

**FEDERAL EMERGENCY  
MANAGEMENT AGENCY****44 CFR Part 295**

RIN 3067-AD12

**Disaster Assistance; Cerro Grande Fire  
Assistance**

**AGENCY:** Office of Cerro Grande Fire Claims, Federal Emergency Management Agency (FEMA).

**ACTION:** Final rule.

**SUMMARY:** This final rule implements the Cerro Grande Fire Assistance Act (CGFAA), Public Law 106-246, and supersedes the interim final rule that we published on August 28, 2000 [65 FR 52260]. It applies to claims that were filed before the effective date of the final rule and claims filed after the effective date of the final rule, unless this rule provides otherwise.

**EFFECTIVE DATE:** March 21, 2001.

**FOR FURTHER INFORMATION CONTACT:** For further information on this regulation please contact Nathan Bergerbest, Office of the General Counsel, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, (202) 646-2685, or (e-mail) [nathan.bergerbest@fema.gov](mailto:nathan.bergerbest@fema.gov). For claims forms and customer service information contact the Cerro Grande Fire Claims Administrative Office, Post Office Box 1480, Los Alamos, New Mexico 87544-1480, (telephone) 1-888-748-1853 (toll-free).

**SUPPLEMENTARY INFORMATION:** The CGFAA requires that FEMA administer a program to provide compensation to survivors of the May 2000 Cerro Grande Fire in northern New Mexico. The Act required that FEMA publish implementing regulations within 45 days of enactment. FEMA met this deadline by publishing the interim final rule on August 28, 2000 [65 FR 52260]. Due to the short period of time for completion of the interim final rule, it was published without opportunity for public comment.

FEMA accepted public comment on the interim final rule for a sixty-day period, which closed on October 27, 2000. FEMA received 69 written comments by mail and e-mail from various stakeholders, including the Cerro Grande Fire Survivors' Association, Los Alamos County, the Pueblo of Santa Clara, the Rio Grande Chapter of the Appraisal Institute and several insurance industry trade associations. These statistics include 15 written comments submitted to FEMA before the interim final rule was issued. The 69 comments addressed 81 issues.

We found all of the comments to be relevant and constructive. We considered each comment carefully in formulating this final rule.

**Sectional Analysis**

**Subpart A.** Subpart A of the final rule (§§ 295.1-295.7) provided general information on the CGFAA. We have made several editorial changes to § 295.5, which provides an overview of the claims process, to reflect amendments to §§ 295.30 and 295.32 of the interim final rule and to highlight the relationship between these sections and § 295.21(a).

Section 295.6 of the interim final rule addressed partial payments. A commenter suggested that partial payments should be made for at least 70% of the claim amount, with expedited payments to those in need. We have not amended § 295.6 because we believe that the existing language provides FEMA with sufficient discretion to make partial payments of any amount and to expedite payments when it is appropriate to do so. The amount of a partial payment in any particular case will depend upon the nature of the claim and in some cases, how well the claim is supported. We encourage Claimants who require expedited payments to discuss the matter with a Claims Reviewer.

A new § 295.7 authorizes the Director of OCGFC to offer Claimants an opportunity to settle or compromise a claim in whole or part.

One commenter asked whether Claimants have access to policies adopted by the Office of Cerro Grande Fire Claims. We post copies of these policies on the World Wide Web at <http://www.fema.gov/cerrogrande>. They also are available for public inspection at OCGFC Customer Service Centers. The commenter also asked how members of the public might comment on the implementation of the CGFAA. Comments may be directed to the Director of OCGFC, Cerro Grande Fire Claims Administrative Office, Post Office Box 1480, Los Alamos, NM 87544-1480 or dropped in one of the suggestion boxes that are in each of the Customer Service Centers.

**Subpart B.** Subpart B explains the process for bringing a claim under the CGFAA. We are clarifying §§ 295.10(a) and 295.11 to remind Claimants that the Notice of Loss must contain a brief description of each Loss. The term "Loss" is defined in Subpart F of the final rule, § 295.50.<sup>1</sup> This is important

<sup>1</sup> The term "Loss" refers to one of the several categories of compensable personal injuries, property losses, business losses, and financial

because FEMA cannot provide compensatory damages for a Loss unless the Claimant has reported it to FEMA by August 28, 2002. §§ 295.33 and 295.34 of the final rule establish a process for notifying FEMA about Losses that are not mentioned in the initial Notice of Loss. However a Claimant tells FEMA about a Loss, whether in the initial Notice of Loss, an amendment under § 295.33 or a request to reopen the claim under § 295.34—we must know about the Loss by August 28, 2002.<sup>2</sup>

We amended § 295.10(c) of the interim final rule to clarify who must sign the Notice of Loss. If the Claimant is an entity<sup>3</sup> or an individual who lacks the legal capacity to sign the Notice of Loss, then and only then can a duly authorized legal representative of the Claimant sign the Notice of Loss. The same principle applies to affidavits submitted in support of claims, the Proof of Loss, and the Release and Certification Form. Public adjusters and attorneys should not sign CGFAA documents on behalf of individual Claimants who have the legal capacity to execute these documents. OCGFC will audit Notices of Loss that were filed under the interim final rule. If we determine that an attorney, public adjuster or other representative signed a Notice of Loss, which should have been signed by an individual Claimant, we will require that the Claimant submit a written ratification of the Notice of Loss. The Claimant will need to execute this ratification under penalty of perjury and subject to the provisions of 18 U.S.C. 1001, which provides penalties for false statements.

Section 295.10(e) of the interim final rule does not permit the submission of Notices of Loss by facsimile. One

losses described in § 104(d)(4) of the CGFAA and in this regulation. A Claimant must tell us about his or her Losses in general terms in the Notice of Loss. A complete inventory of lost household effects need not be included in the Notice of Loss. For example, a Claimant who claims that household effects or personal property were lost to the Cerro Grande Fire may obtain compensation for a destroyed toaster, even though the toaster is not specifically listed on the Notice of Loss. However, Claimants who seek damages for personal injuries or losses involving real estate should describe the injury suffered with reasonable specificity.

<sup>2</sup> There are a few exceptions to this rule. A Claimant who tells FEMA that his or her home was damaged or destroyed by the Cerro Grande Fire may seek mitigation compensation under § 295.21(d) without specifically mentioning it on the Notice of Loss. Similarly, eligible Claimants are eligible to receive a lump sum payment under § 295.31(b) for incidental expenses incurred in claims preparation, without having to request these funds specifically in the Notice of Loss.

<sup>3</sup> Entities are organizations such as corporations, sole proprietorship businesses (d/b/a's), partnerships, limited liability companies, trusts, estates, unincorporated associations, cooperatives, Indian tribes and government agencies.

commenter suggested that FEMA should reconsider the decision. We have decided to retain the present policy because we believe that it substantially reduces the risk of lost documents.

#### *Withdrawal of CGFAA Claims*

Commenters suggested that Claimants should have a short period following publication of the final rule to withdraw their claims under the CGFAA and pursue them under other mechanisms. FEMA believed that there was merit in the suggestion. However, FEMA cannot unilaterally implement regulations providing CGFAA Claimants with an opportunity to pursue their claims under other legal mechanisms, such as the Federal Tort Claims Act. We must consult with the Department of Justice and the Department of the Interior before making policy in this area.

FEMA has discussed this issue with the Department of Justice and the Department of the Interior. The Department of Justice concluded that providing CGFAA Claimants with an opportunity to withdraw their fire act claims and proceed under other mechanisms, including the Federal Tort Claims Act, is contrary to Section 104(h) of the CGFAA. FEMA must respect this conclusion.

#### *Subrogation Claims*

Section 295.13 of the interim final rule addressed subrogation claims. A number of comments addressed subrogation issues. An individual commenter suggested that FEMA should penalize insurance companies for delays in processing the claims of their policyholders by reducing subrogation payments under the CGFAA. Another commenter suggested that insurance companies receiving subrogation payments should be required to refund premiums to injured policyholders and be limited in the rates they charge injured policyholders in the future. FEMA lacks the authority under the CGFAA or any other law to regulate the conduct of insurance companies.

Two comments from the insurance industry suggested that FEMA should request any additional information it needs to process a subrogation claim within 30 days of its submission. We have not adopted this suggestion because the law authorizes us to seek additional information concerning a claim at any time while we are evaluating the claim.

Two insurance industry commenters asked whether FEMA would reimburse insurance companies for monies paid to injured policyholders, which was not required to be paid under the terms of the policy. The issue arose in two

different contexts—the first in which the insurance company has paid an injured policyholder's living expenses in excess of policy limits. The other scenario involves the case in which the insurance company is not required to pay a policyholder for the cost of replacing a home unless the policyholder actually rebuilds. The OCGFC has provided guidance to the insurance industry on this issue. The guidance provides that OCGFC may reimburse insurance companies for reasonable payments, not required by the policy, made to injured policyholders on or before October 25, 2000. The OCGFC will not entertain subrogation claims for payments made in excess of policy limits or contrary to policy terms made after October 25, 2000.

An insurance industry commenter suggested that their adjuster's determination of Loss should be binding on FEMA when considering a subrogation claim. The CGFAA requires that FEMA determine and fix the compensation due to all Claimants, including subrogation claimants. We cannot exempt subrogation claims from our evaluation process simply because a professional adjuster was involved in the formulation of the claim.

