Navigators to identify compensable losses and to understand what is needed to complete a Proof of Loss, and developed a Claims Office ethos that emphasizes the needs of the claimant. The Claims Navigators work with claimants to ensure that they develop the information needed to receive compensation for all eligible losses. The Claims Office recognizes that some

claims will require special expertise and will pay for experts that are needed to value particular claims. FEMA also notes that at the time the comment was submitted, the Claims Office had not yet fully developed the claims procedures, so it is understandable that the commenters did not recognize that the process is designed so that claimants do not need legal assistance.

*Comment:* One commenter wrote that the Act recognized that claimants may seek legal assistance and capped those fees at 20 percent. The commenter stated that a FEMA representative, "protected by sovereign immunity, with no legal, ethical, or fiduciary obligation to the claimant, will be advising the claimant on the strategy to meet their burden of proof to obtain make-whole damages allowed by the language of the HPFAA and New Mexico State law. This approach puts claimants in the hands of FEMA representatives who have a conflict of interest. That is simply improper, unfair, unduly harmful to claimants, and places an administrative burden on FEMA and its representatives that otherwise would be borne by the claimant's attorneys." This commenter also stated that the claims process required claimants to make decisions with legal implications and that FEMA employees and contractors would be able to obtain legal advice and assistance from their counsel in the process. The commenter stated that FEMA's legal team would be paid from Act's funds as an administrative expense and that claimants' attorneys' fees should be as well. The commenter also added that if represented by attorneys, FEMA should pay those funds directly to the attorneys for proper handling and lien resolution through authorized IOLTA trust accounts stating that claimants would have lien obligations that must be satisfied out of the compensation received, whether to satisfy fees, mortgages, medical liens, or other liens.

*FEMA Response:* As with the Cerro Grande Act, in this Act, Congress limits attorney fees that an attorney is able to charge given it has established a claims process statutorily mandating the expeditious provision of compensation to all injured persons. FEMA designed the program to help claimants navigate the process. The Claims Office is implementing measures to eliminate potential conflicts of interest, and otherwise the Claims Office has no incentive not to pay claimants for all eligible losses. The Act creates the Claims Office and instructs the Director of the Claims Office, other officials, and staff to fully compensate claimants applying the authorizations and

limitations in the law. The Director, other officials, and staff have a legal duty to pay eligible claimants the full amount of proven claims. Third, the assignment of benefits prohibition in the regulations.

*Comment:* One commenter stated that attorneys' fees should be covered to help with the claims process for those especially that are elderly, handicapped, or those with basic literacy skills that don't have the ability to file the claims process themselves, that "the attorneys' fees should not come out of the final claim; that should be added on top of it."

*FEMA Response:* As discussed above, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>46</sup> While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the "American Rule," generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel v. Wiseman*,<sup>47</sup> provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required. Also, the State of New Mexico has identified several programs providing free legal representation for individuals affected by the Fire.

*Comment:* One commenter stated that attorneys' fees and consultant fees need to be paid out of the Act's funding if the fees to administer the program would be paid out of the Act's funding.

*FEMA Response:* As explained above, section 104(a)(2)(C)(i) requires FEMA to use the funding made available under the Act to fund the Claims Office. FEMA is required to follow the Act's

<sup>44</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>45</sup> E.g., *Anderson v. United States*, 127 F.3d 1190, 1191 (9th Cir. 1997) ("The FTCA does not contain an express waiver of sovereign immunity for attorneys' fees and expenses."); *Joe v. United States*, 772 F.2d 1535 (11th Cir. 1985).

<sup>46</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>47</sup> 3 U.S. (3 Dall.) 306 (1796). See also *Peter v. NantKwest, Inc.*, 140 S.Ct. 365 (2019), *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717 (1982).

requirement to fund the Claims Office from the Act's funding. Additionally, as discussed above, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>48</sup> While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the "American Rule," generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel v. Wiseman*,<sup>49</sup> provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

*Comment:* Some commenters stated that the funding provided under the Act was not sufficient to pay the claims and attorneys' and agents' fees.

*FEMA Response:* FEMA is also concerned about the use of funds under the Act to pay attorneys' fees. As explained above, FEMA is committed to hiring staff and providing resources to assist all claimants with their claims. While claimants can seek counsel on their own, the claims process, as structured, will provide claimants with the assistance needed to prepare and submit their claims effectively.

*Comment:* A commenter requested consistency in awards for damage, asking if FEMA would treat all claimants equitably whether the claimant chose to represent themselves and hired an attorney to handle their claim.

*FEMA Response:* FEMA understands the commenter's concern but reiterates that the agency is bound to act in a fair manner with all claimants, regardless of representation. FEMA is committed to

hiring staff and providing resources to assist all claimants with their claims. While claimants can seek counsel on their own, the claims process, as structured, will provide claimants with the assistance needed to prepare and submit their claims effectively.

#### 4. Comments on the Cost of Prosecuting a Claim

*Comment:* Several commenters sought to remove this exclusion from damages. One commenter wrote "Absolutely every second of time spent on every action required of victims for them to receive compensations from the Hermit's Peak Fire Assistance Act must be covered as recoverable expense since this situation has been foisted upon victims against their will and through no fault of their own. This must be the case no matter the severity level of injury suffered by victims because this entire ordeal is both time consuming and stressful as it drags on to full conclusion." A different commenter wrote "Time spent in claims preparation is not considered a damage. The time required for processing this claim is extensive. Loss of my time is a loss of that part of my life, and it should be considered valuable."

*FEMA Response:* FEMA provides claimants with the ability to recover the reasonable costs incurred in providing documentation requested by the Claims Office pursuant to § 296.31(a) and incidental expenses pursuant to § 296.31(b). However, time spent in the prosecution of a claim is not considered an actual compensatory damage. Section 104(c)(3)(A) of the Act requires FEMA to reimburse claimants only for actual compensatory damages. FEMA cannot reimburse claimants for time spent working on their claims as such reimbursement is beyond the agency's statutory authority.

*Comment:* One commenter wrote that because the Act authorizes compensation for 'any other loss that the Administrator determines to be appropriate for inclusion,' FEMA can allow the cost of prosecuting a claim to be recoverable.

*FEMA Response:* As explained in the IFR, compensatory damages for time spent in claims preparation or prosecuting a claim are not available under New Mexico law or the Federal Tort Claims Act. Moreover, there is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA

will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed \$25,000. The minimum lump sum payment is \$150. Section 296.31(b) of the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process.

#### H. Comments on § 296.21(c) Loss of Property

*Comment:* One comment stated flood damage should be specifically added to this section. Several other commenters suggested an addition to this paragraph to allow for other losses including anticipated future damages from flooding through November 14, 2032. These commenters noted that it could be up to ten years before conditions stabilize in the impacted forests and watersheds and that the Act's language indicates that post-fire flooding injuries should be considered as actual compensatory damages.

*FEMA Response:* As explained above, FEMA is revising § 296.1 of the Final Rule to clarify that claimants may seek compensatory damages for injuries resulting from the Fire. This language is broad enough to encompass a range of injuries resulting from the Fire, including flood damages. Additionally, the definition of "injured person" includes injuries "resulting from the Hermit's Peak/Calf Canyon Fire" and is broad enough to encompass flooding, mudflow, mold, and debris flow as well as other types of injuries that may be considered to be resulting from the Fire. FEMA does not believe additional edits to this section of the regulation are required as a result. Further, FEMA is unable to extend the deadline for claims submission requested by the

<sup>48</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>49</sup> 3 U.S. (3 Dall.) 306 (1796). See also *Peter v. NantKwest, Inc.*, 140 S.Ct. 365 (2019), *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717 (1982).

commenters. As previously explained, some deadlines in the rule are beyond FEMA's control and authority to change. Section 104(b) of the Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR is promulgated. FEMA has built in extensions of this timeline for good cause, recognizing the realities of the Fire's impact. Sections 296.34 and 296.35 below establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. Whether a claimant tells FEMA about an injury in the initial Notice of Loss or an amendment under § 296.34, FEMA must know about the injury by November 14, 2024. For heightened risk reduction efforts, a claimant must include the claim in their Notice of Loss by November 14, 2024, or an amended Notice of Loss filed no later than November 14, 2025. *See* § 296.21(c)(5). Additionally, FEMA recognizes the potential long-term impacts of flooding after fire and will encourage claimants to consider risk reduction measures to address those risks.

#### 1. Comments on § 296.21(c)(1) Real Property and Contents

*Comment:* Several commenters wrote about how FEMA would value real property and contents when analyzing claims under the Act. Most of these commenters suggested FEMA consider the actual costs to rebuild and construct in the future, acknowledging increasing market values of land, construction, and other costs such as inflation. with some commenters stating that it may not be safe to immediately rebuild.

*FEMA Response:* The language in the IFR addresses these concerns as it explains the costs of reconstruction must factor in post-Fire construction costs as well as current building codes at the time of construction. FEMA will work with claimants to ensure that compensation effectively addresses future construction cost concerns and compensation for any decrease in the value of the land on which the structure sat as detailed in § 296.21(c)(1). FEMA is not making any changes to this section of the Final Rule.

*Comment:* Some commenters stated that it may not be safe to immediately rebuild. One commenter wrote claimants face decades of uncertainty regarding terrain stability and that "such areas are now extremely high-risk hazard zones."

*FEMA Response:* FEMA understands concerns about rebuilding immediately after the Fire and will work with claimants to ensure that compensation effectively addresses concerns regarding

stabilizing the land and for any decrease in the value of the land on which the structure sat as detailed in § 296.21(c)(1). The current text in the IFR is sufficient to address this concern and is not making any changes to this section of the Final Rule.

*Comment:* Commenters raised questions regarding compensation for other damages beyond home reconstruction. Some commenters suggested FEMA consider the intrinsic value of the property lost, as well as loss of use damages and compensation for future potential land use. Commenters suggested that damages be calculated based on replacement and/or intrinsic value—not fair market value. Other commenters wrote requesting compensation for lost sentimental value for damaged real and personal property and the loss of use of personal or real property.

*FEMA Response:* Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act and Federal law. To the extent that this valuation is not preempted by Federal law, New Mexico law will govern.

*Comment:* Some commenters suggested payment of double compensatory damages for trespass under New Mexico Statutes Annotated section 30–14–1.1.

*FEMA Response:* As noted, the Act does not provide for punitive or non-economic damages, including non-economic damages for nuisance and trespass. Economic damages associated with nuisance and trespass are available upon proper proof. However, because the Act limits recovery to actual damages, double compensation would not be available.

*Comment:* Two commenters suggested FEMA compensate for property taxes, either to the local government or individual property owners.

*FEMA Response:* The Claims Office compensates claimants for actual damages resulting from the Fire. Any increases in property tax or any decreases in property tax revenue income, if resulting from the Fire, would be compensable under the IFR.

*Comment:* One commenter asked how losses for wells, water, and erosion would be compensated.

*FEMA Response:* While the IFR addresses erosion, FEMA is adding paragraph (c)(5) to § 296.21 of the Final Rule specifically address damages for physical infrastructure including irrigation infrastructure such as acequia systems. This change in the Final Rule can also encompass concerns raised regarding well and water losses to the extent those losses are of physical

infrastructure. Those losses may also be considered part of real property and contents losses in § 296.21(c)(1).

*Comment:* One commenter suggested FEMA find ways to compensate people that work a land grant, as those claimants would not have deeds to the property and figure out ways to get them documentation to support their claims.

*FEMA Response:* The IFR language sufficiently addresses these commenters' concerns. Specifically, FEMA defines "injured person" in § 296.4 to include individuals, businesses, Indian Tribes, State and local government entities, and "other non-Federal entit(ies)." This broad definition currently encompasses all potential claims associated with land grants as a result. As explained above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the Proof of Loss in support of the claim. Claims Navigators and Claims Reviewers will work with each claimant to ensure that they are able to get the proper documentation to complete their claim and will use alternative methods to prove ownership when the deed is not available, such as affidavits, utility bills, and tax records.

*Comment:* One commenter inquired as to whether or not their vehicle and newly published book would be covered under the regulation.

*FEMA Response:* Section 296.21(c)(1) of the IFR explains that claimants can seek compensation for the contents of real property damaged by the Fire. The commenter's personal property mentioned is covered by the current language and no changes to the regulatory text is required for the Final Rule.

*Comment:* Several commenters focused on the issue of compensation for debris removal under this paragraph. Commenters generally sought clarification on what compensation was available. Commenters sought wages as compensation for debris removal efforts they complete because of the lack of available contractors in the area. One commenter stated "there is so much devastation, the cleanup part of the reimbursement is going to fall mainly on the landowner because there [are] not enough contractors or help out there to do this much clean up. And so, in order to do that, the landowners are going to need to pay themselves for their time and equipment that they use and need to cleanup a massive amount of trees. And so, I would hope that part of the compensation for the debris removal and reforestation is, would include wages for the landowners or their

friends or whoever to pay to get it done.”

**FEMA Response:** Claimants seeking compensation for their own work or the work of those they hire to remove debris can claim this expense under § 296.21(c)(1). FEMA does not believe further edits to the regulatory text are required for claimants to seek this compensation.

**Comment:** Commenters questioned the extent to which adjacent property owners could be held responsible for debris flow traced to their property.

**FEMA Response:** FEMA recognizes that not every property owner will file a claim or seek to restore their property and FEMA cannot require property owners to do so. Claimants seeking to promote recovery of their properties can file a claim under this paragraph. Also, the Act does not authorize FEMA to pursue liability against third parties who may be responsible for damage.

**Comment:** Other commenters raised concerns about current debris removal efforts. A commenter stated that trees being removed for right of way created stumps that were too high and dangerous and a lack of inspections on the work performed. The commenter stated a general lack of progress on debris removal and how a lack of fencing resulted in animals in the road, presenting a danger to commuters in the area.

**FEMA Response:** FEMA understands the challenges associated with debris removal after a wildfire and subsequent flooding. This paragraph of the IFR provides claimants the ability to receive compensation for removing debris and burned trees. As noted, FEMA and other Federal and State agencies have a number of programs that provided assistance after the Fire and had responsibilities for debris removal. The Claims Office provides compensation for damages resulting from the Fire, including debris removal, and is not responsible for debris removal and other post-disaster activities undertaken by other Federal and State agencies.

**Comment:** Finally, some commenters sought clarification on prioritization of claimants with respect to this paragraph. Commenters generally suggested that FEMA focus first on those who lost their homes, including mobile homes, and do everything possible to make them whole.

**FEMA Response:** FEMA intends to prioritize individual claimants over subrogees consistent with the Act's mandate at section 104(d)(1)(A)(ii). FEMA understands the unique challenges presented for those that lost their homes in the Fire and agrees that those claims require immediate

attention. FEMA will work to ensure that all claims are reviewed in an expeditious and fair manner.

**Comment:** A commenter raised concerns about FEMA assistance through the Individual Assistance Program related to SBA loans, stating that an SBA loan would not make claimants whole.

**FEMA Response:** Under the Act, this commenter has the option of filing a claim to be compensated for these damages if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.<sup>50</sup> FEMA notes that the Individual Assistance Program has specific criteria for assistance,<sup>51</sup> including requirements regarding pursuing a loan with the Small Business Administration, that are not found in the Act. FEMA encourages claimants to seek compensation for actual compensatory damages for injuries resulting from the Fire and as explained above, the Act can provide compensation if the assistance provided under the Individual Assistance Program was insufficient to fully compensate claimants. Notably, Small Business Administration loans, and the interest accrued on these loans, is compensable under the Act.

**Comment:** One commenter asked if the Act would compensate for looting that occurred on their property after the Fire, stating they were denied assistance under the Individual Assistance Program.

**FEMA Response:** Under the Act, this commenter has the option of filing a claim to be compensated for these damages if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.<sup>52</sup> FEMA notes that the Individual Assistance Program has specific criteria for assistance.<sup>53</sup> FEMA encourages claimants to seek compensation for actual compensatory

damages for injuries resulting from the Fire and as explained above, the Act can provide compensation for damage from the Fire if the assistance provided under the Individual Assistance Program was insufficient to fully compensate them.

## 2. Comments on § 296.21(c)(2) Reforestation and Revegetation

**Comment:** Most commenters opposed the formula to pay 25 percent of the pre-Fire value of the lot and structures as compensation for reforestation and revegetation. Commenters stated 75 percent less value was unacceptable when there were large parcels of land previously forested before the Fire and recommended FEMA delete the 25 percent cap on reforestation damages, with several commenters stating the 25 percent limit violated New Mexico law. One commenter wrote “For landowners that have more than 100 acres, this is a tremendous financial burden when they need to come up with 75 [percent]. The compensation needs to be changed from 25 [percent] to a greater extent to cover losses from fire, erosion, creeks and water ways, meadows, deep canyons, pine trees, oak brush, and trees.” A different commenter wrote “Generations of stakeholders have provided a free ecological service maintaining the lands that make up the watersheds that provide clean water for millions downstream. This includes best practices for farming and forestry. Restoring the forests and planting new trees is essential for regenerating a healthy ecosystem, and repairing the harm done by the US government. Providing 100 [percent] of costs for loss will ensure that future generations have a better chance to develop this unique rural/mountain economy.”

**FEMA Response:** In the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. FEMA understands that the land impacted by this Fire was more heavily forested than the Cerro Grande Fire and that those resources were relied on for personal, subsistence, and business needs, making the formula in this section of the IFR particularly confusing. The Final Rule allows for

<sup>50</sup> Section 296.21(e)(1) provides for compensation under the Act for interest paid on loans for damages resulting from the Fire as well as proceeds from the compensation award to repay any SBA loans obtained.

<sup>51</sup> For information on the criteria for participation in the Individual Assistance Program please see the Individual Assistance Program and Policy Guide, Version 1.1 found at [https://www.fema.gov/sites/default/files/documents/fema\\_iappg-1.1.pdf](https://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf) (last accessed Feb. 24, 2023).

<sup>52</sup> Section 296.21(e)(1) provides for compensation under the Act for interest paid on loans for damages resulting from the Fire as well as proceeds from the compensation award to repay any SBA loans obtained.

<sup>53</sup> For information on the criteria for participation in the Individual Assistance Program please see the Individual Assistance Program and Policy Guide, Version 1.1 found at [https://www.fema.gov/sites/default/files/documents/fema\\_iappg-1.1.pdf](https://www.fema.gov/sites/default/files/documents/fema_iappg-1.1.pdf) (last accessed Feb. 24, 2023).

compensatory damages for the cost of replacement of destroyed trees and other landscaping and removes references to the 25 percent formula.

*Comment:* Several commenters opposed to this paragraph stated the distinctions between the Cerro Grande Fire and Hermit's Peak/Calf Canyon Fire communities necessitated a different valuation analysis for the claims process. One commenter wrote "Landowners of Mora and San Miguel are usually on many acres of land (some have been passed down through generations), whereas Cerro Grande were on smaller lots. 75 [percent] less value is unacceptable when you have a large parcel of land that was previously forested." Another commenter wrote "This approach was used in the Cerro Grande Fire Assistance Process in Los Alamos, New Mexico of which is one of the wealthiest counties per capita in the nation. I suspect the structures and land parcels are of higher value in Los Alamos versus Mora, New Mexico based on property assessments. It is suggested to reconsider the formula because properties in Mora would receive less compensation for similar damage from the wildfire versus Los Alamos." A commenter wrote "Unlike properties in Los Alamos that were damaged by the Cerro Grande Fire and upon which this interim rule is based, many of the properties damaged by the Hermit's Peak and Calf Canyon Fires consist of hundreds of tree-covered acres, not small, landscaped lots. New Mexico has a long history of subsistence use of forests and trees that should be recognized by this rule."

*FEMA Response:* As explained above, FEMA appreciates the insights provided by commenters on the distinctions between the areas impacted by the Cerro Grande Fire and the Hermit's Peak/Calf Canyon Fire. These differences are important to recognize, and FEMA agrees that these differences require revision to the IFR where the process implemented for the Cerro Grande Fire will no longer meet the needs of claimants for the Hermit's Peak/Calf Canyon Fire. In response to commenters' concerns, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. As explained above, FEMA understands the communities impacted by this Fire were less densely populated and contained larger areas of privately held land. This land was also more heavily forested, making the loss of trees and vegetation a particularly devastating loss for claimants. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping and

removes references to the 25 percent formula.

*Comment:* A commenter wrote that the Act did not impose caps on tree or mitigation damages and that New Mexico law did not have a cap on damages to trees or for mitigation, but rather that New Mexico law allows plaintiffs to recover the full value of any trees destroyed on their property. This commenter further stated that "New Mexico law allows as compensatory damages double the value of tree damages. While the Act prohibits 'punitive damages' it does not prohibit statutory compensatory damages but requires application of New Mexico law which includes section 30-14-1.1."

*FEMA Response:* In the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation does not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. FEMA understands that the land impacted by this Fire was more heavily forested than the Cerro Grande Fire and that those resources were relied on for personal, subsistence, and business needs, making the formula in this section of the IFR particularly confusing. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping and removes references to the 25 percent formula.

