



FEMA

Federal Insurance and Mitigation Administration

Policy Clarification: Eligibility of Hazard Mitigation Assistance Applications with Pre-Award Demolitions

August 26, 2019

Purpose: The purpose of this policy clarification is to explain when previously demolished structures may be eligible for Hazard Mitigation Assistance (HMA) grant-funded projects.

Policy Clarification: Properties where private individuals have demolished damaged structures using private funds or other non-Federal funds prior to application for HMA funding will now be eligible for inclusion in HMA project applications if the demolition is not connected to the project. The demolition costs cannot be included in the project application. The Federal Action is recognized as beginning when the project application is submitted to FEMA. Once the property is included in an HMA application submitted to FEMA, no work can be initiated prior to project review, approval and grant award as that would be a connected action. In addition, no work can be underway at the time the application is submitted. This means that a homeowner-initiated demolition must be totally completed prior to that property being submitted to FEMA for another mitigation action such as an acquisition. If the demolition is not connected to a FEMA Federal Action, no FEMA environmental planning and historic preservation (EHP) review of the demolition is necessary and demolition costs will not be eligible for reimbursement under the HMA programs. FEMA, however, will continue to analyze the cumulative impacts of any privately conducted demolition and subsequent FEMA funded projects as required under NEPA as part of its EHP review process.

This policy clarification amends the HMA Guidance, published February 27, 2015. This change is effective as of the date of this clarification for all open and future application periods for all HMA programs. The clarification will apply to Building Resilient Infrastructure and Communities (BRIC), the pre-disaster mitigation grant program authorized by the Disaster Recovery Reform Act of 2018 (DRRA), Section 1234.

Background: FEMA has generally found acquisitions, mitigation reconstruction and other mitigation projects that included properties with structures that had been demolished prior to application to FEMA ineligible for HMA funding. This finding applied to HMA's three programs, the Hazard Mitigation Grant Program (HMGP), Pre-Disaster Mitigation (PDM), and Flood Mitigation Assistance (FMA). FEMA's regulation on eligible costs for acquisitions at 44 CFR 80.9(b) states that activities where implementation is initiated or completed prior to award are not eligible and will not be reimbursed. FEMA interpreted this to mean that in all cases demolition was regarded as part of the acquisition project. This interpretation of the regulation is reflected in FEMA's Hazard Mitigation Assistance Guidance (February 2015), Part III, Section E.1, which describes activities that are ineligible for HMA funding, including:

Projects for which actual physical work, such as groundbreaking, demolition, or construction of a raised foundation, has occurred prior to award or final approval. Projects for which demolition and debris removal related to structures proposed for acquisition or mitigation reconstruction has already occurred may be eligible when such activities were initiated or completed under the

FEMA Public Assistance (PA) program to alleviate a health or safety hazard as a result of a disaster.¹

The determination of ineligibility was based on two aspects of program requirements: pre-award costs and EHP compliance. First, according to applicable HMA regulations including 44 CFR 80.9(b), the HMA Guidance and 2 CFR 200.458 Pre-award Costs, pre-award costs must be approved before the costs are incurred.² When demolition occurs before HMA project approval, FEMA has historically considered the demolition to be an unapproved pre-award cost, rendering the property ineligible for HMA funding.

Second, all activities funded by FEMA under the HMA programs must be reviewed for compliance with applicable EHP laws, implementing regulations, Executive Orders (EOs) and FEMA Directives, including, but not limited to, the National Environmental Policy Act (NEPA) and FEMA Directive Number: FD 108-1. The Council on Environmental Quality regulations that implement NEPA direct Federal agencies to analyze effects of connected actions. Connected actions are defined as actions that are closely related and should be discussed in the same environmental impact statement (or environmental assessment) and include those actions that: 1) automatically trigger other actions which may require environmental impact statements; 2) cannot or will not proceed unless other actions are taken previously or simultaneously; 3) are interdependent parts of a larger action and depend on the action for their justification.³ NEPA directs Federal agencies to analyze the reasonably foreseeable effects and/or consequences of proposed actions. Agencies must analyze indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. FEMA considered the demolition of the structure to be a necessary component of any subsequent proposed mitigation project on the property and, therefore, connected under NEPA to the Federal Action of the mitigation activity and requiring EHP review. When EHP review had not been completed prior to, or on, the demolition activity, the property was considered ineligible for HMA funding. Conversely, when demolition was initiated or completed under the FEMA Public Assistance program, FEMA met the required EHP compliance as part of the required FEMA EHP review for the PA project application.

FEMA has recently evaluated this approach and determined that a finding of ineligibility based on a property owner's use of private funds, or other non-Federal funds, to demolish a structure, in which the demolition has been completed prior to FEMA receiving a project application for a subsequent HMA project, is unnecessarily restrictive. FEMA has determined that when a property owner uses private funds to demolish an event-damaged structure, and at the time of the demolition, the property had not been in an application submitted to FEMA, the demolition is not a "connected action" under NEPA (i.e., is not connected to the FEMA federal project). Therefore, the demolition is not subject to FEMA review and approval for EHP compliance, the costs of the demolition are not considered pre-award costs, and the demolition does not preclude a finding of project eligibility. The demolition must be in accordance with state and local legal requirements, and any applicable federal law.

¹ See 44 CFR §§ 79.8(b), 80.9(b), 206.434(d)(2). These regulations address the ineligibility of pre-award costs for FMA and HMGP projects, and for acquisitions under all HMA programs. This policy clarifies FEMA's interpretation of them as they apply to pre-award demolitions conducted by property owners with private funds.

² *Id.* "Pre-award costs are those incurred prior to the effective date of the Federal award directly pursuant to the negotiation and in anticipation of the Federal award where such costs are necessary for efficient and timely performance of the scope of work. Such costs are allowable only to the extent that they would have been allowable if incurred after the date of the Federal award and only with the written approval of the Federal awarding agency."

³ 40 CFR 1508.25