Several comments related to § 104(d)(1)(A)(ii) of the CGFAA, which suggests that FEMA should not pay subrogation claims until other claims have been paid. An individual commenter suggested that FEMA not pay any insurance subrogation claim until the insurance company has settled all of its obligations to policyholders who suffered damage from the Cerro Grande Fire. An insurance industry commenter suggested that it is appropriate for FEMA to process and pay a subrogation claim when an insurer has fulfilled its obligations to a particular policyholder. Another insurance industry commenter suggested that the OCGFC should consider partial payments on subrogation claims.

After considering these comments, we decided to amend § 295.6. FEMA will not accept a subrogation claim to recover payments made on an insurance policy until the insurer has paid the insured everything that the insurer believes that the insured is entitled to receive under the policy. A Subrogation Notice of Loss may be filed if there is a dispute between the insurer and the insured, which is pending before a third-party (e.g., appraiser, arbitrator or court), provided that the insurer has made the final payment that it believes that the insured is entitled to receive under the policy. We must receive the

Subrogation Notice of Loss by August 28, 2002.

*Subpart C.* Subpart C of the interim final rule addressed damages available under the CGFAA. By far, the greatest number of comments submitted pertained to Subpart C issues. Before we published the interim final rule, Los Alamos County suggested that we publish a comprehensive, non-restrictive listing of the types of items that we can compensate a Claimant for under the Act. We sought comment on whether we should accept this suggestion.

Numerous commenters suggested that we rule on whether specific losses are compensable. None suggested that we provide a comprehensive list of Losses that are compensable or eligible damages. FEMA continues to believe that we should consider the unique facts of each claim before making final decisions about whether losses are compensable and how to compensate Claimants for their losses. Claimants should not assume that a loss resulting from the Cerro Grande fire is not compensable simply because the regulations fail to address it specifically. Claimants should include all losses resulting from the Cerro Grande fire on the Notice of Loss.

#### *Exclusions*

We received a significant number of comments on § 295.21(b), which addresses compensation not available under the CGFAA. Section 295.21(b) provides that FEMA will not reimburse Claimants for taxes owed as a consequence of receiving a CGFAA payment. One commenter suggested that the interim final rule be amended to make payments under the CGFAA tax-free. FEMA is not authorized under the CGFAA to determine the tax treatment of the payments that we make. We encourage Claimants to consult with their tax advisors or tax agencies about the tax consequences of receiving a CGFAA payment. FEMA has encouraged the tax agencies to implement public information programs concerning these issues.

Section 295.21(b) also provides that we will not reimburse attorneys' and agents' fees. We intend the exclusion to apply to attorneys' and agents' fees incurred in the prosecution of a CGFAA claim. We also note that neither New Mexico law nor the CGFAA regard attorneys' fees and agents' fees incurred in the prosecution of an insurance claim as compensatory damages.

Fifteen commenters suggested that we reimburse public adjuster fees in whole or in part. We considered the issue with an open mind. After careful reflection,

we concluded that it is not appropriate to reimburse Claimants for public adjuster fees. We looked to New Mexico law and the Federal Tort Claims Act for guidance in resolving this question. Under New Mexico law public adjuster fees, like attorneys' fees, are not regarded as compensatory damages in tort actions. These fees are also not recoverable in Federal Tort Claims Act lawsuits.

A number of Claimants argued that public adjuster fees should be reimbursed under the rubric of claims preparation expenses. The cost of organizing and presenting a claim is not regarded as compensatory damages in tort actions under New Mexico law nor is it recoverable in a Federal Tort Claims Act lawsuit.<sup>4</sup> For these reasons we are unable to adopt the suggestion.

A commenter suggested that Claimants should not be prejudiced by their decision to work with a public adjuster. The decision on whether to use a public adjuster or other representative is the Claimant's alone. FEMA will not treat a Claimant who chooses to work with an attorney, public adjuster or other agent more favorably or less favorably than a Claimant who chooses to represent him or herself in the claims process.

We also have considered whether statutory double damages provided in § 30-32-4 of the New Mexico Statutes Annotated (1978) may be recovered under the CGFAA. The CGFAA provides that punitive damages are not recoverable. While we have not identified any New Mexico or federal court decision addressing the specific question of whether statutory damages under § 30-32-4 are compensatory damages or punitive damages, the New Mexico Supreme Court noted in *Hale v. Basin Motor Company*, 110 N.M. 314, 320, 795 P.2d 1006, 1012 (1990) that "multiplication of damages pursuant to statutory authority is a form of punitive damages." Congress did not authorize FEMA to pay statutory damages under § 30-32-4 in the CGFAA or its legislative history. It also failed to appropriate sufficient funds to pay damages in accordance with § 30-32-4. These facts lead us to conclude that Congress believed statutory damages under § 30-32-4 are punitive damages, rather than compensatory damages.

#### Home Replacement

Section 295.21(d) of the interim final rule set out our approach to

<sup>4</sup> FEMA has exercised the discretion afforded by the CGFAA to make a lump sum payment to eligible Claimants for miscellaneous and incidental expenses. See, § 295.31(b) of the final rule. Public adjuster fees can be paid from this allowance.

compensating those whose homes were destroyed by the Cerro Grande fire. The preamble to the interim final rule suggested that FEMA would look to construction costs in northern New Mexico when determining Replacement Cost of a home. Two commenters noted that there are variations in construction costs among communities in northern New Mexico. We have always intended to consider construction costs in the locality that a damaged or destroyed home existed before the fire in determining Replacement Costs. We made a clarifying revision to § 295.21(d). We also defined the term "Replacement Cost" in § 295.50.

A number of comments addressed the Home Replacement Policy, adopted by OCGFC on November 1, 2000.

Ordinarily we would not respond to comments concerning a policy in the preamble to a final rule. We are making an exception in this case because it is important for Claimants to understand how the Home Replacement Policy fits within the final rule.

Option I of the Home Replacement Policy offers those Claimants whose homes were lost to the fire an opportunity to receive a lump sum payment for most of their home replacement costs. This lump sum offer is a type of compromise or settlement authorized by § 295.7 of the final rule. Claimants who elect Option I will receive a lump sum payment for eligible home replacement costs under the terms of the policy, not under § 295.21(d) of the final rule. While many Claimants have indicated to OCGFC that they will be able to replace their homes satisfactorily with the funds made available through Option I, some Claimants continue to believe that Option I is inadequate. These Claimants should elect Option II. Option II damages will be determined in accordance with § 295.21(d).

A commenter argued that FEMA should periodically adjust the lump sum award under Option I upward to account for inflation. OCGFC believes that it is important to address this question at this juncture so that Claimants do not delay their home replacement decision in the mistaken belief that the terms of the Option I will change over time. FEMA does not intend to change the square foot replacement rates specified in Option I of the Home Replacement Policy. Claimants who do not expect to rebuild immediately can protect their payments against inflation by prudently investing the funds until they are needed for construction. Option I payments will not be Discounted to Present Value. Claimants who remain concerned that

inflation might erode the Option I award may find that Option II is more advantageous.

One commenter suggested that the lump sum payment for a duplex that was converted to a single-family home should be compensated at the Option I rate for single-family homes. FEMA will not consider modifications made to the dwelling before the fire in determining which square foot replacement rate applies. A dwelling that was originally constructed as a duplex will be compensated as a duplex.

An insurance industry commenter suggested that the Option I square foot replacement rates are unduly generous. FEMA disagrees. The square foot replacement rates were calculated after consultations with a reputable local architect and local contractors. These rates represent our estimate of reasonable Replacement Costs in the post-fire marketplace. FEMA expresses no opinion as to whether insurance companies were mandated to offer replacement cost settlements comparable to Option I under the terms of their policies.

The Home Replacement Policy provides that FEMA will not "compensate for costs to replicate construction materials that are no longer readily available, that do not meet code or that are not reasonably necessary to replace the home." Several commenters took issue with this section of the policy. FEMA believes that this statement is consistent with § 295.21(d) and the CGFAA. Replacement Cost is the cost of reconstructing something that is comparable in quality and utility to that which was destroyed.<sup>5</sup> The term does not require that FEMA compensate Claimants to construct an exact replica using outdated construction materials that may have been standard or low cost in their day.

A commenter suggested that FEMA provide an upgrade allowance on the theory that some homes destroyed by the fire were constructed with more durable materials than are available today. Our obligation under the CGFAA is to provide sufficient funds for a homeowner to rebuild a home comparable in quality and utility to the home that the Cerro Grande fire destroyed. Section 295.21(d) provides that we will fund upgrades to meet current codes. A mitigation allowance is made available over and above Replacement Cost.

A commenter inquired whether FEMA would compensate a quad or duplex owner for the cost of buying out the interests of other owners in order to

<sup>5</sup> See Subpart F, § 295.50 of the final rule.

reconstruct a home on the same site. FEMA does not believe that it is reasonable to compensate the owner of a quad unit for the cost of buying out the other three owners.

#### *Replacement Cost for Trees and Landscaping*

Section 295.21(d) of the interim final rule and the preamble indicated that Replacement Cost includes the reasonable cost of returning one's lot to pre-fire condition. OCGFC has issued a policy on how we will calculate a reasonable Replacement Cost for trees and landscaping lost to the fire. We developed the policy, which was issued on October 20, 2000, in consultation with arborists and after reviewing the Guide for Plant Appraisal, 9th Ed., authored by the Council of Tree and Landscape Appraisers. The policy provides that FEMA will compensate for the cost of replacing lost trees and landscaping in an amount up to 25% of the pre-fire value of the structure and lot.