*Comment:* Commenters asked how the valuation used in the formula would be made under the formula, with one commenter requesting the inclusion of intrinsic value to be part of the damage's calculation for real property loss. A commenter asked how the 25 percent would be quantified and qualified. A different commenter requested that losses be calculated using replacement and/or intrinsic value, not fair market value and that these values should account for the generational investment in the land and forest that was destroyed, as well as the loss that will be incurred while regrowth takes place.

*FEMA Response:* In response to commenter concerns and confusion regarding the application of this formula as explained above, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula. The Final Rule allows for

compensatory damages for the cost of replacement of destroyed trees and other landscaping. Valuation of losses under this revised language will be at 100 percent of the damage. Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act, Federal law, and New Mexico law, but only to the extent that New Mexico law is not pre-empted by Federal law.

*Comment:* In lieu of the proposed formula, one commenter suggested FEMA pay per acre (\$10,000 per acre) to be used to replant and rebuild loss.

*FEMA Response:* FEMA appreciates the suggestion for a payment formula based on acreage. FEMA attempted to streamline the process by offering the formula presented in the IFR and understands there can be advantages to formulas to better assist claimants in receiving prompt payment. Given the challenges with the specific formula in the IFR and the unique concerns of the impacted communities because of the heavily forested areas and personal, subsistence, and business uses of the forest and vegetation, FEMA is removing the 25 percent formula from this section of the regulation. However, FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas based on acreage such as the one suggested by one of the commenters to claimants. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages.

*Comment:* Another commenter stated that landowners should be allowed to request wages as compensation for reforestation efforts on their land because of the lack of contractors to assist in the area.

*FEMA Response:* Claimants seeking compensation for their own work or the work of those they hire for reforestation efforts can claim this expense under this paragraph. FEMA does not believe further edits to the regulatory text are required for claimants to seek this compensation.

*Comment:* Commenters also commented on limiting compensation where the costs may be covered by another Federal program. Most commenters suggested FEMA remove this limitation, stating claimants should not be required to use other Federal programs, with some raising concerns those Federal programs may not have sufficient funding to cover the losses associated with the Fire. One commenter stated that FEMA must be



responsible for identifying other Federal programs and help claimants receive other identified funding in a timely manner to ensure they do not lose out on the Act's funding based on available funding that they may otherwise never receive.

**FEMA Response:** Section 296.21(c) of the IFR states that compensatory damages may be awarded for the "cost of reforestation or revegetation not covered by any other Federal program." This language has caused confusion with commenters as interpreting it to require claimants to first apply with other Federal programs. FEMA does not require claimants to apply to other Federal programs associated with reforestation and/or revegetation. Rather, the language was intended to clarify that, where the claimant has received payment from another Federal program, FEMA will only be able to compensate for reforestation and/or revegetation under the Act for those costs not covered already in the payment received from the other Federal program. This avoids a duplication of payment for the same damage. Claimants have the option of seeking assistance from other Federal programs for reforestation and revegetation, filing for compensation under the Act, or pursuing both other Federal program and compensation under the Act. The language in § 296.21(c) is simply to clarify that FEMA cannot duplicate payment but can provide additional payment to cover actual compensatory damages for reforestation and revegetation. As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

**Comment:** Commenters also sought clarification on the distinctions between claims for reforestation and revegetation and subsistence or business loss. A commenter wrote that many claimants used trees for subsistence resources and asked for clarification regarding whether trees could be considered subsistence

resources based on the language of the IFR.

**FEMA Response:** As explained in the IFR, FEMA limited compensation for trees and other landscaping to 25 percent of the pre-Fire value of the structure and lot. This approach was generally consistent with the approach taken in the Cerro Grande Fire Assistance process. As explained in the IFR, the 25 percent limitation did not apply to business losses for timber, crops, and other natural resources under § 296.21(d). In response to commenter concerns and confusion regarding the application of this formula, FEMA is revising this paragraph in the Final Rule to eliminate references to the 25 percent formula as the Cerro Grande formula is not appropriate given the geographic, economic, and cultural distinctions between that area and the areas impacted by this Fire. The Final Rule allows for compensatory damages for the cost of replacement of destroyed trees and other landscaping. Compensation for business loss and subsistence resources continue to be compensated at 100 percent. FEMA further notes that the definition of "subsistence resources" in § 296.4 of the Final Rule includes firewood or other natural resource gathering, timbering, or agricultural activities undertaken by the claimant without financial remuneration. This definition should encompass the loss of trees as subsistence resources. The edits made to § 296.21(c)(2) of the Final Rule are sufficient to address the commenters' concerns and modify the claims process to more appropriately address the needs of the claimants and communities impacted by this Fire.

### 3. Comments on § 296.21(c)(3) Decrease in Value of Real Property

**Comment:** Several commenters recommended FEMA delete the requirement that claimants demonstrate the value of the real property was permanently diminished as a result of the Fire. Two commenters recommended FEMA revise the language to "significantly" or "long-term."

**FEMA Response:** FEMA agrees that it will be difficult to demonstrate the real property value is permanently diminished given the size and scope of the Fire as well as the types of damages caused to real property in this area. As discussed above, the Hermit's Peak/Calf Canyon Fire impacted communities that are less densely populated and more heavily forested than the Cerro Grande Fire. These undeveloped areas may not be able to easily establish a permanent diminution in value as a result of the

Fire. FEMA is removing the term "permanently" from § 296.21(c)(3) in the Final Rule and is rewriting this paragraph to read that the claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire. This change addresses the commenters' concerns regarding their ability to prove property values were permanently diminished while also still requiring some demonstration of a significant diminution in property value that is long-term in nature. The change in the Final Rule balances the need to compensate claimants for actual compensatory damages with the challenges of demonstrating a loss of property value where the claimant does not sell the property.

**Comment:** Commenters raised specific concerns in documenting the diminution of property value, noting real estate sale amounts are not available in public records in New Mexico and recommending FEMA develop a method to compensate for real property claims using local appraisers, insurance records, and tax assessments.

**FEMA Response:** FEMA understands these concerns and will be developing tools to assist claimants with this process. The regulatory text does not require revision as the process for demonstrating this injury can be better addressed in tools developed for claimants to accompany Claims Office policy and procedures.

**Comment:** Some commenters sought the inclusion of intrinsic value in this loss calculation.

**FEMA Response:** Generally, FEMA's calculation of damages, including how damaged property is valued, will be governed by the Act and Federal law and, to the extent it is not pre-empted by Federal law, New Mexico law.

**Comment:** One commenter stated the loss calculation would increase if neighboring homes were not also rebuilt.

**FEMA Response:** FEMA recognizes that not every property owner will file a claim or seek to rebuild on their property. Claimants receiving payment for their real property are not required to rebuild and FEMA cannot require property owners to do so. Claimants may provide information on how the lack of rebuilding in their area is impacting their property value when filing a claim under this paragraph.

**Comment:** Another commenter suggested FEMA provide more than two years to be able to claim the loss of property value. The commenter stated "for those of us who are not going to sell our property in the next two years, how

are we going to claim the loss in value of our property due to the fire and flood? I believe that the regulation should contemplate more than [two] years to be able to claim this loss.”

**FEMA Response:** As explained above, some deadlines in the rule are beyond FEMA’s control. The Act requires claimants submit their Notice of Loss no later than November 14, 2024, two years from the date the IFR is published. FEMA has built in extensions of this timeline for good cause, recognizing the realities of the Fire’s impact. Sections 296.34 and 296.35 below establish a process for notifying FEMA of injuries that are not referenced in the initial Notice of Loss. In § 296.35, the IFR allows claimants to reopen a claim no later than November 14, 2025 if they sold their real estate and wished to present a claim for decrease in the value of real property. Additionally, claimants may request compensation for a decrease in the value of real property if they can demonstrate the value of the real property was significantly diminished long-term as a result of the Fire pursuant to changes made to this section in the Final Rule.

**Comment:** Several commenters suggested FEMA incorporate language regarding water rights into this paragraph because water rights are treated as property rights in New Mexico and a claimant should be permitted to submit a claim for the decrease in value of a water right.

**FEMA Response:** Claimants can file a claim for damages regarding water rights under the current language of this section and no changes are required in the Final Rule. Specifically, the current regulatory language regarding real property can be read to include water rights attached to that real property.

#### 4. Comments on § 296.21(c)(4) Subsistence

**Comment:** Commenters raised questions about how damages would be defined and calculated under this paragraph. One commenter stated claimants in the area tend to practice self-sustainability in addition to using the land for business purposes and asked that FEMA further define on how losses under this would be calculated. Another commenter wrote “FEMA needs to build in as much flexibility as possible for compensating future claims related to lost subsistence. The restoration of certain subsistence resources is difficult to predict, and the services may be permanently lost in certain cases.” Comments were also received on the appropriate timeline for when these resources can reasonably be expected to return to the level of

availability that existed prior to the Fire. Some commenters suggested that FEMA determine a date of five years as the timeline by which subsistence resources can be expected to return to the level of availability that existed before the Fire while at least one commenter felt that five years was not a sufficient period of time.

**FEMA Response:** FEMA recognizes the challenges associated with calculating damages for subsistence. FEMA anticipates consulting experts with respect to subsistence resource claims to ensure the damages calculations address the reasonable cost of replacing these resources and the timeline for when these resources can reasonably be expected to return to the level of availability that existed prior to the Fire. FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas for subsistence. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages.

**Comment:** Some commenters suggested that income losses be considered part of subsistence losses. A commenter suggested that the regulations acknowledge that subsistence resources can also be the primary source of revenue and income for impacted individuals and businesses.

**FEMA Response:** FEMA disagrees with the commenter. As defined at § 296.4, “subsistence resources” include “activities undertaken by the claimant without financial remuneration” and losses involving revenue and income are better addressed as business loss.

**Comment:** Other commenters sought compensation for ongoing costs for rent, food, energy, and other resources needed to maintain a subsistence lifestyle both in the immediate and long-term. One commenter suggested FEMA fully cover the recovery costs necessary to restore agricultural systems and damages and mitigation costs related to water quality, water rights, and soil health impairments for household and subsistence uses.

**FEMA Response:** FEMA recognizes that the loss of subsistence resources can result in the need to obtain substitute resources in the cash economy. The current IFR allows for the costs of obtaining substitute resources in the cash economy to be considered compensatory damages. Other Federal and/or State programs may also address some of the immediate costs such as rent raised by commenters. To the

extent the agricultural system and related costs constitute a subsistence resource (*i.e.*, one for which the claimant receives no financial remuneration), it can be considered under a subsistence resource claim. To the extent such a system and related costs are for financial remuneration, a claim can be filed for damages as a business loss. As explained above, claimants can file a claim for damages regarding water rights under the current language of the regulation and no changes are required in the Final Rule. Specifically, the current regulatory language regarding real property can be read to include water rights attached to that real property.

**Comment:** Several commenters on this paragraph focused on the need for firewood and other subsistence resources, with one commenter requesting vouchers for firewood for the next five to ten years or until the forests have regrown to support subsistence firewood requirements.

**FEMA Response:** The IFR includes firewood gathering as a subsistence resource that can be compensable. Claimants can seek compensation for firewood under the subsistence resources paragraphs of the regulation and, where firewood may have been sold by the claimant, under the business loss paragraph of the regulation.

#### 5. Comments on Physical Infrastructure (New § 296.21(c)(5))

**Comment:** Several commenters suggested FEMA incorporate language into the regulation clarifying the availability of compensation for damages to physical infrastructure. Two commenters recommended FEMA specifically incorporate guidance on acequias in the Final Rule to help alleviate challenges for claimants. Another commenter suggested language be added to this paragraph to include physical infrastructure such as irrigation infrastructure, acequias, and the loss of use of irrigation water rights appurtenant to the land with which other commenters agreed.

**FEMA Response:** Consistent with the Act at section 104(d)(4)(A)(iii), FEMA is adding paragraph (c)(5) to § 296.21 to address physical infrastructure damage. This paragraph clarifies that claimants may seek compensation for the damage or destruction of physical infrastructure that may include damage to irrigation infrastructure such as acequia systems. This addition is consistent with the Act and incorporating this language better reflects the unique challenges faced by the communities impacted by the Fire. As explained above, claimants can file a claim for damages regarding water

rights under the current language of the regulation and no changes are required in the Final Rule.

#### *I. Comments on § 296.21(d) Business Loss*

*Comment:* Some commenters raised questions about the types of damages that would be considered as business losses, from opportunities to seek other business ventures to compensating for lost opportunity, agricultural loss, future business loss, lost income from landowner tag use or national forest permits, and future lost income.

*FEMA Response:* In paragraph (d), FEMA details the types of damages generally considered eligible for compensation. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether the loss is eligible for compensation under the Act. Claimants should submit all claims associated with loss or damages resulting from the fire for review and consideration.

*Comment:* Two commenters suggested compensation for economic development for the areas impacted by the Fire.

*FEMA Response:* As explained above, economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss was a result of the Fire. The IFR currently provides the types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act. For this type of claim, claimants should consider how these damages would be considered actual compensatory damages for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

*Comment:* One commenter suggested FEMA cover damages and mitigation costs related to water quality and water rights impacts to businesses, including agricultural producers.

*FEMA Response:* Businesses may file claims for damages associated with water rights as part of claims associated with damages to real property under that paragraph and/or under business loss.

*Comment:* Some commenters asked how FEMA would calculate business losses and specifically loss of business income given the economic challenges presented by the COVID-19 pandemic. Commenters generally stated that FEMA consider the time period prior to the pandemic, but also to consider other factors such as prior fires impacting the area.

*FEMA Response:* FEMA understands the challenges regarding the appropriate timeline for consideration of business loss calculations given the COVID-19 pandemic and prior disasters. FEMA must also consider the programs available to businesses during those periods and the financial resources those programs may have provided to businesses. Claimants seeking compensation should present what they believe is a reasonable period of time to demonstrate their income and business losses resulting from the Fire. FEMA anticipates future policy and procedure documents will provide examples to help claimants with this type of compensation request.

*Comment:* Commenters also asked about the types of businesses that are covered under the Act. One comment stated the statutory construction of the Act allows for reimbursement of business loss for nonprofit organizations.

*FEMA Response:* The current definition of “injured person” includes “other non-Federal entity” and that terminology encompasses non-profit organizations. While FEMA understands the importance of non-profit organizations in the relief process, the agency believes the current definition sufficiently encompasses all types of for-profit and non-profit entities and those entities can seek damages for business loss.

*Comment:* Two commenters asked about the eligibility for business losses for those communities that were not in the direct area of the Fire but suffered losses as a result of the Fire. In prioritizing these claims, a commenter asked FEMA to first consider claims from claimants with actual fire and flood damage, but then consider business loss for claimants where the State closed off areas during the Fire.

*FEMA Response:* Unlike disaster declarations that cover a specific geographic area, the Act covers all injured parties that suffered injuries as a result of the Fire. Claimants seeking compensation for their business losses should file a claim demonstrating their loss was a result of the Fire for consideration. Regarding prioritization, FEMA is amending § 296.13 to specifically clarify the prioritization

required under section 104(d)(1)(A)(ii) of the Act that requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. FEMA will work to ensure that all claims are reviewed in an expeditious and fair manner.

*Comment:* Finally, a commenter asked questions about the reforestation damages formula and its application to business losses for revenue received from cutting Christmas trees on their property.

*FEMA Response:* As explained in the IFR, business losses are distinct from reforestation losses and a formula developed for reforestation would not be applied to those losses. Timber, crops, and other natural resources were listed under business losses in paragraph (d). With the updates made to paragraph (c)(2) above, FEMA has removed the 25 percent reforestation formula from the regulation. Business losses are not subject to a specific formula as part of compensation under the regulation.

#### *J. Comments on § 296.21(e) Financial Loss Generally*

*Comment:* Commenters raised questions about the types of financial losses to be covered under the Act and the eligible claimants for financial losses. One commenter suggested FEMA clarify how claimants can be compensated for the increased cost of homeowner and business insurance, stating these additional expenses will be ongoing for decades. Another commenter suggested FEMA cover unforeseen financial costs associated with evacuations.

*FEMA Response:* In paragraph (e), FEMA details the types of damages generally considered eligible for compensation under financial loss. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with financial loss for review and consideration.

*Comment:* One comment stated the statutory construction of the Act allows for reimbursement of financial loss for nonprofit organizations.

*FEMA Response:* The current definition of “injured person” includes “other non-Federal entity” and that terminology encompasses non-profit organizations. While FEMA understands the importance of non-profit organizations in the relief process, the agency believes the current definition sufficiently encompasses all types of for-profit and non-profit entities and

those entities can seek damages for financial loss.

*Comment:* One commenter made several specific suggestions in their comment seeking funding for public transportation and increased county staff salaries and fringe benefits.

*FEMA Response:* As explained above, FEMA details the types of damages generally considered eligible for compensation under financial loss in this paragraph in the IFR. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with business loss for review and consideration. FEMA reminds claimants that they must demonstrate that the financial loss was a result of the Fire. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek financial losses if they can demonstrate these losses were a result of the Fire.

*Comment:* Two commenters wrote that FEMA should provide funding to allow for economic redevelopment and stimulus activities under business and/or financial loss.

*FEMA Response:* As explained above, economic development can be speculative and a claimant seeking compensatory damages for loss of economic development would need to be able to demonstrate such loss was a result of the Fire. The IFR currently provides the types of actual compensatory damages that are compensable under the Act, but that list is not all-inclusive. Claimants seeking compensation for actual compensatory damages not specifically listed in the regulation can still submit a claim for compensation under the Act. For this type of claim, claimants should consider how these damages would be considered actual compensatory damages to compensate claimants for injuries resulting from the Fire consistent with the Act. FEMA does not believe changes to the regulatory text are required in the Final Rule for claimants to seek this type of compensation if they can demonstrate the loss and that the loss resulted from the Fire.

#### 1. Comments on § 296.21(e)(1) Recovery Loans

*Comment:* One commenter wrote that claimants are carrying the cost burden of paying interest on loans provided by the SBA and suggested that FEMA define a process in coordination with the SBA such that when an individual signs a Notice of Loss, any further

payment of SBA interest will be deferred.

*FEMA Response:* Section 296.21(e)(1) of the IFR provides compensation for interest paid on recovery loans, including SBA loans, and FEMA will cooperate with the SBA for procedures on the repayment of those loans. While FEMA intends to compensate claimants for interest paid on their SBA or other recovery loan, FEMA does not have the statutory authority to defer payment of interest on SBA loans in the interim.

#### 2. Comments on § 296.21(e)(2) Flood Insurance

*Comment:* Commenters suggested specific changes to this section of the IFR. Specifically, commenters suggested the agency delete the two-year limitation on flood insurance. Some commenters requested a five-year period for flood insurance coverage while suggested a 10- or 15-year period of coverage. Commenters also requested that these premium payments be available as compensation for claimants that are not required to purchase flood insurance.

*FEMA Response:* Section 104(d)(4)(C)(viii) of the Act provides for payment of flood insurance premiums required to be paid on or before May 31, 2024. FEMA expanded upon this section of the Act to provide claimants with payment for flood insurance premiums even if the claimant is not required to purchase flood insurance, as the agency understands some claimants may have legitimate reasons for concern around flooding even if they are not currently required to maintain flood insurance. FEMA exercised the discretion in section 104(d)(4)(C)(x) to allow compensation for flood insurance premiums if the claimant purchased flood insurance after the Fire due to the fear of heightened flood risk. FEMA does not believe, however, that the agency has the statutory authority to extend these payments beyond the period set by Congress in the Act. The current regulatory text sufficiently addresses the timeline and explains that both claimants currently required to purchase flood insurance and those claimants that purchase flood insurance based on their fear of heightened flood risk will be compensated for their flood insurance premiums due on or before May 31, 2024. As explained in the IFR, FEMA may provide flood insurance to such claimants directly through a group or blanket policy. The terms of that policy may allow for a longer period of coverage than the annual renewals under the regular National Flood Insurance Program Standard Flood Insurance Policy so long as the premium

for that policy is paid on or before May 31, 2024. Additionally, FEMA notes that the Act provides for funding for heightened risk reduction to help alleviate the long-term impacts of flooding. This funding under § 296.21(e)(5) is available for claimants to file a claim until November 14, 2025.

*Comment:* One commenter wrote asking FEMA to clarify that an increase in flood insurance premiums is allowable as an allowable financial loss.

*FEMA Response:* As explained above, section 104(d)(4)(C)(viii) of the Act provides compensation for payment of flood insurance premiums paid on or before May 31, 2024. The current regulatory text sufficiently addresses the timeline and explains that both claimants currently required to purchase flood insurance and those claimants that purchase flood insurance based on their fear of heightened flood risk will be compensated for their flood insurance premiums paid on or before May 31, 2024 even if those premiums increase. FEMA does not believe changes to the regulatory text are required in the Final Rule for this clarification.

#### 3. Comments on § 296.21(e)(3) Out-of-Pocket Expenses for Mental Health Treatment

*Comment:* Commenters were generally supportive of this paragraph but sought clarifications and an extension of the time for which expenses would be compensated. Most commenters asked FEMA to consider the long-term impacts of the Fire and extend the coverage of expenses beyond 2024. A commenter stated that negative mental and emotional impacts would continue for decades, if not through the remainder of their lives. Another commenter wrote that not all mental health impacts of this major disaster were known to us now and would take additional time to be identified and treated, recommending FEMA extend this reimbursement deadline to treatments rendered by the end of 2025.

