



FEMA

August 1, 2012

MEMORANDUM FOR: Charles K. Edwards
Acting Inspector General
Office of Inspector General

FROM:  W. Craig Fugate
Administrator

SUBJECT: Response to Final Report OIG: *FEMA's Decisions to Replace Rather than Repair Buildings at the University of Iowa*

The Federal Emergency Management Agency (FEMA) has reviewed the Office of Inspector General's (OIG) final report of June 19, 2012, entitled *FEMA's Decisions to Replace Rather than Repair Buildings at the University of Iowa* (Report).¹ The Report requested that FEMA provide a written response within 90 days. The following is FEMA's final response to the findings and recommendations presented in the OIG's final report.

In June 2008, flooding along the Iowa River inundated portions of the University of Iowa for weeks, resulting in a Presidential major disaster declaration—much of the damage was catastrophic.² Floodwaters damaged University of Iowa facilities, including the Hancher Voxman-Clapp (HVC) and Art Building East (ABE) buildings. FEMA determined both facilities were eligible for replacement assistance under FEMA's Public Assistance Program. More than three years into the recovery process, the OIG decided to audit FEMA Region VII's decisions to fund the replacement, rather than repair, of the HVC and ABE facilities.

The gravamen of the OIG's findings, and the basis for all recommendations in the Report, is that FEMA incorrectly applied its regulations and policies when deciding whether to repair or replace HVC and ABE. Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) authorizes FEMA to restore an eligible facility to its pre-disaster design.³ FEMA divides "restoration" into two categories: repair or replacement.⁴ The Stafford Act is silent on whether or how much the amount of damage to a facility should drive the decision to repair or replace a facility—Congress left such decisions to the discretion of the Executive branch.

¹ DHS-OIG Report # DD-12-17 (June 19, 2012), *FEMA's Decisions to Replace Rather than Repair Buildings at the University of Iowa* at 20. (OIG Report# DD-12-17).

² Major Disaster Declaration declared on May 27, 2008 (DR-1763) (Sever storms, tornadoes, and flooding).

³ 42 U.S.C. § 5172(e).

⁴ 44 CFR 206.226(f), FEMA 322/June 2007 - Public Assistance Guide (PA Guide) at 36.

FEMA's implementing regulations provide, "[a] facility is considered repairable when disaster damages do not exceed 50 percent of the cost of replacing a facility to its predisaster condition, and it is feasible to repair the facility so that it can perform the function for which it was being used as well as it did immediately prior to the disaster."⁵ This regulation is the source of the so-called "50 Percent Rule." The rule, however, is silent on the timing and the methods of estimating costs for deciding whether to fund the repair or replacement of damaged facilities, which is the focal point of the OIG Report. FEMA addresses timing and methods through Agency policy, specifically FEMA Recovery Policy RP9524.4, *Eligibility of Facilities for Replacement under 44 CFR 206.226(d) (1) (The 50 percent Rule)* (RP9524.4) and FEMA 322/June 2007 - Public Assistance Guide (PA Guide).

No document with the force and effect of law controls the timing and the methods of estimating costs for deciding whether to fund the repair or replacement of damaged facilities—that entire process is a product of Agency policy. With respect to Agency policy, we agree with the OIG that FEMA's current policy and methods for implementing the 50 Percent Rule are in need of significant review and revision. Indeed, the decision-making process for the HVC and ABE facilities highlights the need for improvement and clarification of policies and procedures for cost estimating large and complex projects, as well as the training associated with such policies and procedures. The frequent calculation and re-calculation of the 50 Percent Rule equation, confusion over the inclusion and exclusion of codes and standards in those calculations, limitations of standard cost estimating guidance and tools, and the significant escalation of eligible costs as described in the OIG's Report illustrate the need for better policy, training, and oversight.