Numerous comments addressed compensation for trees and landscaping. One of the commenters complimented FEMA for adopting the policy. Other commenters suggested that FEMA should reimburse Claimants for the costs that they actually incur in replacing trees, regardless of the cost.

Under New Mexico tort law, damages are awarded for destroyed or damaged trees based upon the value of the trees destroyed or the difference in the value of the real estate with and without the trees. This is a less generous formula than Replacement Cost. The legislative history of the CGFAA suggests that FEMA should use Replacement Cost as the measure of damages for replacement of real and personal property, however it did not speak directly to trees and landscaping. FEMA believes that the Replacement Cost calculation it has established is consistent with the legislative intent and is incorporating the policy into § 295.21(d).

#### *Mitigation for Homeowners Who Rebuild Under § 295.21(d)*

Section 104(d)(4)(C)(vii) of the CGFAA grants FEMA the authority to compensate for mitigation to address future wildfires, floods or other natural disasters as a component of financial loss. This section of the CGFAA also empowers FEMA with discretion to determine the reasonableness of mitigation compensation requests. Section 295.21(d) of the final rule provides that FEMA will compensate rebuilding homeowners for mitigation measures in an amount not to exceed 15% of compensation from all sources,

i.e., the CGFAA, insurance and FEMA disaster assistance, to restore the structure and lot to its pre-fire condition.

We also have revised § 295.21(d) to clarify the procedures for obtaining mitigation compensation. In order to obtain mitigation compensation under § 295.21(d), a Claimant must have a Notice of Loss that claims damage from the Cerro Grande fire to residential real property (home and/or lot) owned by the Claimant at the time of the fire. This Notice of Loss must be on file by August 28, 2002. A separate Request for Mitigation Assistance on an OCGFC form must be submitted not later than August 28, 2003. This is the deadline provided by Section 104(d)(4)(C)(vii) of the CGFAA. Claimants who receive mitigation compensation must construct the mitigation measures they have applied for. FEMA will audit the use of mitigation funds and can recoup funds which were paid for the construction of mitigation measures but were not properly spent.

A number of comments addressed § 295.21(d) of the interim final rule as it relates to mitigation. One of the commenters suggested that mitigation funds be available under § 295.21(d) to Claimants who suffered smoke damage or repairable structural damage to their home and to those who suffered damage to their lot and/or landscaping. FEMA accepts this suggestion. The term "Destruction of a Home" has been defined in Subpart F, § 295.50 to include these types of losses. This change enables FEMA to extend mitigation funds under § 295.21(d) to those Claimants who did not experience the total loss of a home as well as those Claimants that did.

Two commenters suggested that mitigation funds should be available to those who lost their homes but choose to purchase an existing home or rebuild on another site. Section 295.21(d) authorizes FEMA to compensate Claimants for mitigation measures "that will reduce the property's vulnerability to the future risk of wildfire, flood or other natural disasters related to the Cerro Grande Fire." We interpret this provision to mean that anyone who lost a home to the Cerro Grande fire and who chooses to either build or purchase a home within the boundaries of Los Alamos, Rio Arriba, Sandoval or Santa Fe counties (including the Indian reservations and pueblos sited within those counties, such as the Santa Clara Pueblo and the San Ildefonso Pueblo) may seek mitigation funds. We have selected these counties because the Cerro Grande fire passed through them. Anyone who lost a home to the Cerro

Grande fire but who chooses to rebuild in one of the other New Mexico counties which were part of the disaster area referred to in § 102(a)(4) of the CGFAA may be eligible for mitigation funds if the Claimant can demonstrate an increased risk of fire, flood or other natural disaster at the new location as a result of the Cerro Grande fire.

Several comments addressed the prerequisites to obtaining mitigation compensation in the interim final rule. In response to these comments, we are amending § 295.51(d) to provide that a Claimant need not obtain local government approval of his or her proposed mitigation measures if none is required under applicable law or an agreement between OCGFC and the local government. However, if a permit, or other land use approval is required to construct the mitigation measures under federal, state, local or tribal law or a clearance is required under an agreement between a governmental entity and OCGFC, the permit, approval or clearance must be obtained before construction begins. OCGFC expects to enter into an agreement with Los Alamos County that will require local government approval before we will provide mitigation compensation for defensible space. Claimants should consult with the Claims Reviewer to determine whether OCGFC has entered into any other agreements concerning mitigation before construction begins.

We also are relaxing the requirement that Claimants must obtain our approval of the proposed mitigation measures well before their construction. This requirement was initially formulated in response to concerns that environmental and historic preservation reviews required by law cannot be meaningfully undertaken after construction has begun. Since we have discretion to fund or not fund mitigation measures under § 104(d)(4)(C)(vii) of the CGFAA, we must consider environmental and historic preservation issues when exercising this discretion.

We will consider compensating property owners for mitigation measures after construction has begun or has been completed, but only if those requests qualify for a categorical exclusion under the National Environmental Policy Act. The criteria for categorical exclusions are explained in our agency-wide environmental review regulations which appear at 44 C.F.R. 10.8(d). A list of mitigation measures that fall within the categorical exclusions is available from the OCGFC. In addition, the mitigation measures cannot raise issues under other applicable environmental or historic preservation statutes.

While we anticipate that many mitigation projects will meet these criteria, property owners who do not obtain our pre-approval of such measures run the risk that we will not be able to pay for them. Accordingly, we continue to encourage property owners to apply for mitigation funds well in advance of construction.

One commenter suggested that mitigation funds should be made available to homeowners who did not suffer any damage to their home or lot from the Cerro Grande Fire. These property owners may seek mitigation compensation under § 295.21(h) of the final rule, provided that they experience an increased risk of wildfire, flood or other natural disaster caused by the Cerro Grande fire and the community has provided for individual mitigation projects in its Mitigation Compensation Plan. They are not eligible for mitigation compensation under § 295.21(d). A commenter suggested that FEMA make low interest loans available to those Claimants who wish to undertake flood mitigation projects for which compensation is not available under the CGFAA. The CGFAA does not provide us with any authority to make loans.

#### *Real Estate Valuation Issues*

Section 295.21(e) is intended to implement Section 104(d)(4)(A)(ii) of the CGFAA, which authorizes FEMA to pay "otherwise uncompensated damages resulting from the Cerro Grande fire for \* \* \* a decrease in the value of real property." Section 295.21(e)(1) of the interim final rule provided for compensation of realized losses, while § 295.21(e)(2) was addressed to unrealized losses.

We are amending the § 295.21(e)(1) and (2), to allow us to compensate for realized losses in the value of real property, i.e., land and structure, to the extent that such losses have not been fully compensated either through the Replacement Cost award under § 295.21(d)(1) or otherwise. Section 295.21(e)(1) and (2) of the interim final rule did not allow us to compensate for an otherwise uncompensated loss of value to the structure. We have amended § 295.21(e)(2) to clarify that FEMA will only compensate for unrealized losses in the value of real estate that are permanent in nature. This is consistent with New Mexico law. We also have amended both sections to clarify that they apply only to residential real estate. Losses involving the value of commercial real estate will be evaluated on a case by case basis, rather than under § 295.21(e).

#### *Mitigation Under § 295.21(h)*

Section 295.21(h) addresses mitigation projects that are not eligible under § 295.21(d). Section 104(d)(4)(c)(vii) of the CGFAA authorizes FEMA to compensate Claimants for reasonable mitigation measures, as determined by the Director. The final rule budgets up to 15% of the \$455 million appropriated by Congress for the payment of fire claims and 15% of any subsequent appropriations for the payment of fire claims to fund reasonable mitigation measures under § 295.21(h). However, it is our intention to only fund mitigation measures that we believe will reduce risks that were heightened by the Cerro Grande fire and which make sense in our professional judgment.

Several amendments made to § 291.21(h) clarify the deadlines for seeking compensation for specific mitigation projects undertaken pursuant to FEMA-approved Mitigation Compensation Plans. In order to obtain mitigation compensation under § 295.21(h), a Claimant must have a Notice of Loss on file with OCGFC, even if the Claimant's only Cerro Grande Fire related losses are for mitigation expenses. This Notice of Loss must specifically denote mitigation expense as an item of Loss and must be on file by August 28, 2002. A separate request for compensation of specific mitigation measures must be submitted not later than August 28, 2003. The mitigation measures that are funded must be constructed.

A Claimant may request mitigation compensation before, during or after construction work on the mitigation measures begins. However, environmental and historic preservation reviews of the mitigation activity must be conducted. We will not approve mitigation compensation if the Claimant started construction before receiving our approval unless the mitigation activities qualify for a categorical exclusion under the National Environmental Policy Act and do not raise issues under other applicable environmental or historic preservation statutes.

One commenter suggested that our approval of Mitigation Compensation Plans submitted by governmental entities under § 295.21(h) should be conclusively presumed if we have not approved them within 30 days of the date when they were submitted. OCGFC plans to complete its review of Mitigation Compensation Plans within 60 days of submission. In some cases, we may require additional time to consider a Mitigation Compensation Plan. We do not believe that it is

appropriate to impose an inflexible deadline for approval of Mitigation Compensation Plans.

#### *Other Losses*

Numerous comments suggested that the Director of FEMA exercise his discretion to establish new categories of compensable Loss as permitted by various provisions of the CGFAA. We adopted a few of these suggestions. However, we reserve the discretion to establish new categories of compensable Loss if merited by particular cases.