*FEMA Response:* FEMA appreciates the concerns raised by commenters on the timeline associated with out-of-pocket mental health expenses. In the IFR, FEMA limited this timeline to April 6, 2024, two years after the date the Fire began. FEMA agrees that this timeline should be extended and recognizes that mental health treatment may extend beyond the deadline to file a claim. The Final Rule extends the deadline allowing claimants to seek reimbursement for out-of-pocket mental health treatment expenses for treatment identified on or before November 14, 2024. FEMA is extending the deadline

until November 14, 2024 for consistency with the timeline to file a claim under the Act to ensure that all treatment identified during that period may be claimed. FEMA recognizes that mental health treatment may extend beyond the deadline for filing a claim and claimants may also reopen claims under § 296.35 for good cause.

*Comment:* One commenter expressed confusion about whether or not mental health treatment would be compensated. Other commenters requested clarification that the mental health treatment expenses apply to conditions that the Fire worsened.

*FEMA Response:* FEMA is revising § 296.21(e)(3) in the Final Rule to clarify that compensation will be available for out-of-pocket mental health treatment expenses for conditions resulting from and conditions that were worsened by the Fire. This change in the Final Rule will ensure those victims whose conditions worsened as a result of the Fire will be able to receive compensation for out-of-pocket mental health treatment expenses.

*Comment:* Commenters also raised questions about personal injuries and physical health conditions, raising questions about long-term health effects because of exposure to contaminant and carcinogens and other air and water pollutants as a result of the Fire and how FEMA would cover those damages.

*FEMA Response:* As one commenter noted, FEMA defines injury in § 296.4 to include personal injury consistent with the Federal Tort Claims Act and personal injury damages are compensable under the Act. FEMA lists the types of damages for which compensation may be awarded for financial loss. This list, however, is not all inclusive and FEMA will review each claim on a case-by-case basis to determine whether or not the loss is eligible for compensation under the Act. Claimants should submit all claims associated with personal injury for review and consideration. FEMA does not believe changes to the regulatory text from the IFR are required in the Final Rule given the definition of injury clearly encompasses personal injury.

#### 4. Comments on § 296.21(e)(4) Donations

*Comment:* Most commenters generally supported extending the timeframe provided for donations beyond the September 20, 2022 timeframe provided in the IFR. Three commenters supported changing the timeframe for donations to one year after the Fire was contained. Two of the three commenters disagreed on the appropriate date to reflect one year after the Fire's containment with

one commenter recommending August 30, 2023 and another recommending FEMA change the date to August 21, 2023.

*FEMA Response:* FEMA agrees that the timeframe should be extended and given the confusion regarding the timeline for the Fire's containment, FEMA is changing the deadline in the Final Rule from September 20, 2022 to November 14, 2022 to reflect the date the IFR was published. FEMA seeks to balance the need to extend this deadline with concerns raised by other commenters regarding the inclusion of donations as allowable financial loss damages in the IFR. Setting the timeframe for these donations to the IFR's publication date ensures that those donations made to support those suffering from the Fire will be compensated up until the date at which claimants had a better understanding of how FEMA would provide for compensation for their losses and the date when claimants could begin to pursue a claim under the Act thus reducing the need to rely on these donations.

*Comment:* Two individual commenters opposed the inclusion of donations in the regulation. A commenter wrote "Voluntary and charity is just that, given freely and without expectation of gain or reimbursement. If that was the actual intent of the presence of these organization in the area, then they should not be reimbursed for their acts of charity and volunteering." Another commenter asked if there were other programs that could compensate these organizations for the donations provided to the people of impacted by the Fire. A different commenter recommended FEMA prioritize payment of claims for property loss, financial loss, and business loss before reimbursing claims for voluntary donations.

*FEMA Response:* FEMA incorporated the ability to seek compensation for financial loss for donations consistent with the Cerro Grande Fire Assistance process. FEMA heard from the public that this Fire is distinct in many ways from the Cerro Grande Fire and requires differences in the process but believes the ability to compensate those that provided donations should remain in the Final Rule given the Hermit's Peak/Calf Canyon Fire's impact. FEMA understands that these donations may have come from individuals, businesses, and other entities not just charitable organizations whose sole purpose is providing such services and wants to ensure those claimants are able to seek compensation for their donation efforts

to support the community. Recognizing the concerns raised by these commenters as well as those commenters that felt this was an important component of the IFR, FEMA is extending but still limiting the timeframe available for those seeking compensation for financial losses associated with donations to the date the IFR was published. Setting the timeframe for these donations to the IFR's publication date ensures that those donations made to support those suffering from the Fire will be compensated up until the date at which claimants had a better understanding of how FEMA would provide for compensation for their losses and the date when claimants could begin to pursue a claim under the Act thus reducing the need to rely on these donations. FEMA also recognizes that donations to injured parties are not considered a duplication of benefits and that extension of the time frame would create the anomalous situation where FEMA would be duplicating compensation. FEMA agrees with the commenter that prioritization of claims should be focused first on claims for property loss, financial loss, and business loss before reimbursing claims for voluntary donations and will implement a process to ensure this prioritization to the greatest extent possible.

#### 5. Comments on § 296.21(e)(5) Heightened Risk Reduction

*Comment:* Commenters generally opposed the formula for compensation provided for heightened risk reduction efforts. Several commenters recommended deleting the 25 percent formula for heightened risk reduction efforts. A commenter wrote that the Act did not impose caps on tree or mitigation damages. A different commenter wrote that the Act addressed limits on damages, limiting them to 'actual compensatory damages measured by injuries suffered' and that the Act further placed New Mexico law in a position subordinate to the terms of the Act itself by allowing for New Mexico law to govern the calculation of damages. Another commenter stated that "these arbitrary Urban Centric caps do not make victims whole as required by the Act but rather shorts the landowners."

*FEMA Response:* FEMA recognizes that this Fire is distinct from the Cerro Grande Fire and that the formula for compensation utilized for the Cerro Grande Fire Assistance process will not sufficiently address the risk reduction needs for claimants in this Fire and is eliminating the 25 percent formula from

the Final Rule. Specifically, FEMA is removing the language “Compensation under this section may not exceed 25 percent of the higher of payments from all sources (*i.e.*, the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damages to the structure and lot, or the pre-fire value of the structure and lot” from the Final Rule. FEMA also recognizes that compensation for risk reduction is not generally compensable under New Mexico law.

*Comment:* Commenters also questioned the language in the IFR requiring that claimants must complete the risk reduction project for which they receive compensation. One commenter wrote that the requirement that the risk reduction project must be completed before compensation can be awarded was an incorrect reading of the Act. “The word ‘incurred’ in Section 104(d)(4)(C)(vii) of the Act does not mean ‘completed’ or ‘paid.’ Rather, the word ‘incur’ means ‘to become through one’s own action liable or subject to.’ (Oxford English Dictionary.) If a claimant has contracted for risk reduction work or started but not completed the work for which he/she will be financially responsible, the claimant has “incurred” the cost within the meaning of the statute. Requiring the work to be completed before compensation is awarded defeats the purpose of the Act to compensate fire victims for their losses. Requiring work to be completed prior to compensation defeats the intent of the Act and is patently unreasonable. To require a wildfire victim to advance money to remediate the damage caused by the Forest Service, but not be recompensed until the work is complete, is not within the express language or intent of the Act.” Another commenter wrote that requiring completion of the risk reduction work before compensation would be provided defeated the purpose of the Act as many claimants would not be able to afford to do the work without the compensation funds. This commenter stated that once a claimant secured a contract for the risk reduction work, they would have technically incurred the costs and the Act allows for advance or partial payments before final settlement.

*FEMA Response:* FEMA disagrees with the commenters’ reading of the IFR that there is a requirement to complete the work before compensation can be received. Rather, the IFR states that claimants “must complete the risk reduction project for which they receive compensation.” FEMA does not require that the work be completed prior to payment. Rather, the language requires

applicants to complete the work for which they receive compensation related to the risk reduction project. FEMA understands that claimants may not have completed the project at the time the claim for this compensation is filed and anticipates these claims may include estimates for the work to be done specifically by allowing claimants to amend their Notice of Loss by November 14, 2025. Claimants must ultimately complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act’s purpose in providing compensation to reduce these risks, and because the compensation provided would not generally be otherwise available in litigation under New Mexico law. FEMA retains the right to inspect real property. See § 296.30.

*Comment:* One commenter suggested removing all language related to the 25 percent formula as well as language regarding the deadlines associated with filings and that claimants should consider current building codes and complete the project for which they receive compensation.

*FEMA Response:* FEMA agrees with the commenter regarding the formula and is removing the sentence associated with it as explained above. However, FEMA disagrees that the agency can and should remove the remaining language in the IFR. The IFR provides a deadline by which claimants must submit the claim for compensation for heightened risk reduction efforts. This language is consistent with other sections of the regulation where deadlines are provided, and the deadline provided here is consistent with the Act. FEMA generally does not have the statutory authority to extend this deadline. FEMA further believes claimants should be encouraged to consider current building codes and standards when completing heightened risk reduction projects as these codes and standards should generally result in more resilient rebuilding and likely will be mandatory under local building ordinances. Finally, as explained above, claimants must complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act’s purpose in providing compensation to reduce these risks. FEMA retains the right to inspect real property. See § 296.30.

*Comment:* One commenter requested that FEMA not attempt to reassure claimants of the safety of rebuilding homes where they once stood as the Fire impacts now made those areas extremely high-risk hazard zones.

*FEMA Response:* FEMA understands concerns about rebuilding immediately after the Fire and will work with claimants to discuss how these concerns can be addressed as part of the heightened risk reduction process. The Act allows for these damages and FEMA is required to provide actual compensatory damages to claimants seeking them under the Act. FEMA does not believe any changes to this section of the Final Rule are required to address this concern.

*Comment:* One commenter asked how heightened risk reduction loss would be calculated and whether payment would be made for processes completed and for those anticipated to be completed.

*FEMA Response:* Claimants seeking compensation for this loss should submit the documentation they have showing costs incurred or expected to be incurred as part of the heightened risk reduction project. As explained above, the IFR states that claimants “must complete the risk reduction project for which they receive compensation.” FEMA does not require that the work be completed prior to payment. Rather, the language requires applicants to complete the work for which they receive compensation related to the risk reduction project. FEMA understands that claimants may not have completed the project at the time the claim for this compensation is filed and anticipates these claims may include estimates for the work to be done specifically by allowing claimants to amend their Notice of Loss by November 14, 2025. Claimants must ultimately complete the risk reduction project for which they receive compensation as failing to do so would be contrary to the Act’s purpose in providing compensation to reduce these risks. FEMA retains the right to inspect real property. See § 296.30.

*Comment:* Several commenters recommended FEMA add language to this section to state that “compensation under this section will not be awarded for costs that have been reimbursed under FEMA’s Public Assistance Programs or by insurance.” The commenters requested that FEMA interpret this limitation liberally and in alignment with FEMA’s mission.

*FEMA Response:* FEMA appreciates the commenters’ desire for clarity, but the agency believes § 296.21(e) resolves these concerns. Specifically, the IFR at § 296.21(e) states that FEMA is not authorized to compensate claimants for damages paid by insurance. Further, § 296.21(f)(2) states that “compensation will not be awarded under the Act for injuries or costs that are eligible under the Public Assistance Program.” FEMA

does not believe revising the Final Rule as requested by the commenters is necessary to meet the intent of the statute. FEMA notes the commenters' desire for the agency to consider additional risk reduction efforts to make individuals and communities more resilient than the pre-Fire condition, but the Act limits FEMA's authority to compensate claimants to the costs of reasonable efforts to reduce risks to levels prevailing prior to the Fire. If a claimant seeks to implement a heightened risk reduction project that will result in reduced risks beyond the level prevailing at the time of the Fire, FEMA will consider such a request on a case-by-case basis consistent with the agency's discretion under the Act.

*Comment:* A commenter wrote regarding nature-based solutions, stating that the science was well established, and that these solutions were actively applied by the U.S. Forest Service to burned areas. The commenter mentioned mulching, seeding, and replanting burned forest ground as accepted means of reduction the risk of flood waters running downslope.

*FEMA Response:* FEMA appreciates the commenter's response to the agency's request for feedback regarding nature-based solutions. FEMA continues to support implementation of these solutions where appropriate and encourages claimants to consider nature-based solutions as part of their claim for compensation under this provision.

*Comment:* One commenter recommended that FEMA develop some pre-approved mitigation opportunities for homeowners, businesses, and other entities to allow claimants to better determine the appropriate projects for them. The commenter stated that this would allow the Claims Office to automatically approve those projects with the present dollar amount and thus not require every single specific claim go through some arduous mitigation process.

*FEMA Response:* FEMA appreciates the suggestion for a pre-approved project plan and associated cost formula. FEMA attempted to streamline the process by offering the formula presented in the IFR and understands there can be advantages to these types of schemes to better assist claimants in receiving prompt payment. As explained above, FEMA is revising the language in this paragraph to eliminate the 25 percent formula that raised so many concerns with commenters. However, FEMA is looking at ways to better streamline the claims process in response to other comments and is considering offering payment formulas

based on specific project types as the commenter suggested. For example, FEMA is considering a menu of potential actions claimants may take for heightened risk reduction claims that would reduce claim review time and streamline payment for those claims. Any such type of formula would provide claimants with the option to either leverage that formula with their claim or submit documentation detailing their specific damages and costs.

#### *K. Comments on § 296.21(f) Insurance and Other Benefits Generally*

*Comment:* As mentioned above, some commenters requested FEMA eliminate references to other Federal government programs and their use in the claims process. Commenters raised general concerns about the burden placed on claimants to engage in other Federal programs and expressed concerns about a lack of interagency cooperation.

*FEMA Response:* FEMA does not intend to require claimants to apply to other Federal programs, except for FEMA's Public Assistance program. Rather, the language was intended to clarify that, where the claimant has received payment from another Federal program, FEMA will only be able to compensate claimants under the Act for those costs not covered already in the payment received from the other Federal program. This avoids a duplication of payment for the same damage. Claimants have the option of seeking assistance from other Federal programs, filing for compensation under the Act, or pursuing both other Federal program and compensation under the Act. The language in this section of the IFR simply clarifies that FEMA cannot duplicate payment but can provide additional payment to cover actual compensatory damages that were not covered by other Federal programs. FEMA notes that the IFR only prohibits payment under the Act for injuries or costs that are eligible under the Public Assistance Program. The Act provides in section 104(k) to waive the matching funds required for Federal programs and require that those programs pay the cost share directly. This ensures that those funds are taken from those Federal programs rather than the Act's funding and thus helps further extend the ability of the Act to fund compensation for claimants. Section 296.21(f)(2) of the IFR confirms that FEMA will not pay claimants for injuries or costs that are eligible under the Public Assistance Program but rather that these injuries and costs need to be paid through the Public Assistance Program and given the Act's provisions, FEMA is required

to pay those eligible costs at 100 percent without a cost share requirement for State and local projects.

As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's requirements in section 104(g), FEMA is consulting with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

*Comment:* One commenter requested FEMA streamline access to available Federal programs and, in addition to funds appropriated under the Act, to utilize other Federal funding opportunities when and where available. The commenter asked that State Case Managers be integrated into the program and trained as Navigators to serve as a single point of contact to help claimants throughout the process. The commenter also requested FEMA reopen Federal programs where deadlines may have passed to submit applications to allow claimants the opportunity to take advantage of those programs.

*FEMA Response:* FEMA anticipates that Claims Navigators will provide the assistance envisioned by the commenter and additional staffing outside of the Claims Office will not be required. FEMA is unable to reopen non-FEMA Federal programs for claimants but can work with claimants regarding Federal program availability generally and the deadlines associated with FEMA-specific programs.

#### 1. Comments on § 296.21(f)(1) Insurance

*Comment:* Three commenters recommended FEMA delete all references to insurance companies in the regulation.

*FEMA Response:* Section 104(d)(1)(C) of the Act requires FEMA to reduce the amount paid for the claim by the amount that is equal to the total of insurance benefits and other payments or settlements with respect to the claim. FEMA does not have the statutory authority to delete this requirement.

*Comment:* One commenter requested FEMA note that if an insurance company has not paid all that FEMA anticipated, FEMA should commit to awarding the difference at the time the



authorized official's determination is made.

**FEMA Response:** In the preamble to the IFR, FEMA stated that the agency can award the difference at the time the Authorized Official's determination is made. FEMA also noted in the preamble that the State of New Mexico generally requires insurance companies to settle catastrophic claims within 90 days of the date the claim was reported, and the agency expects that most, if not all, insurance claims will be paid before the determination is issued. FEMA further explained in the IFR preamble that if the insurance claim is resolved after the determination and the claimant is due additional compensation as a result, the claim can be reconsidered under sections 296.34 or 296.35 of the IFR. FEMA believe this process is sufficient to resolve the commenter's concerns and no changes to the regulatory text of the Final Rule are required.

**Comment:** Another commenter stated that insurance companies will demand compensation for the amounts they have paid or will pay to insured claimants and found that to be fair. However, the commenter stated that greed may influence the insurers claims and those claims would then negatively affect claimant compensation.

**FEMA Response:** Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid or not to be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 of the Final Rule, will help ensure that the compensation available to injured persons is not negatively affected.

**Comment:** One individual commenter expressed concerns that insurance benefits would be impacted by claims under the Act and that claims under the Act will impact insurance benefits.

**FEMA Response:** As explained above, Section 104(d)(1)(A)(ii) of the Act requires FEMA to place priority on claims submitted by injured parties that are not insurance companies seeking payment as subrogees. Section 296.13 of the IFR requires subrogees to file their Notice of Loss after they have made all

payments entitled to the injured person for Fire-related injuries under the terms of the insurance policy. FEMA is amending § 296.13 to specifically clarify the prioritization required under the Act. Further, § 296.21(f) of the regulation requires FEMA to compensate injured persons only for damages not paid or not to be paid by insurance companies. As explained above, these provisions, in addition to the changes made to § 296.13 of the Final Rule, will help ensure that the compensation available to injured persons is not negatively affected.

## 2. Comments on § 296.21(f)(2) Coordination With FEMA's Public Assistance Program

**Comment:** Some commenters requested FEMA remove references to the Public Assistance Program as the deadlines have passed for that program. Other commenters suggested the paragraph be reworded from expecting claimants to apply for the program to encouraging them to do so and to state that compensation under the Act will not be awarded for damages already compensated by FEMA's Public Assistance Program instead of all eligible costs.

**FEMA Response:** FEMA disagrees with the commenters seeking to delete this provision of the IFR. FEMA is retaining this language in the Final Rule as the agency believes it is important to clarify that those injuries and costs eligible under the Public Assistance Program must be paid from that program to ensure the funds are used consistently with the Act's provision in section 104(k). FEMA understands that the Public Assistance application period has closed but will continue to accept these applications given the Act's requirements. Those entities eligible for Public Assistance should continue to apply for and seek assistance through that program.

**Comment:** One commenter requested that FEMA, in coordination with the New Mexico Department of Homeland Security and Emergency Management, assist claimants in applying for and receiving assistance under the Public Assistance Program.

**FEMA Response:** As explained above, FEMA is coordinating with other Federal agencies to ensure data sharing and better communication between programs. FEMA has engaged with and continues to engage with the Small Business Administration, the Department of Agriculture, and other Federal agencies to help facilitate coordination of the assistance available to claimants and the impacted communities. Consistent with the Act's

requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process to include ways to ensure claimants have the information they need regarding Federal programs available to them.

**Comment:** A commenter requested compensation in several areas that may qualify for the Public Assistance Program.

**FEMA Response:** Any claimant with an injury or costs that may be eligible for Public Assistance should apply for Public Assistance. FEMA understands that the Public Assistance application period has closed but will continue to accept these applications given the Act's requirements.

## 3. Comments on § 296.21(f)(3) Benefits Provided by FEMA's Individual Assistance Program

**Comment:** One commenter requested that FEMA amend this section to make clear that if FEMA only partially compensated a claimant for injuries or costs under the Individual Assistance Program that the Claims Office will compensate the remainder of costs and injuries under the Act.

**FEMA Response:** FEMA does not believe the language in the IFR requires revision on this point. The current language provides that FEMA will not award compensation under the Act for those injuries or costs that have been reimbursed under the Individual Assistance program. This language necessitates that those injuries or costs that have not been fully reimbursed are eligible under the Act for compensation. FEMA is not making any changes to the Final Rule in this paragraph given the current language is sufficiently clear.

**Comment:** Two commenters requested FEMA clarify that temporary emergency support and sheltering, as well as temporary housing costs provided by FEMA should be considered in addition to the Act's funding and should not impact an individual claim.

**FEMA Response:** FEMA disagrees with these commenters. FEMA cannot pay for temporary housing costs under the Act if the individual has already received payment for these expenses under the Individual Assistance program as this would result in a duplication of payment. These costs, however, would not be deducted from a real property claim. Thus, if a claimant obtained a temporary housing unit through FEMA's Individual Assistance program but sought compensation to rebuild their home after the Fire, FEMA would fully compensate the claimant for the costs associated with rebuilding

their home and would not deduct the costs associated with the claimant's time in the temporary housing unit from the claim as these are distinct costs.