Because of the Report, FEMA reprioritized and accelerated a thorough review of the 50 Percent Rule, commenced earlier this year and led by a dedicated work group. Our goal is to redesign 50 Percent Rule policy so that our employees and applicants find it clear, consistent, easy to apply, transparent, and practical to perform at an appropriate stage of an applicant's recovery. This review includes highlighting tools, job aids, and training to implement policy changes. In addition to outreach to FEMA Regions and other stakeholders, we commit to seeking the input and expertise of the OIG in this process. Given the complexity of the issues involved and the statutory requirement to provide an opportunity for public notice and comment when modifying such policies,⁶ this process may take up to 12 months.

While FEMA strongly agrees with the Report's recommendation to review and revise the policies and tools supporting decisions to repair or replace disaster-damaged facilities, FEMA disagrees with the Report's recommendations to suspend the replacement decisions for the HVC and ABE facilities and to deobligate the Federal cost share of \$75.4 million to replace those facilities. There is no doubt—and the Report creates none—that catastrophic flooding heavily damaged the HVC and ABE buildings. Indeed, given the damage to these complex facilities and the mandatory flood plain management requirements associated with the repair of the damaged

⁵ 44 CFR 206.226(f)(1).

⁶ 42 U.S.C. § 5165c.

components, it is FEMA's view that the ultimate replacement decisions for these facilities were both reasonable and appropriate.

The OIG found that FEMA did not comply with its own policies in deciding to replace the HVC and ABE facilities. We disagree; however, the OIG makes a compelling case that, notwithstanding FEMA's past efforts to clarify the applicable policies, considerable and significant ambiguity remains. At the time of the Iowa disaster, the nationwide policy guidance in effect included FEMA Recovery Policy RP9524.4, the June 2007 PA Guide, and the FEMA 321/ January 2008 Public Assistance Policy Digest (PA Policy Digest).

FEMA issued policy clarifications in both the PA Guide and the PA Policy Digest, which addressed ambiguities in RP 9524.4, as to whether the costs of codes and standards required for the repair of damaged components should be included in the 50 Percent Rule calculation.⁷ RP 9524.4 states, "[t]he determination of eligibility for a replacement facility shall include only costs for the repair of damage, and not the costs of any triggered or mandatory upgrading of the facility beyond the repair of the damaged elements."⁸ This provision of RP 9524.4 is admittedly ambiguous. Some thought it meant that costs to repair damage were included in the 50 percent Rule calculation, but costs for code compliance were never included in the 50 Percent Rule. Others read it as including costs to repair damage, *plus* costs to comply with applicable codes and standards required to repair damaged elements.

In June 2007, because of the ambiguity in RP 9524.4, FEMA published an updated version of the PA Guide, which clarified that the repair cost estimate includes "only those repairs ... associated with the damaged components *and the codes and standards that apply to the repair of the damaged components.*"⁹ Thus, the PA Guide, published after RP 9524.4, removes any ambiguity regarding whether FEMA should include in the 50 Percent Rule calculation costs to comply with codes and standards required to repair damaged components – such costs are included in the repair estimate. Likewise, FEMA published the PA Policy Digest in January 2008, which recited the same policy guidance verbatim.¹⁰ Unfortunately, neither policy document explicitly clarifies whether the compliance with floodplain management requirement mandatory for the repair of damaged components should be included in repair estimates for the 50 Percent Rule calculation. And, to a great extent, that is potentially the central issue in contention here.

Consistent with both the PA Guide and PA Policy Digest, which direct applicants to pose any questions regarding the program guidance to appropriate FEMA PA program officials for validation,¹¹ FEMA Region VII officials sought verification from FEMA Headquarters in April 2011. Region VII asked whether it was appropriate to include in the 50 Percent Rule calculations the costs to comply with applicable codes and standards (here, floodplain management requirements¹²) required to repair damaged components of the facilities. In

⁷ See PA Guide at 36; FEMA 321/ January 2008, Public Assistance Policy Digest (PA Policy Digest) at 113.

⁸ FEMA Recovery Policy RP9524.4, *Eligibility of Facilities for Replacement under 44 CFR 206.226(d) (1) (The 50% Rule)* (Sept. 24, 1998) (RP9524.4).