Two commenters suggested that we compensate for flood insurance premiums incurred by Claimants who are concerned that the fire may have increased the risk of flood. One commenter suggested that we should not compensate for flood insurance premiums if the Claimant is not at risk of flooding due to natural features. Section 104(d)(4)(C)(viii) of the CGFAA authorizes us to compensate those Claimants who were not required to maintain flood insurance before the fire, but are required to maintain flood insurance as a consequence of the fire for premiums incurred through May 12, 2002. We believe that the statutory language is too restrictive to compensate all of those who legitimately may desire to obtain flood insurance out of the fear of heightened flood risk. Because there has not been sufficient time to revise flood zone maps since the Cerro Grande fire, some Claimants who may have legitimate reason for concern may not be "required" to maintain flood insurance. We have decided to exercise the discretion to establish a new category of financial loss to address these concerns. A new § 295.21(j) of the final rule addresses flood insurance.

Two commenters from the insurance industry asked us to provide for the reimbursement of catastrophic claims expenses as a business or financial loss. These expenses cannot be recovered as part of a subrogation claim. Under New Mexico law, claim adjustment expenses are not regarded as compensatory damages but costs. The CGFAA provides for recovery of compensatory damages, not costs. We amended § 295.21(b) of the final rule to indicate that insurance company claims expenses are not compensable under the Act.

We are also exercising the discretion under the CGFAA to compensate individual Claimants who have incurred reasonable out of pocket expenses for the treatment of a mental health condition resulting from the Cerro Grande fire which are not covered by insurance. Reimbursement will be available only if the condition cannot be

effectively treated through no-cost outpatient crisis counseling services in the communities affected by the Cerro Grande fire. This new category is described in § 295.21(k) of the final rule. Damages for mental health conditions are not recoverable under New Mexico law, except in a very limited class of cases. We will not entertain subrogation claims for mental health treatment unless those expenses could be recovered in a tort action under New Mexico law.

In the preamble to the interim final rule, we sought comment on whether we should reimburse those who provided merchandise, equipment or other items of value to fire victims without charge or at a discount. We have decided to create a new category of financial loss for donations. This new category is described in § 295.25(l) of the final rule.

#### *Duplication of Benefits*

We have relocated the duplication of benefits provisions, which appeared in § 295.21(i) of the interim final rule, to § 295.21(m) of the final rule. Two comments addressed the duplication of benefits provisions. The first comment, submitted by an insurance industry commenter, pertains to debris removal. The commenter suggests that we should reimburse insurance companies that made debris removal payments to policyholders in cases where Los Alamos County removed the debris at no cost to the policyholder. Insurance companies may seek reimbursement of these payments in their subrogation claims. However, we will not reimburse insurers in cases where the debris was removed by Los Alamos County unless the insurance policy required that the payment be made to the policyholder notwithstanding that such services were provided free of charge to the policyholder by the local government.

The second comment asks us to interpret § 104(d)(1)(C) of the CGFAA, which provides that compensatory damages will be reduced by the amount of insurance proceeds that will be paid. If a Claimant has not settled with the insurance company by the time we are prepared to make a partial payment on the claim, we will examine the insurance policy and determine what we reasonably expect the insurance company to pay. We will review the issue again in the Authorized Official's Determination. If the insurance company has not paid all that we anticipated, we can award the difference at the time that the Authorized Official's Determination is made. We note that the Public Regulation Commission of the State of New Mexico required insurance

companies to settle claims brought by policyholders who suffered fire-related losses within 90 days of the date that the claim was reported to the insurer. We expect that most, if not all, insurance claims will have been paid before the Authorized Official's Determination is issued. However, in the event that the insurance claim is resolved after the Authorized Official's Determination is issued and as a result the Claimant is due additional compensation under the CGFAA, the Claimant should ask the OCGFC to reconsider the matter under §§ 295.33 or 295.34.

#### *Subpart D*

Subpart D of the interim final rule addressed the process by which FEMA will evaluate claims. On the one hand, it has always been our intention that this process be non-adversarial and collaborative. On the other hand, we must base our compensation decisions on information, not speculation. We have reorganized Subpart D to more clearly describe our expectation of how the process is to work.

#### *Burden of Proof and Documentation of Losses*

Section 295.21(a) of the interim final rule advised Claimants that they bear the burden of establishing all elements of their Losses and damages. Sections 295.5 and 295.30 of the interim final rule suggested that Claimants could expect some assistance in documenting their claims from the Claims Reviewer. Some Claimants appear to have taken this to mean that the burden of establishing Losses and damages has shifted from the Claimant to the Claims Reviewer. Although the customer service responsibilities of the Claims Reviewers are substantial, there are limitations. The primary responsibility of the Claims Reviewer is to review, investigate and objectively evaluate claims for the OCGFC. Our Claims Reviewers cannot function as agents or representatives of the Claimant.

Here are some of the ways that we expect Claims Reviewers to help Claimants. In routine cases, we expect the Claims Reviewers to be proactive in helping the Claimant to identify Losses and formulating a strategy for proving them. In more complex cases, the Claimant will need to take the lead in assembling the claim and should not await direction from the Claims Reviewer. Claims Reviewers should also help Claimants to obtain reasonably available substitute documentation to support their Losses if the original documentation was either lost to the fire or through the passage of time.

We have rewritten § 295.30(a) in an effort to clear up any remaining confusion between the responsibilities of the Claimant and the role of the Claims Reviewer. Section 295.30(a) of the final rule states that the Claimant bears the burden of proof for establishing all elements of the Loss and compensatory damages. This language is excerpted from § 295.21(a) of the interim final rule. It also provides Claimants with the opportunity to make a record supporting the claim by submitting any information or documentation that they deem relevant. The responsibility for making this record rests with the Claimant, not the Claims Reviewer.

Since we must support our compensation decisions with evidence, we expect that Claimants will provide whatever evidence is reasonably available to corroborate the nature, extent and value of their losses. If documentation or substantiating evidence of a Loss or damage is not reasonably available (e.g., it burned in the fire), OCGFC may determine that the Claimant's statement, given under penalty of perjury, is sufficient to substantiate that portion of the claim. We will determine whether the Claimant's statement alone will be sufficient to substantiate the Loss or damage based on the unique circumstances presented by each case, taking into consideration potential alternative sources of substantiation and documentation.

Section 295.30(a) of the final rule authorizes OCGFC to ask that Claimants provide affidavits to support the claim. For example, we are advising Claimants who have suffered business losses that they may expedite resolution of their claim if they voluntarily provide copies of their income tax returns. Claimants who decline to submit their income tax return voluntarily during the claims review process must sign an affidavit agreeing to produce the returns if requested by our Office of the Inspector General or the General Accounting Office in the course of an audit.

A number of comments addressed affidavits. One commenter suggested that we should not ask people to obtain affidavits from family members and others in the community who might be familiar with their losses. We are sensitive to the privacy concerns of our Claimants. Where we believe an affidavit from a close associate of the Claimant will strengthen the claim, we may suggest that the Claimant obtain one. We will not automatically reject the claim, however, if the Claimant declines to provide the affidavit. We will consider all of the evidence in the

record, including any alternative substantiation offered by the Claimant, in making a decision.

We also have noted some resistance to our request for an affidavit to support a partial payment. We will ordinarily make partial payments only when we have a reasonable basis to estimate the Claimant's damages. The affidavit may be necessary to provide us with the reasonable basis to make a partial payment early in the claims process. In response to comments from the community, OCGFC has established policy on when we will request affidavits.

#### *Proof of Loss*

Before the Authorized Official's Determination can be issued, the Claimant must sign the Proof of Loss. The interim final rule did not establish a deadline by which the Claimant must sign the Proof of Loss. We expected that most Claimants would want to resolve their claims expeditiously, consistent with the spirit of the legislation, and did not initially see a need for one.

Some members of the public have commented that it is legitimate to delay submission of the Proof of Loss until August 28, 2002. It has also been suggested that suggestion that FEMA is asking Claimants to submit their Proofs of Loss expeditiously for FEMA's convenience. In response, we respectfully submit that it is in both the Claimant's interest and FEMA's interest that claims be expeditiously resolved. The intent of the CGFAA is to compensate fire survivors as quickly as possible.

Congress entrusted FEMA with administering an orderly compensation process. The CGFAA 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. It is impossible for FEMA to fulfill this mandate if Claimants are unwilling to provide specific details about their losses by signing the Proof of Loss. While we believe that Congress intended for FEMA to have the flexibility to provide Claimants with extra time to tell us about their losses in appropriate cases, nothing in the CGFAA or its legislative history suggests that Claimants should be able to keep their claims open for a full two year period.

For these reasons, we have added a new § 295.30(b) to the final rule, which addresses the Proof of Loss in non-subrogation cases.<sup>6</sup> Claimants who

submitted their initial Notice of Loss before January 1, 2001 have 90 days from March 21, 2001 to submit a Proof of Loss, without regard to whether they previously requested an extension of time from FEMA. We are providing this automatic 90 day extension out of respect for those Claimants who wanted a reasonable time to review the final rule before submitting the Proof of Loss. This extension does not preclude any Claimant from submitting the Proof of Loss earlier.

However, Claimants who file their initial Notice of Loss on or after January 1, 2001 must submit the Proof of Loss within 150 days after the initial Notice of Loss is filed. Adherence to this deadline will leave us with 30 days to determine the compensation due to the Claimant and enable us to meet the 180 day timeframe envisioned by Congress.