#### *L. Comments on Claims Evaluation*

##### 1. Comments on § 296.30(a) Burden of Proof

*Comment:* Commenters raised a range of concerns about this paragraph. Several commenters requested that FEMA consider alternative ways of demonstrating ownership, particularly given the multigenerational landowners in the region and lack of availability of real estate sale amounts in the public record in New Mexico. A commenter suggested FEMA pay attention to uninsured claimants and those without "proper" paperwork, particularly those multigenerational landowners. A different commenter stated that sale prices, appraisals, and mortgage amounts were not public information in New Mexico, asking how claimants seeking to prove the value of their land would get that information.

*FEMA Response:* The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire, but, as explained above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the proof of loss in support of the claim. When necessary, the Claims Office can fund appraisals, surveys, or other data collections efforts to aid the claimant in proving value or ownership of property. Further, as explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other documentary evidence and an affidavit executed by the claimant. Claims Office staff are aware of issues surrounding proof of ownership for land and will work with each claimant to determine alternate methods in determining ownership when deeds are not available. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found.

*Comment:* A commenter requested claims be assumed to be reasonable and true with the burden of proof on the Federal government to disprove the claim, stating that claimants should be allowed to "self-certify" their claims. One commenter wrote that claims should be assumed reasonable and true, and that the burden of proof should be on the Federal government to disprove the claim. This commenter also suggested that claimants should be

allowed to self-certify their claims under the penalty of law.

*FEMA Response:* The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. FEMA has a legal responsibility to ensure that funds appropriated for claims under the Act are used to pay valid claims. The agency cannot assume that all claims are reasonable and true without appropriate supporting documentation, as such a process would open the Act's funding to significant fraud and abuse. To ensure the Act's funds are properly paid to claimants that suffered injuries as a result of the Fire, FEMA must review supporting documentation associated with each claim. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others.

*Comment:* Other commenters also requested the burden be placed on FEMA to research their claims and if the burden was not shifted to FEMA, that claimants should be able to utilize their own experts to assist with their claim and should be reimbursed for the expert's costs.

*FEMA Response:* As stated above, the burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others. Additionally, § 296.31(a) provides for the use of experts in the process. FEMA is revising the IFR language regarding expenses for experts as detailed below to help address this and other commenters' concerns about the use of experts and the costs associated with doing so. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found pursuant to § 296.30(b). FEMA also provides flexibility in supplementing and reopening claims as detailed in sections 296.34 and 296.35.

*Comment:* One commenter stated that while they understood that providing proof of ownership was necessary and important for good governance of the funds provided in the Act, they had concerns that the burden of proof would be overly burdensome and difficult for some claimants. The commenter recommended FEMA be flexible in determining what documentation is required.

*FEMA Response:* As explained above, the burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As discussed above, the Claims Office locally hired Navigators to assist claimants compiling necessary documentation and completing the proof of loss in support of the claim. Further, as explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits. Claims Office staff are aware of issues surrounding proof of ownership for land and will work with each claimant to determine alternate methods in determining ownership when deeds are not available such as affidavits, utility bills and tax records. FEMA will work with claimants on this issue and allow claimants the flexibility to extend the deadline for submission of the Proof of Loss where good cause to do so is found. The goal of the claims process is to reduce complexity and provide assistance with the claims process to the extent possible.

##### 2. Comments on § 296.30(b) Proof of Loss

*Comment:* One commenter requested that claimants be able to "self-certify" their claims under penalty of perjury.

*FEMA Response:* The burden of proof remains with the claimant to demonstrate injuries resulting from the Fire. As explained above, FEMA has a legal responsibility to ensure that funds appropriated for claims under the Act are used to pay valid claims. The agency cannot assume that all claims are reasonable and true without appropriate supporting documentation, as such a process would open the Act's funding to significant fraud and abuse. To ensure the Act's funds are properly paid to claimants that suffered injuries as a result of the Fire, FEMA must review supporting documentation associated with each claim. FEMA does currently require that claimants submit claims under penalty of perjury to help reduce the potential for fraud, but the agency is unable to allow for self-certification of claims to ensure the good governance of the Act's funds. As explained in § 296.30(a), FEMA may compensate a claimant for an injury in the absence of supporting documentation on the strength of other evidence and affidavits executed by the claimant and others.

*Comment:* Commenters raised questions about the deadline for submitting a Proof of Loss. Commenters felt the 150-day period was too short with some commenters stating they may not have information on what damages would be covered by insurance or other

Federal and State government programs within that timeframe. Some commenters suggested the time frame to provide proof of loss be extended to no less than 270 days, especially in cases where expert opinions/reports were needed for the claim.

**FEMA Response:** As the preamble to the IFR explained, claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed. To ensure FEMA meets this mandate, claimants need to provide specific details about their injuries by signing the Proof of Loss. FEMA recognizes the challenges with these deadlines and intends to allow extensions where such extensions are for the claimants' benefit. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress. FEMA also provides that this deadline may be extended for good cause at the discretion of the Director of the Claims Office.

**Comment:** Some commenters wrote they need to be required to submit a Proof of Loss Form with extensive supporting documentation by April 14, 2023 if the Notice of Loss was submitted as early as November 15, 2022 under the timeline provided in the IFR. These commenters stated this was unfair as FEMA had not made available a Proof of Loss Form. These commenters recommended a 250-day timeline to submit a Proof of Loss.

**FEMA Response:** As explained above, claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed, which is the date the Notice of Loss is acknowledged by the Claims Office. FEMA would be unable to fulfill this mandate if claimants do not provide specific details about their injuries by signing the Proof of Loss. FEMA recognizes the challenges with these deadlines and intends to allow extensions where such an extension is for the claimant's benefit. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than

150 days after the initial Notice of Loss was acknowledged. Adherence to this deadline will leave FEMA with 30 days to determine the compensation due to the claimant and enable the agency to meet the 180-day timeframe required by Congress. FEMA also provides that this deadline may be extended for good cause at the discretion of the Director of the Claims Office. FEMA notes that the agency completed an emergency information collection associated with the IFR for the Notice of Loss and Proof of Loss forms in November 2022.<sup>54</sup> Those forms were revised in February 2023.<sup>55</sup>

**Comment:** Two commenters raised concerns about the 150-day deadline for claimants to submit their Proof of Loss, stating FEMA had an additional 180 days to respond to claims. One of the commenters wrote "Also interesting is how 120-day response time limits are placed on Hermit's Peak Fire victims while HPFAA Administrators and Reviewers and such have 180-day limits to respond to victims submitted claims/ amendments and such while they are all drawing cushy government pay checks the entire time they spend on claims assessment, judgement and payment."

**FEMA Response:** FEMA disagrees with the commenters' interpretation of the timeline provided in the IFR. Claimants are required to submit their Proof of Loss within 150 days of submission of their Notice of Loss. Section 104(d)(1)(A)(i) of the Act states that FEMA must determine the compensation due to a claimant within 180 days of the date upon which the Notice of Loss is filed. This timeline gives FEMA 30 days to process the Proof of Loss to issue a determination on the claim. Claimants who submit their Notice of Loss should submit a signed Proof of Loss to the Claims Office not later than 150 days after the initial Notice of Loss was submitted to ensure the Congressional mandate for FEMA to process claims within 180 days can be met.

**Comment:** A commenter requested the deadline for the Proof of Loss submittal be relative to the Notice of Loss Acknowledgement date, not relative to the Notice of Loss submittal date. The commenter requested that the deadline for Proof of Loss submittal should be made relative to the Notice of Loss acknowledgement date, not relative to

the Notice of Loss submittal date like it says in the handouts. Another commenter, however, commented that FEMA must pay claims within 180 days and that the 180-day clock must begin when the claim is filed, not based on a FEMA-determined milestone after the claim.

**FEMA Response:** The IFR in § 296.30(b) currently provides that the requirement to submit the Proof of Loss is 150 days from the date the Notice of Loss was submitted. This language is sufficiently clear without change, as FEMA has explained in additional guidance that "submitted" under the regulation is the date FEMA acknowledges receipt of the Notice of Loss. Further, § 296.10(f) explains that a Notice of Loss is deemed to be filed on the date it is received and acknowledged by the Claims Office. FEMA is thus not changing the Final Rule language. The language in the IFR is consistent with the Act's requirement to pay claimants within 180 days of the claim's submittal. FEMA does not believe a Notice of Loss can be submitted until it has been reviewed for sufficiency and receipt has been acknowledged by FEMA. This review and acknowledgement of receipt benefits the claimant. FEMA heard commenters above expressing concerns with the timeline to submit a Proof of Loss and while the agency is limited in its ability to extend that timeframe, allowing FEMA the time to review the Notice of Loss and issuing an acknowledgement before starting the 150-day timeline by which claimants must submit their Proof of Loss allows FEMA to identify any initial challenges with the claim and provide the claimant with initial guidance to update the Notice as required in advance of starting to work on the Proof of Loss resulting in a better overall claim and a more efficient review of that claim.

**Comment:** One commenter asked that the Proof of Loss be an iterative process between FEMA and the claimant, allowing claimants to supplement the Proof of Loss as appropriate.

**FEMA Response:** FEMA agrees. In § 296.5, FEMA explains the process will involve Claims Reviewers working with claimants to assist in developing a strategy to obtain the documentation required for their claim. FEMA anticipates Claims Reviewers will engage with claimants to ensure the Proof of Loss is as comprehensive as possible at the time of submission. Further, Section 296.34 explains the process to supplement claims after submission of a Proof of Loss.

<sup>54</sup> See OMB Control No. 1660–0155 found at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202211-1660-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202211-1660-001) (last accessed Mar. 1, 2023).

<sup>55</sup> See OMB Control No. 1660–0155 revision found at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202302-1660-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202302-1660-001) (last accessed Mar. 1, 2023).

### 3. Comments on § 296.30(c) Release and Certification Form

*Comment:* One commenter wrote about the feasibility of waiving future claims given the extent of damages, losses, and expenses may not be fully known at the time of the award. The commenter wrote that the full extent of damages, losses, and expenses may not be known at the time of award, and it was beyond anyone's ability to foretell those future damages to claim them on their Notice of Loss. The commenter suggested FEMA allow a lump sum payment of 15 percent of all injury, damages, losses, and expenses to be added on to each claim to cover for these future unknown items to resolve this concern.

*FEMA Response:* FEMA understands the concerns with waiving rights to pursue further claims after accepting a final award, but section 104(e) of the Act requires that payment made be final and conclusive with respect to all claims on the same subject matter and that such payment constitute a full release of all claims against the United States on the same subject matter. FEMA is bound by this statutory language to require a release for all final payments. As explained in § 296.30(b), the deadline to submit a Proof of Loss may be extended for good cause. Additionally, sections 296.34 and 296.35 allow claimants to supplement and/or reopen claims. FEMA recognizes the latest deadline for these actions is November 14, 2025; however, this deadline is consistent with the Agency's statutory authority and FEMA does not have the authority to further extend this deadline. Claims related to future damages as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages.

*Comment:* A commenter stated that a claimant's right to civil action or other redress should not be waived or limited until a final payment has been agreed to with FEMA and that it must be clear to claimants at what point(s) in the process they are waiving their rights to further legal action as well as how they can retain their right to further legal action for different types of subject matter.

*FEMA Response:* An injured person who accepts an award under the Act waives the right to pursue any claims arising out of or relating to the same subject matter under the Federal Tort Claims Act or a civil lawsuit. Similarly,

those claimants who accept an award under the Federal Tort Claims Act or a civil lawsuit waive the right to pursue claims under the Act. Until the final award payment is accepted, the claimant may pursue any and/or all of the options available. This flexibility would allow for injured persons to pursue different avenues of compensation until a final award is accepted. To ensure this is clear in the Final Rule, FEMA is revising paragraphs (a) and (b) of § 296.12 to clarify that the injured person only waives the right to pursue these options upon acceptance of a final award.

*Comment:* A commenter requested FEMA not seek to recover possible overpayments where FEMA has made a material mistake, or to establish a specific, short window of time after the Release is signed and denote a value for which it would recover. The commenter wrote that allowing FEMA to recover overpayments when a material mistake was made could lead to a culture of distrust in which claimants were reluctant to seek damages due to a fear that if the agency made a mistake, the claimant could be held liable for repayment. The commenter recommended FEMA either not recover possible overpayments, or to establish a specific, short window of time after the Public Release is signed and denote a value for which it would recover. Another commenter agreed, stating FEMA's reclamation of costs due to an administrative mistake could jeopardize local trust in the program and should be disallowed or limited to extremely rare and clearly defined circumstances. One commenter stated that once FEMA has made a payment to the claimant, any errors made by FEMA should not be recoverable.

*FEMA Response:* FEMA appreciates the concerns raised by these commenters, but the agency is legally obligated to recover funding issued in error. The Act limits compensation to actual damages incurred as a result of the Fire. If the claimant was not injured or did not suffer damages as a result of the Fire and payment is made, such payment is not compensation for actual compensatory damages. FEMA is legally obligated to recover funds paid in situations of civil or criminal fraud, misrepresentation, presentation of a false claim, and where the claimant was not eligible for partial payment under the Act. FEMA considers partial payments made where the claimant was not eligible for the compensation to be a material mistake in § 296.30(d). FEMA also notes that Congress provided appropriations for the Department of Homeland Security's Office of the

Inspector General for oversight of activities authorized by the Act, including oversight of payments made in error.<sup>56</sup>

### M. Comments on Reimbursement of Claims Expenses

#### 1. Comments on § 296.31(a) Expert Opinions

*Comment:* Commenters generally opposed the requirement that FEMA request an appraisal or other third-party opinion before such an expense could be reimbursed under the Act. Most commenters requested FEMA delete the requirement that FEMA request the appraisal or opinion. Commenters stated they would not be made whole if they were not reimbursed for expert opinions.

*FEMA Response:* FEMA heard commenters' concerns regarding this provision in the IFR and is making changes to the Final Rule. Specifically, the IFR language only allows for reimbursement if requested by the Claims Office. FEMA is revising this paragraph in the Final Rule to allow for reimbursement for reasonable costs incurred in providing appraisals or other third-party opinions that the Claims Office deems necessary to determine the amount of the claim. FEMA recognizes the size and scope of this Fire, along with the geographic, economic, and cultural distinctions between this Fire and the Cerro Grande Fire, may result in claimants having to rely more frequently on expert opinions in their claims process and is updating the Final Rule to reflect this need. This revision will allow claimants to seek reimbursement for reasonable costs incurred in obtaining expert opinions that the Claims office reviews and agrees are necessary to determine the amount of the claim. This revision in the Final Rule provides more flexibility to claimants to seek expert opinions as part of the claims process while also retaining good governance of the use of the Act's funds to those opinions that are necessary to effectively determine the claim amount.

*Comment:* Commenters stated that New Mexico law allowed for compensation for expert opinions and that given the complexity of the claims process, claimants needed experts to help value their claims.

*FEMA Response:* As explained above, FEMA is revising this paragraph in the Final Rule to allow for reimbursement for reasonable costs incurred in providing appraisals or other third-party opinions that the Claims Office deems

<sup>56</sup> See Public Law 117–180, Division A, Section 136 (2022).

necessary to determine the amount of the claim. This revision will allow claimants to seek reimbursement for reasonable costs incurred in obtaining expert opinions that the Claims office reviews and agrees are necessary to determine the amount of the claim.

*Comment:* One commenter noted that there are very few appraisers or title companies in the area.

*FEMA Response:* FEMA acknowledges the lack of experts in the area and anticipates working with claimants to obtain appropriate resources for these needed opinions.

*Comment:* Another commenter stated that many claimants had already incurred costs for obtaining expert opinions and stated reimbursement for those expenses would acknowledge that the recovery process did not start when the Claims Office launched, but well in advance. Several commenters agreed that FEMA should exercise discretion to pay the reasonable costs of expert services obtained prior to the IFR's publication.

*FEMA Response:* FEMA considered this approach when making the decision to revise the language to this paragraph of the Final Rule. However, FEMA felt this deadline would not fully address most commenters' concerns with the ability to effectively value their claim on their own and the need for experts to assist. The revision to the Final Rule to allow reasonable costs for these opinions that the Claims Office agrees are necessary regardless of when the opinion was requested will provide more flexibility to claimants to seek expert opinions as part of the claims process while also retaining good governance of the use of the Act's funds to those opinions that are necessary to effectively determine the claim amount.

*Comment:* A commenter requested that FEMA make available technical assistance and expert services to claimants, including arborists, surveyors, appraisers/adjusters, and engineers to help with the most common losses.

*FEMA Response:* FEMA agrees and will work with claimants to identify appropriate resources to assist with valuing claims as explained above.

*Comment:* One commenter requested compensation for a Habitat Equivalency Analysis and GIS mapping as necessary to prove loss in the most accurate way. One commenter suggested FEMA provide claimants with access to all after-wildfire high-resolution aerial imagery of the Fire area to determine the extent of the damage more accurately to private forestlands as well as surrounding forestlands, stating the most recent imagery is insufficient.

*FEMA Response:* FEMA recommends claimants seeking compensation for expert opinions or resources submit their claim for reimbursement explaining why the opinion and/or resource was required to effectively value their claim. As explained above, if claimants are having difficulty obtaining these opinions and/or resources, FEMA will work with the claimant to assist in locating the resources needed to effectively value their claim.

## 2. Comments on § 296.31(b) Lump Sum Payments for Incidental Expenses

*Comment:* Several commenters requested that FEMA pay for all expenses associated with the claims process, removing the exclusion for damages for time spent prosecuting a claim in § 296.21(b) and changing the lump sum payment in paragraph (b) to allow for full recoupment of all expenses, including time. Some commenters focused in on specific incidental expenses, requesting reimbursement for expenses such as travel expenses and replacement of documents.

*FEMA Response:* As explained in the IFR, compensatory damages for time spent in claims preparation are not considered actual compensatory damages. There is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed \$25,000. The minimum lump sum payment is \$150. Section 296.31(b) of

the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

*Comment:* One commenter suggested FEMA partner with a trusted local financial institution to carry out payment of approved claims expense reimbursements to help ensure prompt, complete, and correct payments to approved claimants.

*FEMA Response:* The current claims process requires claimants to provide FEMA with information on how they want to be paid, either by electronic funds transfer or check. No third-party financial institution is required for these transactions.

*Comment:* Two commenters recommended that subrogation claimants and those claimants whose only Fire-related loss is for flood insurance premiums should be eligible if their property was not previously designated in a flood zone but is now considered to be in one as a result of the Fire.

*FEMA Response:* FEMA disagrees that these claimants should be eligible for a lump sum payment for incidental expenses incurred in their claims preparation. Subrogees are generally insurance companies, and their industry involves claims review and preparation. These entities have no legal right to pursue expenses for claims preparation. The burden placed on those claimants only seeking flood insurance premiums is minimal, as the only claim made is for flood insurance premiums and the documentation needed to support such a claim would be very limited compared to other claims. To ensure the funding provided under the Act is utilized to compensate claimants as fully as possible while also ensuring Federal funds are wisely spent, these claimants should not be eligible for a lump sum payment for incidental expenses. FEMA is retaining the language in paragraph (b) in the Final Rule making these types of claimants ineligible for the lump sum payment.

## N. Comments on §§ 296.34 and 296.35 Supplementing Claims and Reopening a Claim

### 1. Comments on § 296.34 Supplementing Claims

*Comment:* A few commenters sought clarification and/or revision to this section of the IFR. One commenter asked if claimants made an error whether they were allowed to file again.

*FEMA Response:* As explained in the IFR, there is flexibility built into the process for claimants to tell FEMA

about injuries and damages that they could not have discovered or did not remember when they signed the Notice of Loss or Proof of Loss. This may also include situations where a claimant makes an inadvertent error. Sections 296.34 and 296.35 explain this flexibility. Section 296.34 allows claimants to supplement their claim by working directly with a Claims Reviewer prior to submitting their Proof of Loss. If a claimant is not prepared to sign a Proof of Loss within the timeframe required, an extension may be requested from the Director of the Claims Office. Alternatively, the claimant may withdraw the claim and re-file the claim before November 14, 2024. Once the Proof of Loss is filed, a claimant can request to supplement their claim by writing to the Director of the Claims Office providing the reasons why the claim needs to be supplemented. The claimant should consult with the Claims Reviewer about the procedure for obtaining permission from the Director of the Claims Office.

*Comment:* Several commenters requested FEMA update the supplementing claims section of the regulation to simplify the process for supplementing claims and eliminate references to the Administrative Appeals process. These commenters wrote that requiring claimants to supplement a claim pursuant to comparatively complex adjudicatory-like procedures undermined FEMA's intent to create a simple claims process that is sensitive to the burdens already placed upon claimants by the Fire.