⁹ *Id.* at 36 (emphasis added). See also PA Policy Digest at 113.

¹⁰ PA Policy Digest at 113.

¹¹ PA Guide at i; PA Policy Digest at Introduction.

¹² See 44 C.F.R. § 60.3(c)(3); Iowa Admin. Code r. 567-72.5(1)(b).

response to that query, FEMA's Acting Director in the Public Assistance Division of the Recovery Directorate confirmed that such costs should be included in the 50 Percent Rule calculation.¹³

Further complicating the landscape is an interpretive memo of limited application —called the “Gulf Coast Memo”— that governs disaster recovery activities only in the Gulf Coast following the 2005 Hurricanes Katrina and Rita.¹⁴ That memo, issued by an Acting Assistant Administrator to the Director of a single and unique FEMA long-term recovery office with a limited geographic and disaster-specific mandate,¹⁵ provided “guidance on the eligibility of costs Public Assistance applicants incur to comply with locally adopted floodplain management codes when repairing disaster-damaged structures.”¹⁶ The Gulf Coast Memo expressly highlighted changes in floodplain management circumstances, unique to the Gulf Coast states following Hurricanes Katrina and Rita, as rationale for its guidance.¹⁷ Issued as correspondence to a single official in a single office, it is not, and FEMA never intended it to be, authoritative nationwide policy guidance. In contrast, the PA Guide and PA Policy Digest, both of which FEMA issued after the Gulf Coast Memo, are authoritative and distributed nationwide.¹⁸

Whatever value the Gulf Coast Memo may have, one could not reasonably expect employees and applicants thousands of miles from the Gulf Coast, and to whom the memo was not addressed, to be on notice of its contents or believe that it took precedent over national guidance issued later in time. It is unreasonable to conclude the correspondence sent to a single Recovery Office director that expressly referenced circumstances unique to the Gulf Coast states following Hurricanes Katrina and Rita was somehow binding on the rest of the Agency, particularly given contrary guidance promulgated nationally and later in time through the PA Guide and PA Policy Digest. Thus, it is the view of the Agency that the Gulf Coast Memo was inapplicable to any disaster other than Hurricanes Katrina and Rita. Whether the Gulf Coast Memo *should* be FEMA's national policy, which appears to be the view taken in the OIG Report, is an entirely different

¹³ See Tod Wells e-mail, dated May 24, 2011 (“costs associated with the codes and standards compliance in the repair of damaged elements of a facility are included in the repair costs for the purposes of the 50% Rule calculation to determine eligibility for replacement. The measures triggered under 9.11(d)(3) due to the determination of substantial damage by the floodplain manager are considered codes and standards compliance requirements ... [and are] appropriately considered part of the repair costs for the purposes of determining eligibility for replacement assistance under the 50% rule.”).

¹⁴ Memorandum for Gil Jamieson, Associate Deputy Administrator for the Gulf Coast Recovery Office, from David Garratt, Acting Assistant Administrator for the Disaster Assistance Directorate, *Floodplain Management Ordinances* (April 13, 2007) (Gulf Coast Memo).

¹⁵ The Gulf Coast Recovery Office was established to provide FEMA assistance following Hurricanes Katrina and Rita in 2005 to provide a single, unified point of contact for the multi-state recovery efforts in Alabama, Louisiana, Mississippi, and Texas.

¹⁶ Gulf Coast Memo at 1.

¹⁷ See Gulf Coast Memo (The Gulf Coast Memo discusses post-disaster changes to advisory base flood elevations (ABFEs) in Gulf Coast states issued by FEMA after Hurricanes Katrina and Rita. These ABFEs were in some instances more than 20 feet higher than existing base flood elevations (BFEs), which resulted in unique floodplain management issues impacting the repair and replacement of facilities in these Gulf Coast states).