To provide a claims process that is orderly for all and to meet our obligation to live within the financial means provided by Congress for administration of the program, we must insist that Claimants comply with the timeframes for signing a Proof of Loss that are set forth in this final rule. There is flexibility built into our process for Claimants to tell us about Losses and damages that they could not have discovered or did not remember when they signed the Proof of Loss. Sections 295.33 and 295.34 explain this flexibility. These sections will be applied equitably, not arbitrarily.

If a Claimant is not prepared to sign a Proof of Loss, for good cause, an extension may be requested from the Director of OCGFC. Extensions will not be granted automatically but only on consideration of the equities in the request. Alternatively, the Claimant may withdraw the claim, repay any partial payment and re-file the claim once before August 28, 2002, when the losses are better defined. If a Claimant does not complete the Proof of Loss within the timeframes specified in the final rule or obtain an extension, OCGFC may administratively close the claim and require the Claimant to repay any partial payment that we made on the claim.

#### *The Authorized Official's Determination*

The CGFAA gives us 180 days from the date when a Notice of Loss is submitted to determine the compensation due to a Claimant. This provision assumes that the Claimant will fully cooperate with FEMA in the adjudication of the claim. We will try to process claims in less than 180 days, but may require the full 180-day period in many cases. Partial payments are intended to ease the burden on the Claimant during this period.

A commenter asked several questions about the Authorized Officials. The Authorized Officials are employees of FEMA who are responsible for deciding claims. The Authorized Officials make their decisions based upon the written information in the claim file using the criteria set forth in the CGFAA, these regulations and OCGFC policies. Hearings are not part of the Authorized Official's Determination process. While the Authorized Officials are permitted to contact the Claims Reviewers to clarify information in the claims file, they are not permitted to discuss the merits of a claim with the Claimant before making their decision. If a Claimant has questions about the status of a claim or Authorized Official's Determination, the Claimant should contact the Claims Reviewer, rather than the Authorized Official directly.

#### *Release and Certification Form*

We have added a new subsection (c) to § 295.30 concerning the Release and Certification Form. Authority for the Release and Certification Form provided by § 104(e) of the CGFAA. Some Claimants have suggested that they can keep their claims open indefinitely by refusing to sign the Release and Certification Form. We do not believe that this view is consistent with the letter or the spirit of the CGFAA, which encourages us to close claims expeditiously. Section 295.34 provides a limited mechanism for Claimants to reopen their claims after signing the Release and Certification Form.

Section 295.30(c) establishes deadlines for the return of a completed Release and Certification Form. If a Claimant does not request an Administrative Appeal of the Authorized Official's Determination, the Release and Certification Form should be returned within 120 days of the date that appears on the Authorized Official's Determination. If the Claimant brings an Administrative Appeal, arbitrates or seeks judicial review, the signed Release and Certification Form should be returned within 60 days of the date when the subsequent decision is not subject to further review (that is the date when no further appeals are available).

Section 104(e) of the CGFAA provides that at the end of the process the United States and employees of the United States are released from all claims and liabilities related to the Cerro Grande Fire and the compensation settlement is conclusive on the Claimant. However, the CGFAA does not bar the United States from recovering payments made to the Claimant after return of the Release and Certification Form.

<sup>6</sup> Subrogation Claimants under § 295.13 sign the Proof of Loss at the same time that the Notice of Loss is submitted. The Notice of Loss and Proof of Loss have been consolidated on a single form.



Claimants have complained to OCGFC about this apparent inconsistency. We find these concerns to be compelling. Claimants who choose to bring their claims under the Federal Tort Claims Act have the certainty that any settlement between the claimant and the United States will be final and binding on both parties, except in extraordinary cases. The CGFAA was intended to provide a more expeditious and less adversarial process for compensation than is available under the Federal Tort Claims Act. This objective will be severely compromised if we second-guess compensation decisions after the Claimant has accepted our final decision. Moreover, our failure to remedy the inconsistency may result in unnecessary arbitrations or judicial review of our decisions, since the decisions of arbitrators and judges are binding on the government.

Section 295.30(c) of the final rule provides that the United States will not attempt to recover monies paid to a Claimant who signs a Release and Certification Form, except in the event of fraud or misrepresentation by the Claimant or the Claimant's representative, a mistake on our part or the Claimant's failure to cooperate with audits as required by § 295.35. Federal law obligates us to attempt to recover payments made to the wrong party. We also may recover overpayments where we made a material mistake in calculation of the damages owed to the Claimant and in other appropriate cases.

#### *Reimbursement of Claims Expenses*

Section 295.31(a) addresses the circumstances in which we will reimburse a Claimant for reasonable costs of third party opinions obtained by the Claimant. It provides that we will do so only if we request that the Claimant procure the opinion. One commenter, a real estate development firm, suggested that we should reimburse Claimants for third-party opinions whenever valuation of land is at issue. The commenter was concerned that its claim might be denied if the Claimant failed to provide the opinion (because it was not requested by us) and we did not obtain one either. As noted earlier in the preamble, it is the Claimant's responsibility to develop and submit whatever evidence he or she thinks is appropriate to support the claim. Claims preparation expenses are not regarded as compensatory damages under New Mexico law or under the Federal Tort Claims Act. Similarly, they are not recoverable under the CGFAA. For these reasons, we believe that § 295.31(a) of the interim final rule accurately

expresses our position on third party opinions.

The Rio Grande Chapter of the Appraisal Institute commented that its member appraisers sometimes need to consult with experts in other fields in order to render an opinion. They inquired whether we will reimburse Claimants for the charges of these other experts. If we request that a Claimant obtain a third party opinion and the expert selected by the Claimant believes that he or she must consult with other experts in order to render the opinion, the Claimant should notify the Claims Reviewer and provide an estimate of the total cost. We will not reimburse the Claimant for the cost of these other experts unless OCGFC has expressly approved their use.

Fifteen commenters suggested that we should reimburse Claimants for the actual hours they have spent seeking compensation under the CGFAA. Most suggested that Claimants should be compensated at an uncapped hourly rate. We have carefully considered these comments, but we cannot accommodate them for several reasons. First and foremost, 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 that Congress intended that Claimants be compensated for the value of their time.

The open-ended compensation program suggested by the commenters would be difficult to administer. One difficulty we would face is how to determine equitably the value of a Claimant's time. Another is how to verify that Claimants have expended the number of hours that they are claiming. Our payments under the CGFAA are subject to independent audit by the General Accounting Office and our Inspector General. Claimants would likely find attempts by the auditors to verify the payment for hours spent in the claims process highly intrusive.

However, we are exercising our discretion under § 104(d)(4)(C)(ix) of the CGFAA to provide a lump sum payment to most individual and business Claimants for miscellaneous and incidental expenses incurred in the claims process. Claimants whose only fire related loss is the cost of a flood insurance premium are not eligible for the lump sum payment.

The decision to exercise this discretion was initially made through an OCGFC policy. The policy has been refined and incorporated into § 295.31(b). In response to comments on the policy, we are increasing the lump sum payment to 5% of the insured and uninsured loss (excluding flood

insurance premiums), not to exceed \$15,000. The minimum payment remains \$100. We believe that § 295.31(b) represents a fair and reasonable accommodation between our responsibility to spend government funds wisely and our desire to compensate Claimants as fully as possible.

The lump sum payment under § 295.31(b) will be made after a properly executed Release and Certification Form is returned to OCGFC and cannot be obtained through partial payment. Claimants who suffered no Cerro Grande fire related loss but have applied to us for reimbursement of flood insurance premiums will not be eligible to receive the lump sum payment.

An insurance industry commenter suggested that insurance companies be eligible to receive a lump sum payment for each subrogation claim submitted. We disagree. Insurance companies are ordinarily compensated for the costs of pursuing subrogation claims through the premiums they collect from policyholders.

#### *Supplementing and Reopening Claims*

Sections 295.33 and 295.34 of the interim final rule address the procedures for supplementing and reopening claims. The final rule amends these sections to clarify and streamline the process. We are amending § 295.33, which provides for supplementing claims before the signing of a Release and Certification Form, along the following lines:

- Before signing the Proof of Loss, the Claimant may amend the Notice of Loss to seek compensation for Losses not mentioned on the Notice of Loss. Claimants who wish to amend the Notice of Loss should contact the Claims Reviewer. The additional Losses will be noted on the Proof of Loss and will be adjudicated in the Authorized Official's Determination.

- Once the Claimant has signed the Proof of Loss, he or she must obtain permission from the Director of OCGFC to amend the Notice of Loss. The Claimant should consult with the Claims Reviewer about the procedure for obtaining permission of Director of OCGFC. The Director of OCGFC will grant the request if it is supported by good cause. If the request is granted, the Director will determine whether compensation is due for the additional Loss under the Administrative Appeal procedures described in Subpart E. The additional Loss will not be considered until 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 Losses, the Director of OCGFC will decide both matters in a single appeal proceeding.

- Claimants are reminded that they *must* put OCGFC on notice of any Loss not mentioned on the initial Notice of Loss not later than August 28, 2002. This deadline was established by § 104(b) of the CGFAA. All amendments to Notices of Loss must be made in writing and submitted in accordance with OCGFC procedures. An amendment to a Notice of Loss must be received by August 28, 2002. A written request for permission to amend a Notice of Loss after the Proof of Loss is signed must be on file with the Director of OCGFC no later than August 28, 2002.