*FEMA Response:* FEMA disagrees with the commenters' suggestion that incorporating language on the Administrative Appeals process in this section of the regulation complicates the process. Section 296.34 allows claimants to supplement their claim by working directly with a Claims Reviewer prior to submitting their Proof of Loss. If a claimant is not prepared to sign a Proof of Loss within the timeframe required, an extension may be requested from the Director of the Claims Office. Once the Proof of Loss is filed, a claimant can request to supplement their claim by writing to the Director of the Claims Office providing the reasons why the claim needs to be supplemented. The claimant should consult with the Claims Reviewer about the procedure for obtaining permission from the Director of the Claims Office. The Director of the Claims Office will then directly review the additional claim consistent with how the Director reviews claims in the Administrative Appeal process. By providing for the procedures used in the Administrative

Appeal process, FEMA ensures that the supplemental claims information is reviewed directly by the Director after the Authorized Official's determination is issued on the remainder of the claim. If the claimant decides to appeal the Authorized Official's determination on other injuries, the Director of the Claims Office will decide both matters in a single appeal proceeding to expedite processing. Alternatively, the claimant may withdraw the claim and re-file the claim once before November 14, 2024, when the injuries are better defined. The process provided for in § 296.34 is sufficient and not overly burdensome on the claimant.

*Comment:* A commenter requested that FEMA allow claims to be reopened and supplemented in response to future flooding events.

*FEMA Response:* As explained above, there is flexibility built into the process for claimants to tell FEMA about injuries and damages that they could not have discovered or did not remember when they signed the Proof of Loss, including future flooding events. Sections 296.34 and 296.35 allow claimants to supplement and/or reopen claims respectively.

## 2. Comments on § 296.35 Reopening a Claim

*Comment:* A few commenters sought clarification and/or revision to the reopening claims section of the IFR. Most of these commenters were concerned about the deadline to reopen a claim, stating additional damages may be experienced. One commenter asked how to proceed where their claim is paid, and they then suffer additional damages from flooding seeking clarification on whether they should file another Notice of Loss.

*FEMA Response:* FEMA recognizes that damages may continue beyond the deadline for submitting a claim. The agency is generally bound by the Act's requirements for claims to be submitted within two years of the IFR's publication. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim.

*Comment:* One commenter requested that FEMA allow a lump sum payment of 15 percent of all injuries, damages, losses, and expenses to be added on to each claim to cover for future unknown items.

*FEMA Response:* As explained above, FEMA recognizes that damages may continue beyond the deadline for submitting a claim. The agency is generally bound by the Act's requirements for claims to be submitted within two years of the IFR's

publication. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim. Claims related to future damages as a result of the Fire would need to be made through other remedies as the Act sets a two-year limitation for claims under the Act. FEMA is unable to pay lump sum payments to cover future unknown injuries, as unknown injuries are speculative in nature and the Act requires FEMA to pay for actual compensatory damages. To the extent that a claimant is able to reasonably quantify expected future losses, future losses are compensable.

*Comment:* Two commenters recommended FEMA insert "real property" in place of "home" in this section to ensure that this clause is not limited to homes but includes all real property.

*FEMA Response:* FEMA concurs with this recommendation and is amending the IFR language that limits the close of the sale to a home. FEMA agrees with commenters that changing the language to address the sale of real property instead of a home is more appropriate and is revising § 296.35 to reflect that those claimants could reopen a claim if they closed on the sale of real property and wish to present a claim for a decrease in the value of the real property under § 296.21(c)(3). This change is consistent with concerns raised by commenters that the Cerro Grande Fire Assistance process was not necessarily appropriate to this Fire given the distinct geographic, economic, and cultural considerations of the impacted communities. As explained above, this Fire impacted significant forested areas and more rural areas than the Cerro Grande Fire. This change in the Final Rule more appropriately reflects the Hermit's Peak/Calf Canyon Fire claimants' needs by including all real property.

*Comment:* Several commenters requested FEMA update this section of the regulation, providing specific suggestions to revise the section on reopening claims to separate out claims for heightened risk reduction, the sale of real property, reconstruction, and good cause, as well as providing an open-ended deadline for submission of reopened claims allowing a deadline to be set in the future via a **Federal Register** notice.

*FEMA Response:* Section 296.35 provides for reopening a claim after the claimant has submitted a Release and Certification Form again with the goal to allow claimants an opportunity to request damages in excess of those previously awarded. Claimants can use

the reopening provision of this section to seek compensation for an injury not previously reported to FEMA in circumstances where claimants seek heightened risk reduction compensation under § 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for a decrease in the value of the real property under § 296.21(c)(3); the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded; or where the Director of the Claims Office determines good cause exists to reopen the claim. While FEMA does not believe the current language in the IFR needs to be restructured as these commenters suggested in the Final Rule, FEMA recognizes that damages may continue beyond the deadline for submitting a claim. FEMA plans to consider and incorporate future losses into the claims valuation methodology, where appropriate. In the IFR, FEMA allows for claimants to reopen their claims for up to an additional year after submitting their initial claim. FEMA is revising § 296.35 consistent with the commenter's request to use the Cerro Grande process to extend the deadline where reconstruction costs under § 296.21(c)(3) exceed the previously paid claim or for good cause. FEMA will issue notice in the **Federal Register** and at <https://www.fema.gov/hermits-peak> of this future deadline. FEMA believes this change is consistent with the prior Cerro Grande process and will help ensure claimants are compensated for their actual damages as a result of the Fire.

### 3. Comments on § 296.37 Confidentiality of Information

*Comment:* One commenter stated the Federal government is responsible for providing the right to privacy to claimants. One commenter raised concerns about privacy violations with local hires.

*FEMA Response:* FEMA agrees that the Federal government is responsible for ensuring confidentiality for private information submitted by claimants. Section 296.37 provides that confidential information submitted by individual claimants is protected from disclosure to the extent permitted by the Privacy Act. The Privacy Act protects the confidentiality of information provided by individual claimants. This information may only be disclosed with the consent of the claimant or pursuant to a routine use, which has been disclosed to the public. Confidential, proprietary, and trade secret information provided by entities, such as business, Indian Tribes, Tribal

entities, and government agencies, are not eligible for Privacy Act protection, but may be exempt from disclosure under the Freedom of Information Act. All FEMA employees are obligated to follow the Privacy Act requirements, whether they are local hires or not and FEMA will ensure that all employees receive appropriate training on the Privacy Act.

### *O. Comments on § 296.41 Administrative Appeal*

*Comment:* Commenters raised concerns and questions about the appeals process provided in § 296.41. Some commenters asked for more detail in the regulation regarding the appeals process. A commenter wrote that the regulations were unclear as they did not outline under which circumstances a victim could appeal FEMA's decision, nor a timeline of the appeals process. The commenter asked that if a claimant wished to appeal, must the claimant appeal the entire award, or could the appeal be limited to the portion of the award to which the claimant objects. The commenter also asked if a claimant wished to have their case heard in the United States District Court, did that mean that the claimant had to file a Federal Tort Claim and begin the process from square one, or would the District Court review the award given by FEMA for legal error and the standard of review if heard by the District Court. The commenter further asked if there would there be an opportunity for appellate review thereafter.

*FEMA Response:* The current regulatory text is sufficient to provide claimants with a general understanding of the process and that details of the process are more appropriate for additional guidance or procedural documents, not the regulation. The regulation states that in their appeal, a claimant should identify the portion of the Authorized Official's determination they believe is incorrect, whether that be the entire claim or just certain portions of the claim. The regulation also enables the claimant to supplement the record with additional documentary evidence supporting the appeal. After the appeal is decided, if the claimant continues to be dissatisfied with the determination, the claimant can pursue arbitration pursuant to Section 104(h)(3) of the Act or elect to seek record review of the decision in the Federal District Court for the District of New Mexico pursuant to Section 104(i) of the Act. Alternatively, the claimant can elect not to pursue compensation through the Hermit's Peak/Calf Canyon Claims Office and elect to pursue their other

legal remedies against the United States as explained in the Act.<sup>57</sup>

*Comment:* Two commenters raised questions about how the appeals process would work, asking what happened if claimants did not accept the Authorized Official's final determination but chose not to appeal while another commenter asked if claimants would be allowed to choose their own attorney if they file an appeal.

*FEMA Response:* If a claimant opts not to appeal and does not accept the final determination, the claimant remains free to pursue other remedies as detailed in the regulation at § 296.12. Claimants that wish to have legal representation may select their own counsel at any point in the claims process.

*Comment:* FEMA received one comment in support of the IFR's allowance for either the Claims Office Director or the claimant to request a conference. The commenter, however, requested additional changes to the IFR. The commenter wrote "I support this Interim Rule, with two caveats. First, to be fair and effective, attorneys representing claimants must be involved with their clients in either conferences or mediations. Second, mediators must be qualified and independent. In other words, they cannot be employees or representatives of FEMA or any other branch or agency of the United States Government. Th[e]s[e] changes would make the proposed conference and mediation process comport with ordinary and fair claims processing practice."

*FEMA Response:* As explained above, claimants that wish to have legal representation may select their own counsel at any point in the claims process. With an appropriate Privacy Act waiver, which is included in the Notice of Loss form, FEMA will ensure attorneys are allowed to participate with claimants in any and all parts of the Claims Process, up to and including any appeal-related conferences and arbitration of the claim. The Arbitration Administrator will maintain a list of qualified arbitrators who have agreed to serve. The Claims Office is using a contracting vehicle to engage independent arbitrators to serve as Claims Office arbitrators. Where possible, the Claims Office will use arbitrators that are local to New Mexico. The arbitrations will be decided by one arbitrator if the amount in dispute is \$500,000 or less and a panel of three arbitrators if the amount in dispute exceeds \$500,000. Arbitrators will be

<sup>57</sup> See Sections 104(h)(1)(B) and 104(h)(1)(C) of the Act.



assigned by the Arbitration Administrator through a random drawing.

*Comment:* One commenter requested FEMA allow claimant's attorney to be notified and included throughout the entire hearing process. The commenter also requested that the rule be changed to allow the claimant to discover the evidence and opinions of those considered or proffered by the Claims Office against the claimant.

*FEMA Response:* As explained above, claimants that wish to have legal representation may select their own counsel at any point in the claims process. With an appropriate Privacy Act waiver, which is included in the Notice of Loss form, FEMA will ensure attorneys are allowed to participate with claimants in any and all parts of the Claims Process, up to and including arbitration of the claim if the claimant elects to proceed to arbitration. As required by the Privacy Act, 5 U.S.C. 552a, and implemented through Claims Office procedure, claimants always have access to their entire claims files. Moreover, FEMA is working to establish the System of Record, Claim and Loss Information Portal (CLIP), that will have a public facing portal where claimants can choose to create a secure account to review the status of their claim and upload documentation related to their Proof of Loss.

*Comment:* Another commenter suggested FEMA allow for in-person conferences and hearings as often as possible.

*FEMA Response:* Section 296.41(g) of the IFR states that hearings will generally be conducted virtually, but also allows the Director of the Claims Office to convene an in-person hearing at a location in New Mexico designated by the Director. The IFR language allows for in-person hearings and claimants can request in-person hearings if they prefer. FEMA does not believe the IFR requires amendment to allow for in-person hearings and is not revising the Final Rule.

#### *P. Comments on § 296.42 Arbitration*

*Comment:* Three commenters stated that expenses incurred for arbitration should be covered as compensatory damages.

*FEMA Response:* It is unclear what the specific arbitration expenses are that are referenced in this comment. Generally, the Claims Office will pay all the fees and expenses of the arbitrator(s), as well as any associated fees and expenses for securing a location to hold the arbitration. The claimant is responsible for any expenses they incur, including travel costs. As

explained in the IFR, compensatory damages for time spent in claims preparation are not available under New Mexico law or the Federal Tort Claims Act. Moreover, there is no evidence Congress intended that claimants be compensated for the value of their time in preparing a claim. Providing compensation for a claimant's time would be difficult to administer, as FEMA would have to determine equitably the value of a claimant's time and to verify that claimants have expended the number of hours that are claimed. FEMA's payments under the Act are subject to independent audit by the GAO and the DHS OIG and claimants would likely find attempts by auditors to verify the payment for hours spent in the claims process highly intrusive. Additionally, the type of compensation requested by commenters here would require production of receipts and other documentation, resulting in an overly burdensome process for this payment to claimants contrary to other comments requesting the agency streamline and simplify the claims process. As explained in the IFR, FEMA is choosing to exercise discretion to provide a lump sum payment to claimants for miscellaneous and incidental expenses incurred in the claims process. FEMA will provide a lump sum payment of five percent of the insured and uninsured loss (excluding flood insurance premiums), not to exceed \$25,000. The minimum lump sum payment is \$150. Section 296.31(b) of the IFR represents a fair and reasonable accommodation between the agency's responsibility to spend Federal funds wisely and the desire to compensate claimants as fully as possible.

To the extent the commenter is requesting that attorney's fees be compensated by the Claims Office, the Act is silent regarding FEMA's authority to pay attorney or agent fees. Generally, if Congress knows how to say something but chooses not to, its silence is controlling.<sup>58</sup> While the Act places limits on the amount an attorney or agent may charge in section 104(j)(1), the Act does not provide for attorney or agent fees as allowable damages. Further, the "American Rule," generally applicable in civil litigation and initially accepted by the United States Supreme Court in the case of *Arcambel*

*v. Wiseman*,<sup>59</sup> provides that in the absence of a statute indicating otherwise, each party is responsible for paying their own attorney fees. FEMA designed the claims process so that claimants will receive all eligible compensation without the need to engage the services of an attorney, and the Claims Office hired Claims Navigators to assist claimants compiling necessary documentation and with the Proof of Loss. Although claimants have the right to hire an attorney, one is not required.

*Comment:* A commenter requested FEMA allow for in-person conferences and hearings as often as possible. Another commenter also suggested that these hearings take place in person and in the county of loss as virtual hearings are challenging because of limited or no broadband service in many areas impacted by the Fire.

*FEMA Response:* Section 296.42(d) of the IFR states that hearings will generally be conducted virtually, but also allows the arbitrator to convene an in-person hearing at a location in New Mexico designated by the Arbitration Administrator. The IFR language allows for in-person hearings and claimants can request in-person hearings if they prefer. FEMA does not believe the IFR requires amendment to allow for in-person hearings and is not revising the Final Rule.

*Comment:* Comments were also received on the independence, selection, and qualifications of arbitrators. One commenter requested the list of qualified arbitrators be provided by an independent source outside of FEMA. Commenters asked about the independence of arbitrators hired by FEMA. One commenter stated "I seriously question the independence of an arbitrator who is both hired by and paid by FEMA . . . The one time in the past when I had to go to binding arbitration, the arbitrators were chosen from a board of independent arbitrators, not someone who was hired by the plaintiff or the defendant I should say in this case." Another commenter stated, "I have never seen where the arbitrators brought in and both sides don't get to eliminate based on how that arbitrator rules his rulings." A different commenter requested that arbitrators be from New Mexico as they needed to be aware of the culture, the livelihood, the history, the importance of the people in the impacted communities. Another

<sup>58</sup> *Animal Legal Defense Fund v. USDA*, 789 F.3d 1206 (11th Cir. 2015), citing *In re Haas*, 48 F.3d 1153, 1156 (11th Cir. 1995), abrogated on other grounds by *In re Griffith*, 206 F.3d 1389 (11th Cir. 2000). See also *United States v. Roof*, 10 F.4th 314 (4th Cir. 2021), citing *Discover Bank v. Vaden*, 396 F.3d 366, 370 (4th Cir. 2005).

<sup>59</sup> 3 U.S. (3 Dall.) 306 (1796). See also *Peter v. NantKwest, Inc.*, 140 S.Ct. 365 (2019), *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), and *Summit Valley Industries, Inc. v. Carpenters*, 456 U.S. 717 (1982).

commenter suggested that the arbitrators should be people who know New Mexico law.

**FEMA Response:** FEMA understands the concerns raised by commenters regarding the selection of arbitrators for the claims process. These concerns are best addressed in policy and procedure documents associated with the claims process and not the regulations. FEMA is thus not making changes to the Final Rule regarding this issue.

#### Q. Comments on the Rulemaking

**Comment:** One commenter wrote on the lack of public comments posted with over half of the comment period completed and asked what FEMA was doing to publicize how to comment on the rulemaking. The commenter also asked questions about the availability of a local library for people to use the internet for public comment submission and suggested local FEMA offices accept verbal comments that could be posted online.

**FEMA Response:** FEMA received over 190 written comments on this rule in addition to over 100 comments during six public meetings held during the comment period across the area impacted by the Fire. FEMA provided public outreach to include News Releases, Media Advisories, and targeted communications to Federal, State, and local officials and their staff in New Mexico to help promote the process for submitting comments to <https://www.regulations.gov>. As explained above, transcripts of the public meetings were posted to the docket at <https://www.regulations.gov> to allow the public the opportunity to review comments made during these meetings if unable to attend.

**Comment:** A commenter asked how out-of-state property owners would be notified of the Act and suggested FEMA obtain a list from the assessor's office to mail those individuals information.

**FEMA Response:** The IFR was published in the **Federal Register** at <https://www.federalregister.gov/documents/2022/11/14/2022-24728/hermits-peakcalf-canyon-fire-assistance> and also via print publication at 87 FR 68085 on November 14, 2022. The **Federal Register** is national in scope and this notice in addition to the information provided at <https://www.fema.gov/hermits-peak> constitute sufficient notice to out-of-state property owners.

**Comment:** One commenter requested that FEMA provide access to the **Federal Register** to claimants.

**FEMA Response:** FEMA provided access to the IFR by providing the link to the **Federal Register** containing the

IFR at <https://www.fema.gov/hermits-peak>. Additionally, as explained above, the IFR was published in the **Federal Register** at <https://www.federalregister.gov/documents/2022/11/14/2022-24728/hermits-peakcalf-canyon-fire-assistance> and also via print publication at 87 FR 68085 on November 14, 2022.

**Comment:** Two commenters sought virtual means of attending the public meetings on the IFR.

**FEMA Response:** FEMA was unable to provide video conferencing or virtual attendance options during these meetings as they were not held in FEMA facilities. FEMA provided an explanation of this challenge in the Notice of Additional Public Meetings published on December 9, 2022. Transcripts of all public meetings are available on the docket at <https://www.regulations.gov>.

**Comment:** A commenter stated that that they were unable to hear a comment during a public meeting. Another commenter stated that the transcripts from the public meetings had not been posted to the public docket as of January 6, 2023 and suggested that all public meeting transcripts be posted preferably 72 but not less than 48 hours before the comment period closed.

**FEMA Response:** Transcripts of all public meetings are available on the docket at <https://www.regulations.gov>. FEMA understands the commenters' concerns about the timing of posting these transcripts and the agency worked diligently to have all of the transcripts posted prior to the end of the public comment period. Two transcripts were posted on January 9, 2023. Three transcripts were posted on January 12, 2023, and the remaining transcript from the last public meeting was posted on January 13, 2023 in advance of the close of the public comment period. Given the volume of public meetings made available and the availability of the transcripts in advance of the close of the comment period provided sufficient opportunity for the public to either attend and/or review the meeting transcripts in advance of submitting any comments on the rule. FEMA notes that over 100 comments were received during the six public meetings held and over 50 comments were received on the last day of the comment period.

**Comment:** Another commenter stated that FEMA may be having too many meetings as the meetings were taking a toll on the community and another commenter at that meeting also agreed, stating the meetings just felt like lip service and asked for progress on the Final Rule and changes to issues raised during meetings such as reforestation.

**FEMA Response:** FEMA has worked diligently to the review and adjudicate all of the comments received on the IFR. FEMA is publishing this Final Rule in less than 8 months after the public comment period closed. This timeframe demonstrates the agency's commitment to expeditiously process claims under the Act and resolve outstanding concerns of the community regarding the Act's implementation by FEMA.

**Comment:** One commenter suggested FEMA post responses to comments while a commenter at a public meeting suggested that FEMA publish a table that lists the comments and FEMA's responses.

**FEMA Response:** FEMA is providing responses to comments received as a result of the rulemaking process in this Final Rule.

**Comment:** One commenter suggested that when fee or reimbursement schedules were developed, to allow for notice and comment and another commenter at a public meeting agreed.

**FEMA Response:** FEMA appreciates this suggestion and if FEMA decides to proceed with payment formulas as discussed above, FEMA will consider whether notice and comment would be appropriate for such formulas at that time.

**Comment:** One commenter requested the opportunity to comment on the Final Rule.

**FEMA Response:** The rulemaking process as set forth in the Administrative Procedure Act does not require an agency to accept comment on a Final Rule.<sup>60</sup> Further information on the rulemaking process can be found at [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf).<sup>61</sup>

#### R. Other General Comments

##### 1. Comments on the Fire Footprint and Loss

Commenters sought clarification and offered suggestions regarding claimants' eligibility outside of the Fire's immediate footprint.

**Comment:** One commenter indicated that people and businesses outside the Fire's direct footprint were impacted and should be compensated. This commenter wrote that many people and businesses outside of the Fires' direct footprint were impacted due to things like the forest closures during fire response as well as the months following. A different commenter suggested relief be provided to New Mexico residents that do not live in the

<sup>60</sup> 5 U.S.C. 553.