¹⁸ The Foreword to the PA Guide clearly indicates that it is a governing, nationwide policy document, stating, “This guide explains how FEMA implements Federal grant funding for the infrastructure recovery through its Public Assistance (PA) Program.” PA Guide at i. The Introduction to the PA Policy Digest states that it “is intended to be an easy-to-read, easy-to-use, brief summary of the basic policies that govern the PA Program.” See PA Policy Digest at Introduction.

issue—an issue we will resolve definitively during the current 50 percent Rule policy review, but not by attempting to impose that policy interpretation on Iowa retrospectively.

It is clear that the proliferation of policies with respect to what factors to include in the 50 Percent Rule calculations had a negative impact on FEMA’s consistent application of the rule. However, when coupled with the differing views of successive leaders in the FEMA Recovery organization, it also is clear that reasonable professionals can and do differ as to what to include in the 50 Percent Rule calculations. Those differences comprise whether to include the costs of complying with floodplain management codes and standards required to repair damaged building components. The OIG asserts that the inclusion of these code-required actions was inappropriate. Yet, applicants and employees reasonably understood national policy governing the 50 Percent Rule as providing that the cost to comply with codes and standards required to repair damaged components should be included in the repair estimate.¹⁹

We agree that prospective policy and program delivery changes consistent with the OIG’s findings fit firmly within the scope of the OIG’s statutory authority to “recommend policies ... to promote the economy, efficiency, and effectiveness in the administration of ... [Agency] programs and operations.”²⁰ The recommendation for policy development also fits squarely within the scope of the OIG’s audit responsibility, per the United States Government Accountability Office (GAO) Government Auditing Standards (Yellow Book)²¹ to recommend program or policy proposals prospectively.²²

However, fundamental fairness dictates that we not overturn reasonable decisions intentionally made early in recovery based on estimates, particularly when such decisions are the products of reasonable interpretations of applicable national policy. We do not think the OIG’s retrospective interpretation of FEMA policy here, conflicting as it does with the reasonable and contemporaneous interpretations of some of the senior Agency officials charged with interpreting it, can fairly serve as the basis for deobligation. This is not a question of FEMA or an applicant failing to comply with statutory or regulatory commands, nor is there any question of fraud—this is purely a question of interpreting admittedly ambiguous policy, and one about which there are apparently many (conflicting) views. The OIG serves FEMA and the public well by clearly describing the contours of the disparity and proposing areas for policy development. Accordingly, within 12 months, we will develop cost-estimating policies and procedures and review standards to address cost estimating for large and technically complex projects under the 50 Percent Rule as stated in the OIG Report recommendation #2.

We find nothing, however, to suggest that deobligation is required or appropriate under the current circumstances. Those circumstances include sufficient and appropriate evidence to demonstrate that both the ABE and HVC facilities experienced substantial damage as a result of

¹⁹ FEMA 321/ January 2008, Public Assistance Policy Digest (PA Policy Digest) at 113.

²⁰ 5 U.S.C. § App. § 2(2).

²¹ See Government Auditing Standards, GAO-07-731G, July 2007 (Yellow Book).

²² Yellow Book at Rule 1.32.a (“Prospective audit analysis objectives provide analysis or conclusions ... about events that may occur in the future along with possible actions that the audited entity may take in response to the future events. Examples of objectives pertaining to this work include ... policy or legislative proposals ...”).

catastrophic flooding and that replacement and relocation outside the floodplain are both the most feasible option and in the best interests of the community's recovery.

Accordingly, FEMA disagrees with recommendations # 1, 3, and 4 regarding suspension of replacement decisions and deobligation of funds. FEMA will proceed immediately with the Applicant to execute the project worksheet to replace ABE and HVC as planned. We recognize the circumstances and gravity underlying the OIG's recommendation #2, as well as the possibility of analogous issues arising while deliberate revisions to the 50 Percent Rule policy remain under development. Likewise, we are mindful that thorough and effective policy review may take up to 12 months while recovery operations continue around the country. Accordingly, FEMA will monitor carefully and proactively the development of projects in analogous circumstances regarding application of the 50 Percent Rule until clear, revised policies, training, and tools are in place.