Section 295.34 provides for reopening claims after a Release and Certification Form is signed. The primary purpose of § 295.34 is to provide the Claimant with an opportunity to request damages in excess of those previously awarded, not to raise Losses for the first time. However, in appropriate cases, the Claimant can use the reopener provision to seek compensation for a Loss not previously reported to us provided that the Claimant files the request to reopen not later than August 28, 2002.

We are amending § 295.34 to clarify that the Claimant may reopen a claim for the reasons stated in subsections (a)(1), (2) and (3) as a matter of right, provided that the request is timely filed. Requests to reopen for the reasons stated in subsection (a)(4) will only be granted in the Director's discretion. The Director of OCGFC may establish a cutoff for filing requests to reopen under subsections (a)(3) and (4). Reopened claims will not be decided by the Director of the OCGFC but by an Authorized Official, after considering the recommendation of the Claims Reviewer. Claimants who are dissatisfied with the Authorized Official's Determination on the reopened claim may appeal to the Director of OCGFC.

One commenter suggested that the Director's discretionary decision to reopen or not reopen a claim under § 295.34(a)(4) is subject to review by an arbitrator. We disagree. Arbitration under the CGFAA is available only if a Claimant is dissatisfied with the damages that have been awarded by FEMA. The Director's decision to reopen or not reopen a claim is not subject to review under the arbitration provisions of Subpart E.

#### *Subpart E*

All of the comments pertaining to Subpart E addressed the arbitration

provisions that appear in § 295.42. The interim final rule invited comment on the size and composition of arbitration panels. The responders suggested that arbitration panels consist of three members, one selected by each party and the third selected by the two arbitrators. We considered these suggestions but note that like the provision in the interim final rule, this process would place only one neutral arbitrator on each panel. However, we acknowledge the concern that larger panels should decide larger disputes and are amending § 295.42(d) in response to the comments. If the amount in controversy in an arbitration is \$300,000 or less, the dispute will be heard by one arbitrator selected by the Claimant in the manner prescribed by the interim final rule. However, if the amount in controversy exceeds \$300,000, three arbitrators selected at random by the Alternate Dispute Resolution Office will decide the dispute. We have adopted random selection to assure that the entire panel will be neutral. This is similar to the way that U.S. District Court Judges in the District of New Mexico are assigned cases.

All arbitrators will be selected from the Alternate Dispute Resolution Office's list of qualified arbitrators. Some commenters expressed concern about the objectivity of arbitrators pre-qualified by our Alternate Dispute Resolution Office. Our Alternate Dispute Resolution Office is a neutral office that encourages the use of alternative dispute resolution mechanisms.

The Alternate Dispute Resolution Office invited nominations for the Cerro Grande arbitration panel from numerous individuals involved in alternative dispute resolution in New Mexico. These individuals hold leadership roles in the New Mexico State Court System, the Office of the Chief Circuit Mediator for the Tenth Circuit, U.S. Court of Appeals, the American Bar Association, and the State Bar of New Mexico. The Alternate Dispute Resolution Office advises that the list of qualified arbitrators will be finalized shortly. Once finalized, biographies of each of the arbitrators will be posted on the OCGFC Internet site and available from the Alternate Dispute Resolution Office.

#### *Subpart F*

Section 295.21(c) of the interim final rule provided that lump sum payments awarded for future damages will be "discounted to present value." One commenter asked for a definition. A definition, derived from § 13-1822 of the New Mexico Uniform Jury

Instructions (Civil), has been added to § 295.50 of the final rule. Discounting to present value is widely used by courts in New Mexico and elsewhere when calculating a single payment of damages for losses that are likely to be sustained over a long period of time. The mathematical calculation assumes that a significant part of the damage award will be invested at the time that the award is received and funds will be drawn down over a period of time as needed to replace a lost item or service. Discounting reduces damages by the amount of investment income the recipient is likely to receive before he or she spends the money to replace what was lost. We intend to discount damages to present value only where losses are likely to be realized over a long period of time, e.g., long-term business losses and long-term subsistence losses. We do not intend to discount damages paid to rebuilding homeowners.

The term "Loss" has been defined in § 295.50 of the final rule. The defined term "Injury," which previously appeared in § 295.50, has been deleted and subsumed into the definition of Loss. The import of this change is discussed in the section of this preamble that addresses Subpart A of the rule.

The term "Replacement Cost" also is defined. The definition in § 295.50 of the final rule is similar to that which appeared in the preamble to the interim final rule at 65 FR 52261 (August 28, 2000).

#### **National Environmental Policy Act**

This final rule involves claims and payment of claims to persons injured as a result of the Cerro Grande fire. Such claims will be paid with no substantive relation to the claimant's subsequent use of the money for prescribed activities and with no limitations on how claimants will use the money. Such activities under the rule are not subject to the National Environmental Policy Act (NEPA). The final rule provides for compensation to mitigate future damages. FEMA has prepared a list of mitigation measures that are consistent with the agency's existing NEPA categorical exclusions. Claimants may propose other mitigation measures. We cannot identify what those measures will be and cannot perform a NEPA review at this stage. As claimants propose mitigation expenditures each will be subject to NEPA review. FEMA reserves the discretion to deny funding for mitigation expenditures which do not fall within a categorical exclusion or to conduct more extensive environmental review, if warranted. We

have not prepared an environmental assessment of this final rule.

**Paperwork Reduction Act**

This final rule contains several information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). Under the Paperwork Reduction Act, a person may not be penalized for failing to comply with an information collection that does not display a currently valid OMB control number.

At the time we published the interim final rule in the **Federal Register**, we submitted several information collections to OMB for emergency approval and obtained an OMB number and expiration date for the following collections:

Notice of Loss, OMB number 3067–0280, Expiration Date 04/30/01. This form has been revised and will be submitted to OMB for a second emergency approval under the provisions of 5 CFR 1320.13, Emergency Processing. The request will allow us to use the revised Notice of Loss form while we seek your comments.

Proof of Loss, OMB number 3067–0282, expiration date 3/31/01. This form was submitted to OMB under their emergency processing procedures and will be resubmitted to allow us to use the Proof of Loss form while we seek your comments.

Subrogation and Proof of Loss, OMB number 3067–0284, expiration date 04/

30/01. This form will be resubmitted to OMB under their emergency processing procedures to allow us to use the Subrogation and Proof of Loss form while we seek your comments.

A new information collection titled “Request for Mitigation Assistance” will be submitted to OMB for emergency processing. OMB’s approval to use this series of forms will allow us to collect data while we seek your comments on this form.

Local governments with land use regulatory authority or Indian tribes that want specific mitigation measures to reduce the heightened risks of wildfire, flood or other natural hazards resulting from the Cerro Grande Fire or that seek compensation for the cost of such measures expended before August 28, 2000, or both, will have to submit a Mitigation Compensation Plan (Plan). The Plan must be in writing and may address property specific mitigation measures and community level mitigation measures. We do not prescribe any specific data requirements and rely on the governmental entity to develop the content of the plan. Because we do not prescribe specificity of data elements for inclusion in the Plan, we have determined that it is not subject to the OMB Paperwork Reduction Act clearance process and will not submit a clearance package for approval.

Claimants will have to execute a Release and Certification Form, which is a document that a Claimant must

complete and return in order to receive payment of compensation awarded pursuant to the CGFAA. These forms require minimal time and effort to complete and are exempt from the Information Collection Provisions of the Paperwork Reduction Act under OMB guidance.

These OMB clearance packages will be submitted to OMB no later than March 19, 2001 for approval under 5 CFR 1320.13 by March 26, 2001.

This rule serves as the notice for the 60-day and 30-day comment period for the publication of final rules with information collections that have not received final approval by OMB. At the end of the 60-day comment period, we will consider the comments that you submit and may make changes to the form as needed. At the conclusion of the comment period, we will resubmit these clearance packages to OMB for a three-year approval. We will not implement the new or revised collections until OMB approves them and assigns them an OMB control number.

*Supplementary Information.* This collection is in accordance with our responsibilities under 44 CFR 295 to provide assistance to claimants who were injured as a result of the Cerro Grande fire. The funds that we provide will help to alleviate the suffering and damage that resulted from the Cerro Grande fire.

*Collections of Information.*

Title	Type of information collection	OMB No.	Abstract
Notice of Loss—Cerro Grande Fire Assistance Acts.	Revision of a currently approved collection.	3067–0280	The Notice of Loss under the Cerro Grande Fire Assistance Act—claimant makes a binding, conclusive and irrevocable election to have all injuries from the Cerro Grande Fire reviewed by us for compensation under the CGFAA.
Interview .....	Extension of a currently approved collection.	3067–0280	Once a Claimant files a Notice of Loss, the Claimant and the Claims Reviewer meet to discuss the nature of the loss sustained by the Claimant, the Claimant’s documentation, insurance claims made, to be made, or insurance payments that the Claimant has received, and other documents such as affidavits that FEMA may need to substantiate the claims.
Documentation of Claims.	Extension of a currently approved collection.	3067–0280	Following the interview the Claimant and the Claims Reviewer may work both independently and together to obtain the documentation needed to substantiate the claims.
Subrogation Notice and Proof of Loss Form—Cerro Grande Fire Assistance Claims.	Extension of a currently approved collection.	3067–0284	The Subrogation Notice of Loss under the Cerro Grand Fire Assistance Act form—an insurance company makes a binding conclusive and irrevocable election to have all subrogation claims of the company from the Cerro Grande Fire reviewed by FEMA for compensation under the CGFAA.
Proof of Loss—Cerro Grande Fire Assistance Claims.	Extension of a currently approved collection.	3067–0282	The Proof of Loss form is a statement, signed by a Claimant under the penalty of perjury and subject to provisions of 18 U.S.C. 1001 that the claim is true and correct, attesting to the nature and extent of the Claimant’s injuries.
Request for Mitigation Assistance.	New .....	.....	Claimants may submit a Request for Mitigation Assistance to request mitigation funding in connection with rebuilding a damaged or destroyed structure. The funding will be a maximum of 15 percent of the amount compensated for replacement, repair or restoration the structure and the land from all sources.