<sup>61</sup> Last accessed Mar. 1, 2023.

direct area of the fire as their business experienced a significant loss due to the Fire and damage to property in the impacted area. A commenter asked whether there was a geographic boundary for who is eligible to file a claim, explaining how the Fire impacted several counties with evacuations. Another commenter stated that the flooding impacted communities downstream from San Miguel and Mora counties and that there were several businesses impacted as well in those areas. However, another commenter requested claims be limited to residents of a specific geographic area. The commenter requested that FEMA limit claims to only residents and property owners in Mora and San Miguel Counties and bordering areas of neighboring counties stating that the funding that had been allocated to these victims was far from sufficient to cover the immediate, obvious loss that the people experienced with the Fire.

**FEMA Response:** The Act recognizes that injured persons can seek compensation for actual compensatory damages for injuries incurred as a result of the Fire. There are no geographic limitations on this compensation beyond the claimant demonstrating they were injured as a result of the Fire. While the disaster declarations were limited to specific counties and further narrowed by the FEMA program,<sup>62</sup> the Act has no such limitations. FEMA thus anticipates receiving and processing claims for any claimant suffering injury as a result of the Fire and seeking actual compensatory damages.

## 2. Other General Comments

**Comment:** A commenter expressed concern that FEMA was not seeking input from local leadership knowledgeable in the local culture and business and regulatory processes while a commenter at a public meeting requested accountability to local groups who are responsible for long-range recovery planning.

**FEMA Response:** Consistent with the Act's requirements in section 104(g), FEMA is in consultation with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process and provide for local concerns.

**Comment:** One commenter suggested FEMA involve the United States Attorney for the District of New Mexico or the New Mexico State Attorney General to ensure the regulations follow New Mexico law.

**FEMA Response:** As explained above, section 104(g) of the Act requires FEMA to consult with other Federal agencies, and State, local, and Tribal authorities to ensure the efficient administration of the claims process. FEMA has consulted and continues to consult with Federal, State, local, and Tribal authorities consistent with the Act's requirements. FEMA consulted with a range of relevant Federal, State, and local agencies and governments. FEMA also completed a Tribal consultation as part of the regulatory process.

**Comment:** One commenter suggested that FEMA review the minutes of the meeting held by Representative Fernandez' in Mora after the Act's passage to understand the intent of the Act.

**FEMA Response:** FEMA appreciates the commenter's input on Representative Fernandez' public meeting. FEMA has met with the New Mexico Congressional Delegation regarding the Act's implementation and received a comment on the IFR from the Delegation. FEMA has adjudicated that comment in this Final Rule and continues to engage with Congressional Representatives regarding the implementation of the Act.

**Comment:** One commenter suggested FEMA provide education and awareness to county residents on preparedness for future manmade and natural disasters.

**FEMA Response:** While this suggestion is outside the scope of the Act, the suggestion does fall within FEMA's overall mission. The agency is coordinating with the State on the integration of long-term recovery efforts and resilience resources under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act") and other applicable statutory authorities.<sup>63</sup>

**Comment:** One commenter asked FEMA to do outreach to the community and assist people, as the experience with seeking benefits from FEMA during the disaster had been one of being turned away.

**FEMA Response:** Unlike the FEMA programs operated under the Stafford Act, the Hermit's Peak/Calf Canyon Fire Assistance Act offers a distinct claims process for claimants to seek actual compensatory damages for injuries suffered as a result of the Fire. The Act's provisions do not have the same eligibility requirements associated with the Public Assistance and Individual Assistance Programs under the Stafford Act. Claimants that were denied assistance under those programs should not assume their claim will be rejected

under the Act. The regulation provides the general framework for compensation under the Act and claimants that have been injured as a result of the Fire should pursue claims for compensatory damages under the Act even if they were denied assistance under the Stafford Act programs.

FEMA is currently accepting Notice of Loss forms in person at the Claims Office locations in Santa Fe, Mora, and Las Vegas, New Mexico and those office addresses can be found at <https://www.fema.gov/hermits-peak>. FEMA will provide services both at set office locations for the Claims Offices, as well as pop-up offices that will rotate through communities and locations in the affected area, to reduce travel burdens on claimants. The pop-up offices will be staffed by Claims Navigators, who can assist claimants in completing and submitting Notices of Loss, providing claims updates, and answering general questions. FEMA plans to offer opportunities for one-on-one engagement with Navigators and Claims Reviewers who will work to engage claimants in ways to meet their needs whether in person or via remote technology. Claims Office Navigators are trained to accommodate the needs of claimants. FEMA recognizes the importance of having claims staff, who interact with claimants and help facilitate the claims process, that are able to speak both Spanish and English. FEMA locally hired bilingual speakers to ensure that claims staff can communicate with claimants in their preferred language.

**Comment:** Another commenter asked that FEMA listen to the community on what they value, as it is different from how FEMA appeared to be valuing buildings, the land, the trees, or the water.

**FEMA Response:** FEMA heard the comments regarding the need to reassess the formulas placed in the IFR and is making changes in the Final Rule to address those concerns. The Final Rule's changes better reflect the impacted communities' needs and values while maintaining consistency with the Act's authorities.

**Comment:** A commenter stated "Every time there is a flood, every time there is a massive weather event, FEMA is to come out now. So, they are understaffed, but here there is a big difference because the appropriations that our legislators have fought to get something in place. So, if you got something, you got something to work with, and I am saying that like our flood was in 2017, and I still haven't recovered . . . So, your comments, and you're coming to these meetings are

<sup>62</sup> See DR-4652-NM found at <https://www.fema.gov/disaster/4652> (last accessed Mar. 1, 2023).

<sup>63</sup> 42 U.S.C. 5121 *et seq.*

demonstrations that you care about yourselves, you know they are not going to chase you off.”

**FEMA Response:** FEMA agrees with the commenter that the Act’s provisions are different from Stafford Act programs and that claimants should engage with FEMA on their claims. As the commenter stated, FEMA received appropriations for the Act and is required to staff the Claims Office to meet the needs of the community to process their claims in an expeditious manner.

**Comment:** One commenter stated that the communities needed to leverage the Act’s funding in conjunction with the overall rollout of infrastructure funding to protect food security and food systems.

**FEMA Response:** FEMA recognizes that other funding may be available to further support the long-term recovery of the impacted communities beyond the funding appropriated by the Act. FEMA appreciates the commenter’s suggestion that the impacted communities also consider that funding and how all available funding can work to improve the community. FEMA has consulted and continues to consult with Federal, State, local, and Tribal authorities consistent with the Act’s requirements.

**Comment:** One commenter stated that they were concerned that money from the Act would go to contractors that are coming in from the outside area.

**FEMA Response:** FEMA understands the need for local hiring for the Claims Office and FEMA has engaged in an extensive effort to recruit locally for positions to support the processing of claims and provision of compensation to claimants impacted by the Fire to ensure these specific concerns are addressed. FEMA is not responsible for

hiring contractors to handle local projects under the Act. FEMA recognizes that other Federal programs, including FEMA Stafford Act programs, may leverage contract support for local projects. The process associated with those contracts varies by program. General information on contracting for FEMA programs can be found at <https://www.fema.gov/grants/procurement>.<sup>64</sup>

**Comment:** Another commenter provided a suggestion on how to spend the funding allocated under the Act by requiring it to cycle through the community several times before it leaves the impacted communities.

**FEMA Response:** FEMA is authorized under the Act to pay claimants for actual compensatory damages for injuries resulting from the Fire.<sup>65</sup> FEMA does not have the authority under the Act to require claimants to spend the compensation awarded in the local community.

**Comment:** Another commenter recommended FEMA hire local contractors for FEMA projects. The commenter stated “The other piece is the issue with contracts. So, we have a lot of local contractors working here. We have local contractors working. We have the majority of them not working and that is another FEMA issue. Massive contracts went out, the Mora people, or Mora contractors are being subcontracted; they are not even given the opportunity—that is wages lost. If you are working for a contractor as a subcontractor, you’ve lost wages. You’ve lost revenue, and that’s another part that FEMA’s failed to do and failed to represent the people.”

**FEMA Response:** As explained above, FEMA is not responsible for hiring contractors to handle local projects under the Act. FEMA recognizes that other Federal programs, including

FEMA Stafford Act programs, may leverage contract support for local projects. The process associated with those contracts varies by program. General information on contracting for FEMA programs can be found at <https://www.fema.gov/grants/procurement>.<sup>66</sup> The Claims Office encourages its contractors to hire locally.

**Comment:** A commenter stated the Claims Office was responsible for clarifying and ensuring that claimants are not taxed for the claims payments they receive through the program.

**FEMA Response:** FEMA appreciates claimants’ concerns with taxes. Section 104(h)(f) of the Act states that “the value of compensation that may be provided under this Act shall not be considered income or resources for any purpose under any Federal, State, or local laws, including laws related to taxation, welfare, and public assistance programs . . .” FEMA is providing this information to claimants as part of the payment process. FEMA is not responsible for taxation and encourages claimants to obtain specific assistance if a Federal, State, or local entity seeks to consider compensation under the Act as taxable income or income for welfare or public assistance purposes. The agency does not believe changes to the IFR regulatory text are needed in the Final Rule to effect the commenter’s request.

#### S. Change Chart

The below table summarizes the changes FEMA has made in this final rule. The economic impacts of these changes are discussed further in Section IV.B, “Executive Order 12866, Regulatory Planning and Review and Executive Order 13563, Improving Regulation and Regulatory Review.”

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.1 .....	This part implements the Hermit’s Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit’s Peak/Calf Canyon Fire Claims (“Claims Office”) to receive, evaluate, process, and pay actual compensatory damages for injuries suffered from the Hermit’s Peak/Calf Canyon Fire.	This part implements the Hermit’s Peak/Calf Canyon Fire Assistance Act (Act), Division G of Public Law 117–180, 136 Stat. 2114, 2168, which requires the Federal Emergency Management Agency (FEMA) to establish the Office of Hermit’s Peak/Calf Canyon Fire Claims (“Claims Office”) to receive, evaluate, process, and pay actual compensatory damages for injuries resulting from the Hermit’s Peak/Calf Canyon Fire.	Consistency with authorizing statute’s language and clarity that injuries resulting from the Fire are compensable.	None.

<sup>64</sup> Last accessed Mar. 1, 2023.

<sup>65</sup> See Sections 102(b) and 104(c) of the Act.

<sup>66</sup> Last accessed Mar. 1, 2023.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.4 .....	Subsistence Resources means food and other items obtained through hunting, fishing, firewood gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.	Subsistence Resources means food and other items obtained through hunting, fishing, firewood or other natural resource gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	Higher claims values for those claiming assistance for "other natural resource" gathering. Potential increase in transfer payments from FEMA to claimants.
296.12(a) .....	An Injured Person who accepts an award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.	An Injured Person who accepts a final award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.	Clarity that claimants only waive their rights upon acceptance of a final award.	None.
296.12(b) .....	An Injured Person who accepts an award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.	An Injured Person who accepts a final award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.	Clarity that claimants only waive their rights upon acceptance of a final award.	None.
296.13 .....	An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office.	An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office and such claims will be paid only after paying claims submitted by injured persons that are not insurance companies seeking payment as subrogees.	Consistency with authorizing statute's language.	None.
296.21(a) .....	(a) <i>Allowable damages.</i> The Act provides for the payment of actual compensatory damages for injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.	(a) <i>Allowable damages.</i> The Act provides for the payment of actual compensatory damages for injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.	Technical edit .....	None.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.21(c)(2) .....	<i>Reforestation and revegetation.</i> Compensation for the replacement of destroyed trees and other landscaping will not exceed 25 percent of the pre-fire value of the structure and lot.	<i>Reforestation and revegetation.</i> Compensatory damages may be awarded for the cost of destroyed trees and other landscaping.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	Removes the formula for compensation for destroyed trees and other landscaping. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of \$3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the additional claims.
296.21(c)(3)(ii) .....	The claimant can establish that the value of the real property was permanently diminished as a result of the Hermit's Peak/Calf Canyon Fire.	The claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire.	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.
296.21(c)(5) .....	N/A .....	<i>Physical Infrastructure.</i> Compensatory damages may be awarded for the damage to physical infrastructure, including damages to irrigation infrastructure such as acequia systems.	Consistency with authorizing statute's language and with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.
296.21(e)(3) .....	<i>Out of pocket expenses for treatment of mental health conditions.</i> FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from the Hermit's Peak/Calf Canyon Fire. FEMA will not reimburse for treatment rendered after April 6, 2024.	<i>Out of pocket expenses for treatment of mental health conditions.</i> FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a licensed mental health professional, which condition resulted from or was worsened by the Hermit's Peak/Calf Canyon Fire.	Reflects public comment feedback on to allow for claims to be filed under deadline for all other claims and revised for clarity on the types of mental health conditions covered.	Removes time limit on reimbursements for treatment. Additional claims will potentially be filed after April 6, 2024, leading to more claims and claims payments. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of \$3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the additional claims.
296.21(e)(4) .....	<i>Donations.</i> FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than September 20, 2022. Donations will be valued at cost.	<i>Donations.</i> FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than November 14, 2022. Donations will be valued at cost.	Reflects public comment feedback on appropriate timeline.	Extends the deadline by approximately 8 weeks for compensation for donations to survivors of the fire. Additional claims for reimbursement were potentially be filed between September 21 and November 14, 2022, leading to more claims and claims payments. This would potentially lead to an increase in the number of awarded claims. More claimants would benefit by receiving assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of \$3.95B, but transfer payments from FEMA to claimants would increase. FEMA may also bear an additional administrative cost to process the additional claims.

44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.21(e)(5) .....	<p><b>Heightened Risk Reduction.</b></p> <p>FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Compensation under this section may not exceed 25 percent of the higher of payments from all sources (<i>i.e.</i>, the Act, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot, or the pre-fire value of the structure and lot. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.</p>	<p><b>Heightened Risk Reduction.</b></p> <p>FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.</p>	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	<p>Removes the formula for compensation for measures taken to reduce risk from natural hazards heightened by the Fire. This would potentially lead to an increase in the value of awarded claims. Claimants would benefit by receiving additional assistance and be able to recover more fully.</p> <p>This would not affect the maximum total impact of the rule of \$3.95B, but transfer payments from FEMA to these claimants would potentially increase.</p> <p>FEMA may also bear an additional administrative cost to process the claims.</p>
296.21(f) .....	<p><b>Insurance and other benefits.</b> The Act allows FEMA to compensate Injured Persons only for damages not paid, or will not be paid, by insurance or other third-party payments or settlements.</p>	<p><b>Insurance and other benefits.</b> The Act allows FEMA to compensate Injured Persons only for damages not paid, and that will not be paid, by insurance or other third-party payments or settlements.</p>	Technical edit .....	None.
296.31(a) .....	<p>FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, requested by the Claims Office. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not requested by the Claims Office.</p>	<p>FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, that the Claims Office deems necessary to determine the amount of the claim. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not requested by the Claims Office.</p>	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process.	None.



44 CFR	IFR text	Final rule text	Reason for change	Economic impact
296.35 .....	The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5); the claimant closed the sale of a home and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3); the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded; or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause.	The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5); the claimant closed the sale of real property and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3). Claimants may request to reopen claims where the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause no later than the deadline established by the Director of the Claims Office as published in the <b>Federal Register</b> and at <a href="https://www.fema.gov/hermits-peak">https://www.fema.gov/hermits-peak</a> .	Consistency with the distinctions between the communities impacted by the Cerro Grande and Hermit's Peak/Calf Canyon Fires and need to accommodate geographic, economic, and cultural distinctions into the Hermit's Peak/Calf Canyon Fire Assistance process while also incorporating a past practice from Cerro Grande to extend the deadline by <b>Federal Register</b> publication for certain losses.	A claimant may file a claim for depreciation after the sale of any real property, not only a home. The deadline to request to reopen a claim under limited circumstances is extended by publication in the <b>Federal Register</b> . Both of these changes would potentially lead to an increase in claims and more claims being awarded. Claimants would benefit by receiving additional assistance and be able to recover more fully. This would not affect the maximum total impact of the rule of \$3.95B, but transfer payments from FEMA to these claimants would potentially increase. FEMA may also bear an additional administrative cost to process the claims.

#### IV. Regulatory Analysis

##### A. Administrative Procedure Act (APA)

The IFR that this Final Rule makes final, with the changes detailed above in response to public comment is already in effect. FEMA issued the IFR pursuant to statutory authority under the Act. Specifically, section 104(f)(1) requires FEMA to publish “interim final regulations for the processing and payment of claims under this Act.” Further, the IFR had to be published “not later than 45 days after the date of enactment.” Given Congress’ specific authority to issue an IFR, the agency had good cause to proceed without advance notice and comment as would have otherwise been required under the APA. See 5 U.S.C. 553(b)(B); Hermit’s Peak/Calf Canyon Fire Assistance, 87 FR 68085, 68095 (Nov. 14, 2022) (“Consistent with Congress’ direction in section 104(f)(1) of the Act that FEMA publish ‘interim final regulations for the processing and payment of claims under [the] Act,’ good cause exists pursuant to 5 U.S.C. 553 (b)(B) as it would be impracticable and contrary to the public interest to require notice and comment rulemaking in this instance.”).

FEMA finds there is good cause, under 5 U.S.C. 553(d)(3), not to require a 30-day delayed effective date for this rulemaking because delaying implementation of this Final Rule by 30 days is contrary to the goal of the statutory purpose found at section 102(b)(2) of the Act to provide for the

expeditious consideration and settlement of claims for injuries resulting from the Fire. The Act required FEMA to promulgate and publish an IFR within 45 days after the Act’s enactment, and delay in the effective date of a Final Rule with changes to that IFR would further negatively impact claimants seeking compensation through the Act. The updates made in this Final Rule will address concerns raised by commenters on the application of the Cerro Grande Fire Assistance processes for the Hermit’s Peak/Calf Canyon Fire Assistance process and ensures the process better reflects the needs of injured persons and impacted communities from the Hermit’s Peak/Calf Canyon Fire given the geographic, economic, and cultural distinctions between the Cerro Grande and Hermit’s Peak/Calf Canyon Fires. This Final Rule will provide additional clarity to claimants seeking to utilize the Hermit’s Peak/Calf Canyon claims process and receive compensation for actual compensatory damages suffered as a result of the Fire. Given the Congressional mandate to expeditiously consider and settle these claims, this Final Rule must be effective upon publication.

The Fire constitutes the largest wildfire in New Mexico history.<sup>67</sup> Over

<sup>67</sup> See Bryan Pietsch and Jason Samenow, “New Mexico blaze is now largest wildfire in state history,” *The Washington Post*, May 17, 2022 found

340,000 acres of forest burned during the Fire and over half of the land impacted by the Fire consisted of privately-owned land, with just under 200,000 total acres burned.<sup>68</sup> At least 160 homes and a total of over 900 structures were destroyed during the Fire.<sup>69</sup> Despite containment, the impact of the Fire continues to be felt in the impacted areas, causing flooding and setting off a drinking water crisis.<sup>70</sup> The higher burn severity of soil on private lands increases the likelihood of flooding and mudslide impacts on those areas. Residents in the areas of the Fire have already suffered significant damage from flooding, including washed out roads and buildings, drowned pastures, and burned debris

at <https://www.washingtonpost.com/nation/2022/05/17/calf-canyon-hermits-peak-fire-new-mexico/> (last accessed July 27, 2023).

<sup>68</sup> See New Mexico Forest and Watershed Restoration Institute, “Hermit’s Peak and Calf Canyon Fire: The largest wildfire in New Mexico’s recorded history and its lasting impacts” Aug. 24, 2022 found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Sept. 27, 2022).

<sup>69</sup> *Id.*

<sup>70</sup> See Jordan Honeycutt, “Rain brings flash flooding to Hermit’s Peak Calf Canyon burn scar,” *KRQE*, July 13, 2022 found at <https://www.krqe.com/news/new-mexico/rain-brings-flash-flooding-to-hermits-peak-calf-canyon-burn-scar/> (last accessed July 27, 2023), and Simon Romero, “How New Mexico’s Largest Wildfire Set Off a Drinking Water Crisis,” *The New York Times*, Sept. 26, 2022 found at <https://www.nytimes.com/2022/09/26/us/new-mexico-las-vegas-fire-water.html> (last accessed Sept. 27, 2022).

moved downstream.<sup>71</sup> In addition, as noted above, Congress explicitly mandated in section 104(f)(1) of the Act that FEMA promulgate these regulations expeditiously as interim final regulations, a factor that supports a finding of “good cause” to also issue this Final Rule without an effective date delay. Pursuant to section 104(f)(1) of the Act, consistent with 5 U.S.C. 553(d)(3), and for the reasons stated above, FEMA therefore will make this Final Rule effective immediately upon publication.

*B. Executive Order 12866, Regulatory Planning and Review, as Amended, and Executive Order 13563, Improving Regulation and Regulatory Review*

Executive Order 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review) and Executive Order 13563 (Improving Regulation and Regulatory Review), directs 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 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. The Office of Management and Budget (OMB) has designated this rule a “significant regulatory action” as defined under section 3(f)(1) of Executive Order 12866, as amended by E.O. 14094. Accordingly, the rule has been reviewed by OMB.