Title	Number of respondents	Average hours per response	Estimated annual burden hours
Notice of Loss—Cerro Grande Fire Assistance Acts .....	18,000	0.75 hour or 45 minutes .....	13,500
Interview .....	18,000	Range from 1.5 to 2 hours .....	27,000–36,000
Documentation of Claims .....	18,000	20 hours .....	360,000
Subrogation Notice and Proof of Loss Form—Cerro Grande Fire Assistance Claims.	12,000	1.5 hours .....	18,000
Proof of Loss—Cerro Grande Fire Assistance Claims .....	18,000	0.5 hour .....	9,000
Request for Mitigation Assistance .....	1,800	3 hours .....	5,400
Estimated total .....			441,900

*Affected Public:* State, local and tribal governments, private sector businesses, not-for-profit organizations, and individuals and households. The information collections are used to allow claimants to apply for compensation under the Cerro Grande Fire Assistance Act.

*Comments:* We ask for written comments to: (a) Evaluate whether the proposed data collection is necessary for the Agency’s proper performance of the program, including whether the information will have practical utility; (b) evaluate the accuracy of the Agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Please send comments on or before May 21, 2001.

Addresses: Interested persons should submit written comments to the Desk Officer for the Federal Emergency Management Agency, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 on or before April 20, 2001. We will continue to accept comments through May 21, 2001. Please send written comments on the information collections, including our burden estimates to Muriel B. Anderson, Chief, Records Management Branch, Program Services Division, Operations Support Directorate, Federal Emergency Management Agency, 500 C Street, SW., room 316, Washington, DC 20472, (telephone) (202) 646–2625, (facsimile) (202) 646–3347, or (e-mail) [muriel.anderson@fema.gov](mailto:muriel.anderson@fema.gov).

**Executive Order 12866, Regulatory Planning and Review**

Under Executive Order 12866, 58 FR 51735, October 4, 1993, a significant regulatory action is subject to OMB review and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

We have determined that this rule is a “significant regulatory action” under the terms of Executive Order 12866. It will have an annual effect on the economy of more than \$100 million, but we do not expect it to affect adversely in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. The rule and its underlying statute are designed to compensate individuals, businesses, not-for-profit organizations, State, local, and tribal governments or communities for injuries as a result of the Cerro Grande fire. Because of the urgent requirement to meet and settle the needs of persons injured as a result of the Cerro Grande fire and in order to comply with the mandates of the CGFAA, we have not prepared a regulatory analysis of the rule.

The Office of Management and Budget (OMB) has reviewed the final rule under Executive Order 12866.

**Executive Order 12898, Environmental Justice**

Under Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” 59 FR 7629, February 16, 1994, we have undertaken to incorporate environmental justice into our policies and programs. The Executive Order requires each Federal agency to conduct its programs, policies, and activities that substantially affect human health or the environment, in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefits of, or subjecting persons to discrimination because of their race, color, or national origin. No action that we can anticipate under the final rule will have a disproportionately high and adverse human health and environmental effect on any segment of the population. In addition, the final rule does not impose substantial direct compliance costs on those communities. Accordingly, the requirements of the Executive Order do not apply to this final rule.

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

We have reviewed the final rule under Executive Order 13175, which became effective on February 6, 2001. We expect that several pueblos and individual members of tribes will seek compensation under the final rule for Cerro Grande fire-related losses, including compensation for lost subsistence from hunting, fishing, firewood gathering, timbering, grazing or agricultural activities conducted on land damaged by the Cerro Grande fire. One of these pueblos submitted written comments to the rulemaking docket. We find that the final rule does not have “tribal implications” as defined in

Executive Order 13175 because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Moreover, the final rule does not impose substantial direct compliance costs on tribal governments, nor does it preempt tribal law, impair treaty rights or limit the self-governing powers of tribal governments.

#### Executive Order 13132, Federalism

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

We have reviewed final rule under E.O.13132 and have determined that the rule does not have federalism implications as defined by the Executive Order. The rule establishes the procedures and criteria for claimants, including the State of New Mexico, to apply for Federal compensation for injuries as a result of the Cerro Grande fire. It neither limits nor preempts any policymaking discretion of the State that the State might otherwise have.

#### Congressional Review of Agency Rulemaking

We have sent this final rule to the Congress and to the General Accounting Office under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801–808. The rule is a “major rule” within the meaning of that Act. It will result in an annual effect on the economy of \$100,000,000 or more. However, we do not expect that it will result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. Nor do we expect that it will have “significant adverse effects” on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises.

In compliance with § 808(2) of the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 808(2), for good cause we find that notice and public procedure on this final rule are impracticable, unnecessary, or contrary to the public interest in light of the urgent requirement to meet the needs of persons injured as a result of the Cerro Grande fire, expedite resolution of claims, and in order to comply with the mandates of the Cerro Grande Fire Assistance Act. Accordingly, this final rule is effective on March 21, 2001.

#### Administrative Procedure Act Determination

The Cerro Grande Fire Assistance Act provides FEMA with 180 days to determine the compensation due to the Claimant. The interim final rule required that Claimants accept FEMA's determination or appeal it within 120 days of the date upon which it is made. The 180 day deadline for Claimants who filed claims immediately prior to or immediately after publication of the interim final rule ran in late February 2001. Many of these claimants feel that they need to review the final rule before deciding whether to accept or appeal FEMA's determination. Other Claimants have delayed submission of the Proof of Loss awaiting the final regulations. The New Mexico congressional delegation has encouraged FEMA to publish the final rule expeditiously and make it effective with all deliberate speed. The primary purpose of the CGFAA is to provide Claimants with expeditious compensation for their losses. FEMA believes that this objective will be compromised if the effective date of the final rule were delayed for an additional 30 days. In accordance with 5 U.S.C. 553(d)(3), I find that there is good cause for the final rule to take effect immediately upon publication in the **Federal Register** in order to meet the urgent needs of those injured as a result of the Cerro Grande fire and to comply with the mandates of the Cerro Grande Fire Assistance Act.

#### List of Subjects in 44 CFR Part 295

Administrative practice and procedure, Aliens, 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.

Accordingly, the Federal Emergency Management Agency amends 44 CFR Chapter I by revising subchapter E, consisting of part 295, to read as follows:

#### SUBCHAPTER E—CERRO GRANDE FIRE ASSISTANCE

#### PART 295—CERRO GRANDE FIRE ASSISTANCE

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#### § 295.50 Definitions.

**Authority:** Pub. L. 106–246, 114 Stat. 511, 584; Reorganization Plan No. 3 of 1978, 43 FR 41493, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412.

##### Subpart A—General

#### § 295.1 Purpose.

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

#### § 295.2 Policy.

It is our policy to provide for the expeditious resolution of meritorious claims through a process that is administered with sensitivity to the

burdens placed upon Claimants by the Cerro Grande Fire.

**§ 295.3 Information and assistance.**

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

**§ 295.4 Organization of this part 295.**

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

**§ 295.5 Overview of the claims process.**

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

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

(c) Shortly thereafter, a Claims Reviewer will contact the Claimant to review the claim. The Claims Reviewer will help the Claimant formulate a strategy for obtaining any necessary documentation or other support. This assistance does not relieve the Claimant

of his or her responsibility for establishing all elements of the Loss and the compensatory damages that are sought, including that the Cerro Grande Fire caused the Loss. After the Claimant has had an opportunity to discuss the claim with the Claims Reviewer, a Proof of Loss will be presented to the Claimant for signature. After any necessary documentation has been obtained and the claim has been fully evaluated, the Claims Reviewer will submit a report to the Authorized Official. The Claims Reviewer is responsible for providing an objective evaluation of the claim to the Authorized Official.

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

**§ 295.6 Partial payments.**

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

**§ 295.7 Authority to settle or compromise claims.**

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

cooperate in an audit as required by § 295.35.

**Subpart B—Bringing a Claim Under the CGFAA**

**§ 295.10 Bringing a claim under the CGFAA.**

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

(b) A single Notice of Loss may be submitted on behalf of a Household containing Injured Persons provided that all Injured Persons on whose behalf the claim is presented are identified.

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

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

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

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

**§ 295.11 Deadline for notifying FEMA of losses.**

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

**§ 295.12 Election of remedies.**

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

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

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

**§ 295.13 Subrogation.**

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

insurers and other third parties with the rights of a subrogee for reasonable payments made to an Injured Party on or before October 25, 2000, which exceeded or were not required by the terms of the insurance policy or other agreement creating a right of subrogation. FEMA will not reimburse insurers and other third parties with the rights of a subrogee for payments made to an Injured Party after October 25, 2000 that exceeded or are not required by the terms of the insurance policy or other agreement creating a right of subrogation.