In the IFR, FEMA established a process by which claimants who were injured as a result of the Fire may apply for compensation under the Act. FEMA is updating that process through this Final Rule. Affected State, local, and Tribal governments, private sector businesses, not-for-profit organizations, and individuals and households are eligible to apply for compensation based on clarifying changes made in this Final Rule. The established process results in costs to claimants for time to apply for and substantiate a claim, and for FEMA to process and adjudicate claims. Claimants submit a Notice of Loss to FEMA, meet with a FEMA Claims Reviewer, obtain the documentation needed to substantiate claims, sign a

Proof of Loss, and complete and return a Release and Certification Form. Additionally, affected insurance companies are eligible to submit a subrogation notice of loss for possible compensation under the Act. Claimants who disagree with FEMA’s evaluation of the claim may also incur costs to appeal the determination. FEMA estimates approximately 28,725 claimants will seek compensation under the Act annually, totaling 732,490 burden hours per year.<sup>72</sup>

The IFR and this rule result in additional transfer payments from FEMA to victims for the settlement of claims for injuries resulting from the Fire. Injuries may include property, business and/or financial losses. Congress appropriated \$3.95 billion to provide for the expeditious consideration and settlement of these claims.<sup>73</sup> The maximum total economic impact of these actions, therefore, is \$3.95 billion (assuming that all funds awarded will be expended). These funds are for the settlement of actual compensatory damages measured by injuries suffered, FEMA’s administration of the program, and DHS OIG oversight.<sup>74</sup> However, without knowing the dollar amount of claims that will be filed for these injuries, it is impossible to predict the amount of the economic impact with any precision. As of July 5, 2023, FEMA has received 1,353 Notices of Loss, which includes 2,257 claimants.

The Act requires claims to be submitted no later than two years after publication of the IFR or November 14, 2024.<sup>75</sup> The Act requires that FEMA determine and fix the amount to be paid for a claim within 180 days after a claim is submitted.<sup>76</sup> Although the impact of the rule could be spread over multiple years as claims are received, processed, and paid, the total economic effects of a specific payment would only occur once, rather than annually.

These actions provide distributional benefits to victims of the Fire. FEMA has provided immediate assistance under the Robert T. Stafford Disaster

Relief and Emergency Assistance Act (Stafford Act), as amended (Pub. L. 93–288) (42 U.S.C. 5121, *et seq.*) to those eligible for public and individual assistance pursuant to the President’s declaration of a major disaster on May 4, 2022. The additional compensation from the Act will more fully compensate victims and allow affected State, local and Tribal governments, businesses, organizations, and individuals to rebuild.

In this Final Rule, FEMA is updating the established process by which claimants who were injured as a result of the Fire may apply for compensation under the Act. FEMA anticipates that several of the changes it made from the IFR to this Final Rule will lead to impacts on costs, benefits, and transfer payments. Below, FEMA discusses the impact of these changes relative to the IFR. Specifically, these changes include the following:

In 44 CFR 296.4, FEMA added “other natural resources” to the definition of “Subsistence Resources.” Expanding the definition leads to the potential for claimants to receive compensation for claims including other natural resources; however, FEMA anticipates any impact on claim values will be a de minimis amount, as the additional language is intended to be clarifying in nature. In § 296.21(c)(2), FEMA removed the formula on compensation for destroyed trees and other landscaping. Removing this formula leads to the potential for claimants to receive higher levels of compensation for these claims, and therefore, an increase in claims values. Section 296.21(e)(3) removes the time limit on reimbursements for treatment, allowing for claimants to file additional claims after April 6, 2024. This will potentially lead to an increase in the number and value of claims filed and awarded as compared to the IFR. Claimants will potentially benefit by receiving treatment for mental health conditions that they would not have sought out if their expenses could not be reimbursed. In § 296.21(e)(4), FEMA extended the deadline for compensation from September 20, 2022 to November 14, 2022 for donations claimants made to survivors of the Hermit’s Peak/Calf Canyon Fire. This will potentially lead to an increase in the number and value of claims awarded by FEMA relative to the IFR. In § 296.21(e)(5), FEMA removed the formula for compensation for measures taken to reduce risk from natural disasters heightened by the Fire. Removing this formula leads to the potential for claimants to receive higher levels of compensation for these claims, and therefore, an increase in claims values. FEMA edited § 296.35 to allow

<sup>71</sup> See New Mexico Forest and Watershed Restoration Institute, “Hermit’s Peak and Calf Canyon Fire: The largest wildfire in New Mexico’s recorded history and its lasting impacts” Aug. 24, 2022 found at <https://storymaps.arcgis.com/stories/d48e2171175f4aa4b5613c2d11875653> (last accessed Sept. 27, 2022).

<sup>72</sup> Agency Information Collection Activities: Proposed Collection; Comment Request; Generic Clearance for Notice of Loss and Proof of Loss, 88 FR 29144 (May 5, 2023). FEMA estimates that 28,725 applicants annually will incur approximately 25.5 burden hours each. Over the two-year period, FEMA estimates a total of 57,450 claims with a corresponding 1,464,980 burden hours.

<sup>73</sup> Division A of Public Law 117–180, 136 Stat. 2144 (2022) and Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Division G of Public Law 117–180, 136 Stat. 2114 (2022).

for a claimant to file a claim for depreciation after the sale of any real property, not only the sale of a home. FEMA also extends a deadline in this section, allowing for a claimant to request to reopen a claim under limited circumstances until the deadline established in the **Federal Register**. Both of these changes will potentially lead to an increase in claims and more claims being awarded as compared to the IFR.

All increases in the number or value of claims payments in comparison to the IFR will lead to an increase in transfer payments from FEMA to affected recipients. The extent to which the claim values increase, recipients will benefit by being made more whole after their loss, thereby improving their ability recover and be resilient. Any increase in the number of claims filed will also lead to an increase in burden hours to claimants and administrative costs to FEMA. None of these changes will affect the maximum total impact of the rule of \$3.95 billion.

#### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) (5 U.S.C. 605(b)) applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b). As discussed previously, FEMA did not issue a notice of proposed rulemaking, and was not required to do so under any law. Accordingly, the RFA's requirements do not apply to this Final Rule.

#### *D. Unfunded Mandates Reform Act of 1995*

As noted above, no notice of proposed rulemaking was published in advance of this action. Therefore, the written statement provisions of the Unfunded Mandates Reform Act of 1995, as amended, (2 U.S.C. 1501 *et seq.*) do not apply to this regulatory action.

#### *E. Paperwork Reduction Act of 1995*

This rule contains information collections necessary to support FEMA's implementation of the Act. The Notice of Loss and Proof of Loss forms (OMB Control Number 1660–0155) were submitted and approved under OMB's emergency clearance procedures on November 14, 2022 to allow FEMA to begin accepting claims immediately after publication of the IFR. A revision of the initial emergency collection was approved on February 16, 2023 to incorporate additional forms necessary to effectively process claims under the Act. FEMA is pursuing approval under the normal notice and comment process for this collection and will publish notice in the **Federal Register** for

comment before receiving an extension of the emergency approval.

#### *F. Privacy Act*

Under the Privacy Act of 1974, 5 U.S.C. 552a, an agency must determine whether implementation of a 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 rule. DHS has determined that this rulemaking does not affect the 1660–0155 OMB Control Number's compliance with the E-Government Act of 2002 or the Privacy Act of 1974, as amended. Specifically, DHS has concluded that the 1660–0155 OMB Control Number is covered by the DHS/FEMA/PIA–044 National Fire Incident Reporting Systems (NFIRS) Privacy Impact Assessment (PIA) and the DHS/FEMA/PIA–049 Individual Assistance (IA) Program PIA. Additionally, DHS has decided that the 1660–0155 OMB Control Number is covered by DHS/ALL–004 General Information Technology Access Account Records System (GITAARS), 77 FR 70792 (Nov. 27, 2012), and DHS/ALL–013 Department of Homeland Security Claims Records, 73 FR 63987 (Oct. 28, 2008) System of Records Notices (SORNs).

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

Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," 65 FR 67249, November 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 shall 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.

FEMA entered into consultation with the Indian Tribes that have been impacted by the Fire and whose Tribal entities or Tribal members have been impacted by the Fire during the public comment period of the Interim Final Rulemaking. The consultation was held on December 9, 2022 at 3:00 p.m. The concerns raised during that consultation are addressed above.

#### *H. Executive Order 13132, Federalism*

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

FEMA has determined that this rulemaking does not have 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, and therefore does not have federalism implications as defined by the Executive Order. FEMA, however, met with the State of New Mexico on January 10, 2023 to discuss the effect of the IFR on the State. The transcript from that meeting can be found on the public docket at <https://www.regulations.gov/document/FEMA-2022-0037-0142> and comments raised during that meeting are addressed above.

### *I. National Environmental Policy Act of 1969 (NEPA)*

Under Section 102 of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. 4321 *et seq.*, an agency must prepare an environmental assessment or environmental impact statement for any major Federal action that significantly affects the quality of the human environment unless the action can be statutorily or categorically excluded. 40 CFR 1501.1(a), 1501.4. A “major federal action” includes new or revised agency rules or regulations. 40 CFR 1508.1(q)(2). A categorical exclusion is a category of actions that the Federal agency has determined, normally does not significantly affect the quality of the human environment. 42 U.S.C. 4336e(1). If there are extraordinary circumstances, however, a normally excluded action may have a significant effect, and if the effect cannot be mitigated, further environmental review is required. 40 CFR 1501.4.

This rulemaking is a major Federal action subject to NEPA. Based on the public comments received, the rulemaking revises the IFR to better address the needs of the communities affected by the Fire with particular consideration to their geographic, economic and cultural characteristics. The purpose of the rulemaking is to establish a process and procedures for FEMA to expeditiously pay actual compensatory damages for injuries resulting from the Fire. FEMA has determined that categorical exclusion A3 included in the list of exclusion categories at Department of Homeland Security Instruction Manual 023–01–001–01, Revision 01, Implementation of the National Environmental Policy Act, Appendix A, issued November 6, 2014, applies to this rulemaking. Specifically, categorical exclusion A3 covers the promulgation of rules, issuance of rulings or interpretations, and the development and publication of policies, orders, directives, notices, procedures, manuals, and advisory circulars if they meet certain criteria provided in A3(a)–(f). This Final Rule meets Categorical Exclusion A3(a), “[t]hose of a strictly administrative or procedural nature,” and A3(b), “[t]hose that implement, without substantive change, statutory or regulatory requirements.” FEMA has determined that there are no extraordinary circumstances that prevent the use of this categorical exclusion for this rulemaking action.

### *J. Executive Orders 12898 and 14096 on Environmental Justice*

Under Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 FR 7629 (Feb. 16, 1994), as amended by Executive Order 12948, 60 FR 6381, (Feb. 1, 1995), FEMA incorporates environmental justice into its policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in programs, denying persons the benefits of programs, or subjecting persons to discrimination because of race, color, or national origin. Further, Executive Order 14096, “Revitalizing Our Nation’s Commitment to Environmental Justice for All,” 88 FR 25251 (Apr. 26, 2023), charges Federal agencies to make achieving environmental justice part of their missions, consistent with statutory authority, by identifying, analyzing, and addressing the disproportionate and adverse human health and environmental effects and hazards of Federal activities, including those related to climate change and cumulative impacts of environmental and other burdens on communities with environmental justice concerns.

This rulemaking does not have a disproportionate and adverse health or environmental effect on communities, nor does it exclude persons from participation in FEMA programs, deny persons the benefits of FEMA programs, or subject persons to discrimination because of race, color, or national origin. The rulemaking finalizes the IFR and establishes the procedures for processing and paying claims for property, business and other financial losses to those person(s) sustaining losses from the Fire. The eligibility requirements are to ensure the validity of the claim for compensation. *See e.g.*, 44 CFR 296.4 (definition of “injured person”), 296.20, 296.21, and 296.30. With its revisions to the IFR, the rulemaking better addresses the needs of the communities affected by the Fire based on the public comments received and the communities’ particular geographic, economic, and cultural characteristics. Claimants also have appeal rights: they can file an administrative appeal of the decision by the Director of the Claims Office, and/or resolve a dispute through binding arbitration or appeal the Director’s

decision to the United States District Court for the District of New Mexico. All persons eligible for compensatory payments resulting from the Fire will benefit.

### *K. 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 has submitted this rule to the Congress and to GAO pursuant to the CRA. The Office of Management and Budget has determined that this rule is “economically significant,” but this rule is not a “major rule” within the meaning of the CRA. FEMA believes this Final Rule is not subject to the additional review requirements under the CRA given the statutory mandate to issue the Interim Final Rule within 45 days of the Act’s enactment under section 104(f) of the Act and Congress’s desire for the agency to begin processing and paying claims pursuant to the Act expeditiously under section 102(b)(2). The changes made in the Final Rule need to be immediately effective to resolve the comments raised during the IFR’s public comment period to the claims process and ensure the continued expeditious processing and payment of claims under the Act. This Final Rule is a procedural rule and does not confer any substantive rights, benefits, or obligations but rather only updates the agency’s procedures for how to voluntarily file a claim under the Act. As such, this Final Rule is a “rule of agency organization, procedure, or practice that does not substantially affect the rights or obligation of non-agency parties” pursuant to 5 U.S.C. 804(3)(C). Finally, even if this final rule is considered a “rule” under the CRA, FEMA finds there is good cause to dispense with notice and public comment under 5 U.S.C. 808(2). Notice and public comment are impracticable and contrary to public interest given the Act’s requirement for the agency to publish an IFR within 45 days of enactment and the Act’s purpose to provide expeditious consideration and settlement of claims for victims of the

Fire as explained above. Therefore, there is no delay in its effective date under the CRA.

#### List of Subjects in 44 CFR Part 296

Administrative practice and procedure, Claims, Disaster Assistance, Federally affected areas, Indians, Indians—lands, Indians—Tribal government, Organization and functions (Government agencies), Public lands, Reporting and recordkeeping requirements, State and local governments.

■ For the reasons discussed in the preamble, the Federal Emergency Management Agency (FEMA) is revising part 296 to read as follows:

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

Sec.

#### Subpart A—General

- 296.1 Purpose.
- 296.2 Policy.
- 296.3 Information and assistance.
- 296.4 Definitions.
- 296.5 Overview of the claims process.
- 296.6–296.9 [Reserved]

#### Subpart B—Bringing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

- 296.10 Filing a claim under the Hermit's Peak/Calf Canyon Fire Assistance Act
- 296.11 Deadline for notifying FEMA of injuries.
- 296.12 Election of remedies.
- 296.13 Subrogation.
- 296.14 Assignments.
- 296.15–296.19 [Reserved]

#### Subpart C—Compensation Available under the Hermit's Peak/Calf Canyon Fire Assistance Act

- 296.20 Prerequisite to compensation.
- 296.21 Allowable damages.
- 296.22–296.29 [Reserved]

#### Subpart D—Claims Evaluation

- 296.30 Establishing injuries and damages.
- 296.31 Reimbursement of claim expenses.
- 296.32 Determination of compensation due to claimant.
- 296.33 Partial payments.
- 296.34 Supplementing claims.
- 296.35 Reopening a claim.
- 296.36 Access to records.
- 296.37 Confidentiality of information.
- 296.38–296.39 [Reserved]

#### Subpart E—Dispute Resolution

- 296.40 Scope.
- 296.41 Administrative appeal.
- 296.42 Arbitration.
- 296.43 Judicial review.

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

#### Subpart A—General

##### § 296.1 Purpose.

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

##### § 296.2 Policy.

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

##### § 296.3 Information and assistance.

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

##### § 296.4 Definitions.

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

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

*Administrator* means the Administrator of the Federal Emergency Management Agency.

*Arbitration Administrator* means the FEMA official responsible for administering arbitration procedures to resolve disputes regarding a claim. Contact information for the Arbitration Administrator can be found online at <https://www.fema.gov/hermits-peak>.

*Authorized Official* means an employee of the United States who is delegated with authority by the Director of the Claims Office to render binding determinations on claims and to determine compensation due to claimants under the Act.

*Authorized Official's Determination* means a report signed by an Authorized

Official and mailed to the claimant evaluating each element of the claim as stated in the Proof of Loss and determining the compensation, if any, due to the claimant.

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

*Claims Office* means the Office of Hermit's Peak/Calf Canyon Fire Claims.

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

*Days* means calendar days, including weekends and holidays.

*Director* means an Independent Claims Manager appointed by the Administrator who will serve as the Director of the Claims Office.

*Good Cause*, for purposes of extending the deadline for filing, supplementing a claim, or reopening a claim includes, but is not limited to: instances where a claimant, through no fault of their own, may not be able to access needed documentation in time to submit a claim or transmit relevant information or data; or where damage is found after a claim has been submitted; or other instances in which the Director of the Claims Office, in their discretion, determines that an undue hardship or change in circumstances on the claimant warrants an extension of a deadline or the supplementation or reopening of existing claims.

*Hermit's Peak/Calf Canyon Fire* means:

(1) The fire resulting from the initiation by the U.S. Forest Service of a prescribed burn in the Santa Fe National Forest in San Miguel County, New Mexico on April 6, 2022;

(2) The pile burn holdover resulting from the prescribed burn by the U.S. Forest Services which reemerged on April 19, 2022; and

(3) The merger of the two fires described in paragraphs (1) and (2) of this definition, reported as the Hermit's Peak Fire or the Hermit's Peak Fire/Calf Canyon Fire.

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

*Household Including Tribal Members* means a Household that existed on April 6, 2022, which included one or more Tribal Members as continuous residents.

*Indian Tribe* means the recognized governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or

components reservation individually identified (including parenthetically) in the list published most recently as of September 30, 2022, pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994.

*Individual Assistance* means the FEMA program established under subchapter IV of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, 42 U.S.C. 5121, *et seq.*, which provides assistance to individuals and families adversely affected by a major disaster or an emergency.

*Injured Person* means an individual, regardless of citizenship or alien status; or an Indian Tribe, Tribal corporation, corporation, partnership, company, association, county, township, city, State, school district, or other non-Federal entity that suffered injury resulting from the Hermit's Peak/Calf Canyon Fire. The term Injured Person includes an Indian Tribe with respect to any claim relating to property or natural resources held in trust for the Indian Tribe by the United States. Lenders holding mortgages or security interests on property affected by the Hermit's Peak/Calf Canyon Fire and lien holders are not an "Injured Person" for purposes of the Act.

*Injury* means "injury or loss of property, or personal injury or death," as used in the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1).

*Notice of Loss* means a form supplied by the Claims Office through which an Injured Person or Subrogee makes a claim for possible compensation under the Act.

*Proof of Loss* means a statement attesting to the nature and extent of the claimant's injuries.

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

*Release and Certification Form* means a document in the manner prescribed by section 104(e) of the Act that all claimants who have received or are awarded compensatory damages under the Act must execute and return to the Claims Office as required by § 296.30(c).

*Subrogee* means an insurer or other third party that has paid to a claimant compensation for Injury and is subrogated to any right that the claimant has to receive payment under the Act.

*Subsistence Resources* means food and other items obtained through hunting, fishing, firewood and other natural resource gathering, timbering, grazing or agricultural activities undertaken by the claimant without financial remuneration, on land damaged by the Hermit's Peak/Calf Canyon Fire.

*Tribal Member* means an enrolled member of an Indian Tribe.

#### § 296.5 Overview of the claims process.

(a) The Act is intended to provide persons who suffered Injury from the Hermit's Peak/Calf Canyon Fire with a simple, expedited process to seek compensation from the United States. This section provides a brief explanation of the claims process for claims other than subrogation claims. It is not intended to supersede the more specific regulations that follow and explain the claims process in greater detail. To obtain compensation under the Act, an Injured Person must submit all Hermit's Peak/Calf Canyon Fire related claims against the United States or any employee, officer, or agency of the United States to the FEMA Claims Office. An Injured Person who elects to accept an award under the Act is barred from accepting an award pursuant to a claim under the Federal Tort Claims Act or a civil action against the United States or any employee, officer, or agency of the United States arising out of or relating to the same subject matter. Judicial review of FEMA decisions under the Act is available.

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

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

evaluation of the claim to the Authorized Official.

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

#### §§ 296.6–296.9 [Reserved]

### Subpart B—Bringing a Claim Under the Hermit's Peak/Calf Canyon Fire Assistance Act

#### § 296.10 Filing a claim under the Hermit's Peak/Calf Canyon Fire Assistance Act.

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

(b) A single Notice of Loss may be submitted on behalf of a household containing Injured Persons provided that all Injured Persons on whose behalf the claim is presented are identified.

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

(d) The Claims Office will provide Notice of Loss forms through the mail, electronically, in person at the Claims Office or by telephone request. The Notice of Loss form can also be downloaded from the internet at <https://www.fema.gov/hermits-peak>.

(e) A Notice of Loss may be filed with the Claims Office by mail, electronically, or in person. Details regarding the filing process can be found at <https://www.fema.gov/hermits-peak>.

(f) A Notice of Loss that is completed and properly signed is deemed to be filed on the date it is received and acknowledged by the Claims Office.

**§ 296.11 Deadline for notifying FEMA of injuries.**

The deadline for filing a Notice of Loss is November 14, 2024. Except as provided in § 296.35 with respect to a request to reopen a claim, an injury that has not been described: on a Notice of Loss, on a supplement to a Notice of Loss or a request to supplement a Notice of Loss under § 296.34 received by the Claims Office on or before November 14, 2024 cannot be compensated under the Act. The Act establishes this deadline and does not provide any extensions of the filing deadline.

**§ 296.12 Election of remedies.**

(a) An Injured Person who accepts a final award under the Act waives the right to pursue all claims for injuries arising out of or relating to the same subject matter against the United States or any employee, officer, or agency of the United States through the Federal Tort Claims Act or a civil action authorized by any other provision of law.

(b) An Injured Person who accepts a final award through a Federal Tort Claims Act claim or a civil action against the United States or any employee, officer, or agency of the United States relating to the Hermit's Peak/Calf Canyon Fire waives the right to pursue any claim arising out of or relating to the same subject matter under the Act.

**§ 296.13 Subrogation.**

An insurer or other third party with the rights of a subrogee, who has compensated an injured person for Hermit's Peak/Calf Canyon Fire related injuries, may file a Notice of Loss under the Act for the subrogated claim. A subrogee may file a Notice of Loss without regard to whether the Injured Person who received payment from the subrogee filed a Notice of Loss. A Subrogation Notice of Loss should be filed after the subrogee has made all payments that it believes the Injured Person is entitled to receive for Hermit's Peak/Calf Canyon Fire related injuries under the terms of the insurance policy or other agreement between the subrogee and the Injured Person, but not later than November 14, 2024. By filing a Notice of Loss for any subrogated claim, the subrogee elects the Act as its exclusive remedy against the United States or any employee, officer, or agency of the United States for all subrogated claims arising out of the Hermit's Peak/Calf Canyon Fire. Subrogation claims must be made on a Notice of Loss form furnished by the Claims Office and such claims will be paid only after paying claims submitted

by injured persons that are not insurance companies seeking payment as subrogees.

**§ 296.14 Assignments.**

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

**§§ 296.15–296.19 [Reserved]****Subpart C—Compensation Available Under the Hermit's Peak/Calf Canyon Fire Assistance Act****§ 296.20 Prerequisite to compensation.**

In order to receive compensation under the Act, a claimant must be an Injured Person who suffered an injury as a result of the Hermit's Peak/Calf Canyon Fire and sustained damages.

**§ 296.21 Allowable damages.**

(a) *Allowable damages.* The Act provides for the payment of actual compensatory damages for injury or loss of property, business loss, and financial loss. The laws of the State of New Mexico will apply to the calculation of damages. Damages must be reasonable in amount.

(b) *Exclusions.* Punitive damages, statutory damages under section 30–32–4 of the New Mexico Statutes Annotated (2019), interest on claims, attorney's fees and agents' fees incurred in prosecuting a claim under the Act or an insurance policy, and adjusting costs incurred by an insurer or other third party with the rights of a subrogee that may be owed by a claimant as a consequence of receiving an award are not recoverable from FEMA. The cost to a claimant of prosecuting a claim under the Act does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 296.31(b).

(c) *Loss of property.* Compensatory damages may be awarded for an uninsured or underinsured property loss, a decrease in the value of real property, damage to physical infrastructure, cost resulting from lost subsistence, cost of reforestation or revegetation not covered by any other Federal program, and any other loss that the Administrator determines to be appropriate for inclusion as a loss of property.

(1) *Real property and contents.* Compensatory damages for the damage or destruction of real property and its contents may include the reasonable cost of reconstruction of a structure comparable in design, construction materials, size, and improvements, taking into account post-fire construction costs in the community in

which the structure existed before the fire and current building codes and standards. Compensatory damages may also include the cost of removing debris and burned trees, including hazardous materials or soils, stabilizing the land, replacing contents, and compensation for any decrease in the value of land on which the structure sat pursuant to paragraph (c)(3) of this section.

(2) *Reforestation and revegetation.* Compensatory damages may be awarded for the cost of replacement of destroyed trees and landscaping.

(3) *Decrease in the value of real property.* Compensatory damages may be awarded for a decrease in the value of real property that a claimant owned before the Hermit's Peak/Calf Canyon Fire if:

(i) The claimant sells the real property in a good faith, arm's length transaction that is closed no later than November 14, 2024 and realizes a loss in the pre-fire value; or

(ii) The claimant can establish that the value of the real property was significantly diminished long-term as a result of the Hermit's Peak/Calf Canyon Fire.

(4) *Subsistence.* Compensatory damages will be awarded for lost Subsistence Resources.

(i) FEMA may reimburse an injured party for the reasonable cost of replacing Subsistence Resources customarily and traditionally used by the claimant on or before April 6, 2022, but no longer available to the claimant as a result of the Hermit's Peak/Calf Canyon Fire. For each category of Subsistence Resources, the claimant must elect to receive compensatory damages either for the increased cost of obtaining Subsistence Resources from lands not damaged by the Hermit's Peak/Calf Canyon Fire or for the cost of procuring substitute resources in the cash economy.

(ii) FEMA may consider evidence submitted by claimants, Indian Tribes, and other knowledgeable sources in determining the nature and extent of a claimant's subsistence uses.

(iii) Compensatory damages for subsistence losses will be paid for the period between April 6, 2022 and the date when Subsistence Resources can reasonably be expected to return to the level of availability that existed before the Hermit's Peak/Calf Canyon Fire. FEMA may rely upon the advice of experts in making this determination.

(iv) Long-term damage awards for subsistence resources will be made to claimants in the form of lump sum cash payments.

(5) *Physical infrastructure.* Compensatory damages may be awarded for the damage to physical



infrastructure, including damages to irrigation infrastructure such as acequia systems.

(d) *Business loss.* Compensatory damages may be awarded for damage to tangible assets or inventory, including timber, crops, and other natural resources; business interruption losses; overhead costs; employee wages for work not performed; loss of business net income; and any other loss that the Administrator determines to be appropriate for inclusion as a business loss.

(e) *Financial loss.* Compensatory damages may be awarded for increased mortgage interest costs, insurance deductibles, temporary living or relocation expenses, lost wages or personal income, emergency staffing expenses, debris removal and other cleanup costs, costs of reasonable heightened risk reduction, premiums for flood insurance, and any other loss that the Administrator determines to be appropriate for inclusion as financial loss.

(1) *Recovery loans.* FEMA will reimburse claimants awarded compensation under the Act for interest paid on loans, including Small Business Administration disaster loans obtained after April 6, 2022 for damages resulting from the Fire. Interest will be reimbursed for the period beginning on the date that the loan was taken out and ending on the date when the claimant receives a compensation award (other than a partial payment). Claimants are required to use the proceeds of their compensation award to repay Small Business Administration disaster loans. FEMA will cooperate with the Small Business Administration to formulate procedures for assuring that claimants repay Small Business Administration disaster loans contemporaneously with the receipt of their compensation award.

(2) *Flood insurance.* FEMA will reimburse claimants for flood insurance premiums to be paid on or before May 31, 2024 if, as a result of the Hermit's Peak/Calf Canyon Fire, a claimant who was not required to purchase flood insurance before the Hermit's Peak/Calf Canyon Fire is required to purchase flood insurance or the claimant did not maintain flood insurance before the Fire but purchased flood insurance after the Fire due to fear of heightened flood risk. Alternatively, FEMA may provide flood insurance to such claimants directly through a group or blanket policy.

(3) *Out of pocket expenses for treatment of mental health conditions.* FEMA may reimburse an individual claimant for reasonable out of pocket expenses incurred for treatment of a mental health condition rendered by a

licensed mental health professional, which condition resulted from or was worsened by the Hermit's Peak/Calf Canyon Fire. FEMA will not reimburse for treatment identified after November 14, 2024.

(4) *Donations.* FEMA will compensate claimants for the cost of merchandise, use of equipment or other non-personal services, directly or indirectly donated to survivors of the Hermit's Peak/Calf Canyon Fire not later than November 14, 2022. Donations will be valued at cost.

(5) *Heightened risk reduction.* FEMA will reimburse claimants for the costs incurred to implement reasonable measures necessary to reduce risks from natural hazards heightened by the Hermit's Peak/Calf Canyon Fire to the level of risk prevailing before the Hermit's Peak/Calf Canyon Fire. Such measures may include, for example, risk reduction projects that reduce an increased risk from flooding, mudslides, and landslides in and around burn scars. Claimants seeking compensation for heightened risk reduction must include the claim in their Notice of Loss by November 14, 2024 or an amended Notice of Loss filed no later than November 14, 2025. Claimants should take into account current building codes and standards and must complete the risk reduction project for which they receive compensation.

(f) *Insurance and other benefits.* The Act allows FEMA to compensate Injured Persons only for damages not paid, and that will not be paid, by insurance or other third-party payments or settlements.

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

(2) *Coordination with FEMA's Public Assistance Program.* Injured Persons eligible for disaster assistance under FEMA's Public Assistance Program are expected to apply for all available assistance. Pursuant to the Act, the Federal share of the costs for Public Assistance projects is 100 percent. Compensation will not be awarded under the Act for injuries or costs that are eligible under the Public Assistance Program.

(3) *Benefits provided by FEMA's Individual Assistance program.* Compensation under the Act will not be awarded for injuries or costs that have been reimbursed under the Federal Assistance to Individual and Households Program or any other FEMA Individual Assistance Program.

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

(5) *Benefits provided by non-governmental organizations and individuals.* Gifts or donations made to a claimant by a non-governmental organization or an individual, other than wages paid by the claimant's employer or insurance payments, will be disregarded in evaluating claims and need not be disclosed to the Claims Office by claimants.

#### **§ 296.22–296.29 [Reserved]**

### **Subpart D—Claims Evaluation**

#### **§ 296.30 Establishing injuries and damages.**

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

(b) *Proof of Loss.* All claimants are required to attest to the nature and extent of each injury for which compensation is sought in the Proof of Loss. The Proof of Loss, which will be in a form specified by the Claims Office, must be signed by the claimant or the claimant's legal representative if the claimant is not an individual or is an individual who lacks the legal capacity to execute the Proof of Loss. The Proof of Loss must be signed under penalty of perjury. Non-subrogation claimants should submit a signed Proof of Loss to the Claims Office not later than 150 days after the date when the Notice of

Loss was submitted. This deadline may be extended at the discretion of the Director of the Claims Office for good cause. If a non-subrogation claimant fails to submit a signed Proof of Loss within the timeframes set forth in this section and does not obtain an extension from the Director of the Claims Office, the Claims Office may administratively close the claim and require the claimant to repay any partial payments made on the claim. Subrogation claimants will submit the Proof of Loss contemporaneously with filing the Notice of Loss.

(c) *Release and Certification Form.* All claimants who receive compensation under the Act are required to sign a Release and Certification Form, including for partial payments under § 296.33. The Release and Certification Form must be executed by the claimant or the claimant's legal representative if the claimant is an entity or lacks the legal capacity to execute the Release and Certification Form. A Release and Certification Form must be received by the Claims Office before the Claims Office provides payment on the claim. The United States will not attempt to recover compensatory damages paid to a claimant who has executed and returned a Release and Certification Form within the periods provided above, except in the case of fraud or misrepresentation by the claimant or the claimant's representative, failure of the claimant to cooperate with an audit as required by § 296.36 or a material mistake by FEMA.

(d) *Authority to settle or compromise claims.* Notwithstanding any other provision of this part, the Director of the Claims Office may extend an offer to settle or compromise a claim or any portion of a claim at any time during the process outlined in this part, which if accepted by the claimant will be binding on the claimant and on the United States, except that the United States may recover funds improperly paid to a claimant due to fraud or misrepresentation on the part of the claimant or the claimant's representative, a material mistake on FEMA's part or the claimant's failure to cooperate in an audit as required by § 296.36.

#### **§ 296.31 Reimbursement of claim expenses.**

(a) FEMA will reimburse claimants for the reasonable costs they incur in providing documentation requested by the Claims Office. FEMA will also reimburse claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions that the Claims Office deems necessary to

determine the amount of the claim. FEMA will not reimburse claimants for the cost of appraisals or other third-party opinions not deemed necessary by the Claims Office.

(b) FEMA will provide a lump sum payment for incidental expenses incurred in claims preparation to claimants that are awarded compensatory damages under the Act after a properly executed Release and Certification Form has been returned to the Claims Office. The amount of the lump sum payment will be the greater of \$150 or 5% of the Act's compensatory damages and insurance proceeds recovered by the claimant for Hermit's Peak/Calf Canyon Fire related injuries (not including the lump sum payment or monies reimbursed under the Act for the purchase of flood insurance) but will not exceed \$25,000. Subrogation claimants and claimants whose only Hermit's Peak/Calf Canyon Fire related loss is for flood insurance premiums will not be eligible.

#### **§ 296.32 Determination of compensation due to claimant.**

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

(b) *Claimant's options upon issuance of the Authorized Official's determination.* Not later than 120 days after the date that appears on the Authorized Official's determination, the claimant must either accept the determination by submitting a Release and Certification Form to FEMA and/or initiate an Administrative Appeal in accordance with § 296.41. Claimants must sign the Release and Certification Form to receive payment on their claims (including for partial payments). The claimant will receive payment of compensation awarded by the Authorized Official after FEMA receives the completed Release and Certification Form. If the claimant does not either submit a Release and Certification Form to FEMA or initiate an Administrative Appeal no later than 120 days after the date that appears on the Authorized Official's determination, the claimant will be conclusively presumed to have accepted the Authorized Official's determination. The Director of the Claims Office may modify the deadlines set forth in this subsection at the request of a claimant for good cause shown.

#### **§ 296.33 Partial payments.**

The Claims Office at the request of a claimant may make one or more partial

payments on any aspect of a claim that is severable. Receipt by a claimant of a partial payment is contingent on the claimant signing a Release and Certification Form for the severable part of the claim for which partial payment is being made. Acceptance of a partial payment in no way affects a claimant's ability to pursue an Administrative Appeal of the Authorized Official's determination or to pursue other rights afforded by the Act with respect to any portion of a claim for which a Release and Certification Form has not been executed. The Claims Office decision on whether to provide a partial payment cannot be appealed.

#### **§ 296.34 Supplementing claims.**

A claimant may amend the Notice of Loss to include additional claims at any time before signing a Proof of Loss. After the claimant has submitted a Proof of Loss and before submission of a Release and Certification Form, a claimant may request that the Director of the Claims Office consider one or more injuries not addressed in the Proof of Loss. The request must be submitted in writing to the Director of the Claims Office and received not later than the deadline for filing an Administrative Appeal under § 296.32 or November 14, 2024, whichever is earlier. It must be supported by the claimant's explanation of why the injury was not previously reported. If good cause is found to consider the additional injury, the Director will determine whether compensation is due to the claimant for the Loss under the Administrative Appeal procedures described in § 296.41.

#### **§ 296.35 Reopening a claim.**

The Director of the Claims Office may reopen a claim if requested to do so by the claimant, notwithstanding the submission of the Release and Certification Form, for the limited purpose of considering issues raised by the request to reopen if, not later than November 14, 2025, the claimant desires heightened risk reduction compensation in accordance with § 296.21(e)(5) or the claimant closed the sale of real property and wishes to present a claim for decrease in the value of the real property under § 296.21(c)(3). Claimants may request to reopen claims where the claimant has incurred additional losses under § 296.21(c)(1) as part of a reconstruction in excess of those previously awarded or the Director of the Claims Office otherwise determines that claimant has demonstrated good cause no later than the deadline established by the Director of the Claims Office as published in the **Federal**

Register and at <https://www.fema.gov/hermits-peak>.

#### **§ 296.36 Access to records.**

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

#### **§ 296.37 Confidentiality of information.**

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

#### **§ 296.38–296.39 [Reserved]**

### **Subpart E—Dispute Resolution**

#### **§ 296.40 Scope.**

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

#### **§ 296.41 Administrative appeal.**

(a) *Notice of appeal.* A claimant may request that the Director of the Claims Office review the Authorized Official's determination by written request to the Appeals Docket, Office of Hermit's Peak/Calf Canyon Claims, postmarked or delivered within 120 days after the date that appears on the Authorized Official's determination pursuant to § 296.32. The claimant will submit along with the notice of appeal a statement explaining why the Authorized Official's determination was incorrect. Information regarding where to file can be found at <http://www.fema.gov/hermits-peak>.

(b) *Acknowledgement of appeal.* The Claims Office will acknowledge receipt of an appeal. Following the receipt of a timely filed appeal, the Director of the Claims Office will obtain the Administrative Record from the Authorized Official and transmit a copy to the claimant.

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

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

(e) *Obtaining evidence.* The Director of the Claims Office may request from the claimant or from the Authorized Official any additional information that is relevant to the issues posed by the appeal in their discretion.

(f) *Conferences.* The Director of the Claims Office may schedule a conference to gain a better understanding of the issues or to explore settlement or compromise possibilities. The claimant may also request a conference. Conferences will generally be conducted virtually. In limited circumstances, the Director may convene an in-person conference at a location in New Mexico designated by the Director. A claimant may request that the Director of the Claims Office appoint a mediator at FEMA's expense to facilitate such conferences.

(g) *Hearings.* The Director of the Claims Office may exercise the discretion to convene an informal hearing to receive oral testimony from witnesses or experts. The rules under which hearings will be conducted will be established by the Director of the Claims Office and provided to the claimant. Formal rules of evidence applicable to court proceedings will not be used in hearings under this subsection. Hearings will generally be conducted virtually, be transcribed, and the transcript will be entered in the Administrative Record. In limited circumstances, the Director may convene an in-person hearing at a location in New Mexico designated by the Director.

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

(i) *Claimant's options following appeal.* The claimant's concurrence with the decision in the Administrative Appeal will be conclusively presumed unless the claimant initiates arbitration in accordance with § 296.42 or seeks judicial review in accordance with § 296.43. If the claimant concurs with the Director's determination, payment of any additional damages awarded by the Director will be made to the claimant upon receipt of a properly executed Release and Certification Form.

#### **§ 296.42 Arbitration.**

(a) *Initiating arbitration.* A claimant who is dissatisfied with the outcome of the Administrative Appeal may elect to submit the dispute to a binding arbitration process. A claimant may initiate arbitration by submitting a written request to the Arbitration Administrator for Hermit's Peak/Calf Canyon Claims. Additional information regarding how to submit a written arbitration request can be found at <http://www.fema.gov/hermits-peak>. The written request for arbitration must be electronically stamped or postmarked no later than 60 days after the date that appears on the Administrative Appeal decision.

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

(c) *Selection of arbitrator.* The Arbitration Administrator will maintain a list of qualified arbitrators who have agreed to serve. The arbitration will be decided by one arbitrator if the amount in dispute is \$500,000 or less and a panel of three arbitrators if the amount in dispute exceeds \$500,000. Arbitrators will be assigned by the Arbitration Administrator through a random drawing.

(d) *Conduct of arbitration.* Pursuant to guidelines from the Arbitration Administrator, which will be provided directly to claimants who have filed a request for arbitration, the arbitration process will include an arbitration hearing with consideration of the claimant's written request for arbitration, the Administrative Record, and oral testimony. Hearings will generally be conducted virtually. In limited circumstances, the arbitrator may convene an in-person hearing at a location in New Mexico designated by the Arbitration Administrator.

(e) *Decision.* After a hearing and reviewing the evidence, the arbitrator(s)

will render a written decision and will transmit the decision to the Arbitration Administrator, the claimant, and the Director of the Claims Office. If a panel of three arbitrators conducts the arbitration, at least two of the three arbitrators must sign the decision. The arbitrator(s) should render a decision no later than 10 Days after a hearing is concluded. The Arbitration Administrator may extend the time for a decision with notice to the claimant and the Director of the Claims Office. The decision will establish the compensation due to the claimant, if any, and the reasons therefor.

(f) *Action on arbitration decision.* The Arbitration Administrator will forward the arbitration decision to the claimant and, if additional compensation is awarded to the claimant, a Release and Certification Form. Additional compensation awarded in the

arbitration will be paid to the claimant after the signed Release and Certification Form is received by the Arbitration Administrator.

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

(h) *Administration of arbitration.* The Arbitration Administrator oversees arbitration procedures and will resolve any procedural disputes arising in the course of the arbitration.

(i) *Expenses.* The Arbitration Administrator will pay all fees and expenses of the arbitrator(s). The claimant is responsible for any expenses they incur, including travel costs.

#### **§ 296.43 Judicial review.**

As an alternative to arbitration, a claimant dissatisfied with the outcome of an Administrative Appeal may seek judicial review of the decision by bringing a civil lawsuit against FEMA in the United States District Court for the District of New Mexico. This lawsuit must be brought within 60 Days of the date that appears on the Administrative Appeal decision. Pursuant to section 104(i) of the Act, the court may only consider evidence in the Administrative Record. The court will uphold FEMA's decision if it is supported by substantial evidence on the record considered as a whole.

**Deanne Criswell,**

*Administrator, Federal Emergency Management Agency.*

[FR Doc. 2023-18457 Filed 8-28-23; 8:45 am]

**BILLING CODE 9111-68-P**