**§ 295.14 Assignments.**

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

**Subpart C—Compensation Available Under the CGFAA****§ 295.20 Prerequisite to compensation.**

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

**§ 295.21 Allowable compensation.**

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

(b) *Exclusions.* Except as otherwise provided in the CGFAA, a Claimant will not receive compensation for any injury or damage that is not compensable under the Federal Tort Claims Act and New Mexico law. Punitive damages, statutory damages under § 30–32–4 of the New Mexico Statutes Annotated (1978), interest on claims, attorney's fees and agents' fees incurred in prosecuting a claim under the CGFAA or an insurance policy, adjusting costs incurred by an insurer or other third party with the rights of a subrogee, and

taxes that may be owed by a Claimant as a consequence of receiving an award are not recoverable from FEMA. The cost to a Claimant of prosecuting a claim under the CGFAA does not constitute compensatory damages and is not recoverable from FEMA, except as provided in § 295.31(b).

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

(d) *Destruction of home—*

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

(2) *Trees and landscaping.*

Compensation for the Replacement Cost of destroyed trees and landscaping will be limited to 25% of the pre-fire value of the structure and lot.

(3) *Mitigation.* If requested by a Claimant, FEMA may compensate a Claimant for the reasonable cost of mitigation measures that will reduce the property's vulnerability to the future risk of wildfire, flood or other natural hazards related to the Cerro Grande Fire. Mitigation compensation made available under this section may not exceed fifteen percent of payments from all sources (i.e., CGFAA, insurance proceeds, FEMA assistance under the Stafford Act) for damage to the structure and lot. The Claimant must obtain all government permits, approvals and clearances required by applicable law, ordinance or regulation before constructing the mitigation measures. The mitigation measures must be reviewed by FEMA under applicable environmental and historic preservation laws. Claimants must construct the mitigation measures for which they have received compensation.

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

(1) The Claimant sells the real property in a good faith arm's length transaction that is closed no later than

August 28, 2002 and realizes a loss in the pre-fire value; or

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

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

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

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

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

(2) *Proof of subsistence use.* FEMA may consider evidence submitted by Claimants, Indian Tribes and other knowledgeable sources in determining the nature and extent of a Claimant's subsistence uses.

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

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

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

(l) *Donations.* FEMA will compensate individual or business Claimants in the counties of Los Alamos, Rio Arriba,

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

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

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

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

- (i) Emergency costs that are eligible for reimbursement under the Public Assistance Program; or
- (ii) Losses that are eligible for repair, restoration or replacement under the Public Assistance Program; or
- (iii) Costs or charges determined excessive under the Public Assistance Program.

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

(4) *Benefits provided by our Individual Assistance program.*



Compensation under the CGFAA will not be awarded for losses or costs that have been reimbursed under the Individual and Family Grant Program or any other FEMA Individual Assistance Program.

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

#### Subpart D—Claims Evaluation

##### § 295.30 Establishing Losses and damages.

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

(b) *Proof of Loss.* All Claimants are required to attest to the nature and extent of each Loss for which compensation is sought in the Proof of Loss. The Proof of Loss, which will be in a form specified by OCGFC, must be signed by the Claimant or the Claimant's legal representative if the Claimant is a not an individual or is an individual who lacks the legal capacity to execute the Proof of Loss. The Proof of Loss must be signed under penalty of perjury and subject to the provisions of 18 U.S.C.1001, which establishes penalties for false statements. Non-subrogation Claimants who filed a Notice of Loss before January 1, 2001 should submit a signed Proof of Loss to OCGFC not later than June 19, 2001. Non-subrogation Claimants who file a Notice of Loss on or after January 1, 2001 should submit a signed Proof of Loss to OCGFC not later than 150 days after the date when

the Notice of Loss was submitted. These deadlines may be extended at the discretion of the Director of OCGFC for good cause. If a non-subrogation Claimant fails to submit a signed Proof of Loss within the timeframes set forth in this section and does not obtain an extension from the Director of OCGFC, OCGFC may administratively close the claim and require the Claimant to repay any partial payments made on the claim. Subrogation Claimants will submit the Proof of Loss contemporaneously with filing the Notice of Loss.

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

##### § 295.31 Reimbursement of claim expenses.

(a) FEMA will reimburse Claimants for the reasonable costs they incur in copying documentation requested by OCGFC. FEMA will also reimburse Claimants for the reasonable costs they incur in providing appraisals, or other third-party opinions, requested by OCGFC. FEMA will not reimburse Claimant for the cost of appraisals, or other third party opinions, not requested by OCGFC.

(b) FEMA will provide a lump sum payment for incidental expenses incurred in claims preparation to individual and business Claimants that are awarded compensatory damages under the CGFAA after a properly executed Release and Certification Form has been returned to OCGFC. The amount of the lump sum payment will be the greater of \$100 or 5% of CGFAA

compensatory damages and insurance proceeds recovered by the Claimant for Cerro Grande Fire related losses (not including the lump sum payment or monies reimbursed under the CGFAA for the purchase of flood insurance), but will not exceed \$15,000. No more than one lump sum payment will be made to all Claimants in a Household, regardless of whether the Household filed separate or combined Notices of Loss. The following Claimants will not be eligible to receive the lump sum payment: subrogation Claimants and Claimants whose only Cerro Grande Fire related loss is for flood insurance premiums.

##### § 295.32 Determination of compensation due to claimant.

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

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

##### § 295.33 Supplementing claims.

A Claimant may amend the Notice of Loss to include additional claims at any time before signing a Proof of Loss. After the Claimant has submitted a Proof of Loss and before submission of the Release and Certification Form, a Claimant may request that the Director of OCGFC consider one or more Losses not addressed in the Proof of Loss. The request must be submitted in writing to the Director of OCGFC and received not later than the deadline for filing an Administrative Appeal under § 295.32

or August 28, 2002, whichever is earlier. It must be supported by the Claimant's explanation of why the Loss was not previously reported. If good cause is found to consider the additional loss, the Director will determine whether compensation is due to the Claimant for the Loss under the Administrative Appeal procedures described in § 295.41.

#### § 295.34 Reopening a claim.

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

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

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

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

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

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

#### § 295.35 Access to records.

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

#### § 295.36 Confidentiality of information.

Confidential information submitted by individual Claimants is protected from disclosure to the extent permitted by the Privacy Act. These protections are described in the Privacy Act Notice

provided with the Notice of Loss. Other Claimants should consult with FEMA concerning the availability of confidentiality protection under exemptions to the Freedom of Information Act and other applicable laws before submitting confidential, proprietary or trade secret information.

### Subpart E—Dispute Resolution

#### § 295.40 Scope.

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

#### § 295.41 Administrative appeal.

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

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

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

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

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

(f) *Conferences.* The Director of OCGFC may schedule a conference to

gain a better understanding of the issues or to explore settlement possibilities.

(g) *Hearings.* The Director of OCGFC may exercise the discretion to convene an informal hearing to receive oral testimony from witnesses or experts. The rules under which hearings will be conducted will be established by the Director of OCGFC. Formal rules of evidence applicable to court proceedings will not be used in hearings under this subsection. Hearings will be transcribed and the transcript will be entered in the Administrative Record.

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

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

#### § 295.42 Arbitration.

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

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

(c) *Settlement and mediation alternatives.* At any time after a request for arbitration is filed and before the time a decision is rendered, either party may request in writing that the

Alternate Dispute Resolution Office stay further proceedings in the arbitration to facilitate settlement discussions. A mediator may be appointed (if requested by the parties) to facilitate settlement discussions. If both parties concur in the request, the Alternate Dispute Resolution Office will stay the arbitration and appoint a mediator at our expense. The stay may be terminated and the arbitration resumed upon written request of either party to the Alternate Dispute Resolution Office. If the dispute is settled, the Alternate Dispute Resolution Office will issue an order terminating the arbitration and provide the Claimant with a Release and Certification Form.

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

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

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

(g) *Decision.* After reviewing the evidence, the arbitrator(s) will render a decision in writing to the Alternate Dispute Resolution Office. The Alternate Dispute Resolution Office will transmit the decision to the Claimant and the Director of OCGFC. If a panel of three arbitrators conducts the arbitration, at least two of the three arbitrators must sign the decision. The decision will be rendered no later than 10 Days after a hearing is concluded or 60 Days after the arbitration is initiated, whichever is earlier. The Alternate Dispute Resolution Office may extend the time for a decision. The decision will establish the compensation due to the Claimant, if any, and the reasons therefore.

(h) *Action on arbitration decision.* The Alternate Dispute Resolution Office will forward the arbitration decision and a Release and Certification Form to

the Claimant. A Claimant who has received or who has been awarded any compensation under the CGFAA must sign and return the Release and Certification Form, regardless of whether any additional compensation is awarded by the arbitration. Additional compensation awarded in the arbitration will be paid to the Claimant after the signed Release and Certification Form is received.

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

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

#### **§ 295.43 Judicial review.**

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

#### **Subpart F—Glossary**

##### **§ 295.50 Definitions**

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

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

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

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

*Authorized Official's Determination* means a report signed by an Authorized Official and mailed to the Claimant evaluating each element of the claim as stated in the Proof of Loss and determining the compensation, if any, due to the Claimant.

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

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

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

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

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

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

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

*Indian tribe* means an entity listed on the most recent list of federally recognized tribes published in the **Federal Register** by the Secretary of the

Interior pursuant to the Federally Recognized Indian Tribe List Act, 25 U.S.C. 479a, or successor legislation.

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

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

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

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

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

*Public Assistance Program* means the FEMA program 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.

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

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

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

*Tribal Member* means an enrolled member of an Indian Tribe.

Dated: March 15, 2001.

**Joe M. Allbaugh,**

*Director.*

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