Attachment B

ASFPM COMMENTS ON INCREASED COST OF COMPLIANCE
September 21, 2007

A. Implement Existing Authority in Sec. 1304(b)(3)

As currently authorized in Section 1304(b), ICC is to be available “to cover the cost of implementing measures that are consistent with land use and control measures established by the community under section 1361 for . . . (3) properties that have sustained flood damage on multiple occasions, if the Director determines that it is cost-effective and in the best interests of the National Flood Insurance Fund to require the implementation of such measures”.

When ICC was first implemented in 1994, FEMA advised that experience would be necessary before it considered exercising that authority. ICC has been available since 1997 – ten years of experience should be sufficient. Further, FEMA pointed out that the original language required compliance with local ordinances and thus it could not take independent action – that limitation was removed by the Reform Act of 2004, which now requires “measures that are “consistent with land use and control measures established by the community under section 1361”.

FEMA has identified Repetitive Loss properties (and those that meet the statutory definition of “severe repetitive loss property”), including properties for which multiple high value claims have been paid. For years FEMA has urged states and local governments to mitigate repetitive loss properties. Given this priority, it is reasonable to expect the agency to determine that it is “in the best interests” of the program to identify those for which there are feasible and cost-effective mitigation options. ASFPM believes that those properties are, in fact, the ones that should be examined for action under Sec. 1304(b)(3).

B. Implement Authority to Trigger ICC with Mitigation Offers (all grant programs)

Section 1304(b) directs FEMA to make ICC available when mitigation offers are made under all of the grant programs (presumably for properties that are insured by the NFIP). The logic is that if a flood mitigation measure proposed by a state or community is determined to be cost-effective, then it is in the best interest of the NFIP to facilitate such measures. ICC payments are non-federal funds that are used to satisfy the non-federal match requirements of the grant programs.

C. Synchronize ICC with Mitigation Grants

When ICC is used to contribute to the non-federal share of mitigation grant projects, it is vital that ICC claims be handled congruent with FEMA mitigation grant programs to the maximum
extent possible: the ICC process must cede to the FEMA grant process. As currently handled, homeowners, community officials, and states have twice the number of requirements to satisfy and the complexity and frustration can be overwhelming. Specifically:

a. Once the determination has been made that an ICC claim will be part of the non-federal match, the adjuster’s role should be significantly reduced. FEMA should rely on the grant process to control the ICC claims. ICC adjusters require separate and extensive documentation paperwork before making an initial determination, to distribute funds, and to close out claims. The burden on communities that are also managing a grant has been considered by some to overwhelm the benefits (especially as such benefits have been overly restricted, see below).

b. It is critical that there be NO conflicts between the adjuster and the FEMA Region staff who are both making determinations of eligibility of cost elements for acquisition, elevation, and demolition/rebuild projects. ASFPM recommends that when ICC is going to be used to support a grant, the grant process should govern and the adjuster should have no involvement beyond the initial confirmation that the property is eligible for ICC and approval of the claim. This will avoid duplication and potential conflicts; FEMA’s grant process provides adequate oversight of eligible activities and costs.

c. For the purpose of preparing grant applications that include NFIP-insured buildings, FEMA should allow communities to use a pre-determined estimate of the ICC contribution (or a guaranteed minimum). Under FEMA-funded grants, cost estimates are used for grant applications, but reimbursements are made based on actual costs. More detailed estimates generally cannot be generated as part of an application due to competitive bid processes and the fact that until a grant is obligated, the community has no assurance that every property in the application will actually be approved in the final award.

D. Implement Amendment to ICC That Requires ICC Based on Community Percentage Adopted for Substantial Damage Determinations

The 2004 Reform Act amended the definition of “substantially damaged structure” so that the determination is based on the lower of percentage specified in the NFIP regulations (50 percent) or the percentage adopted by the community. It is recognized that adjusters do not know the requirements of each community. However, the process can be handled if FEMA directed adjusters to submit the Adjuster Preliminary Damage Assessment (Form 81-109) when the cost of repair appears to be 40% of replacement cost, and if data collected on this form is expeditiously shared with communities. (See recommendation below regarding suspension of basic claim payment when an adjuster determines that damage may be substantial damage.) At the same time, we urge FEMA to consider the use of replacement value less depreciation for determining substantial damage.
E. Expand Costs Eligible for ICC – Buyout Projects

The ASFPM supports the expansion of cost elements that are eligible under the ICC claim for all types of ICC-eligible activities, regardless of whether the claim is used to support a grant-funded project. We initially discussed this with FEMA in 2003.

Based on the above-noted figures of average ICC payments, it is apparent that the majority of ICC claims that are assigned to communities and used as part of the non-federal match for mitigation grants (especially for buyouts) are not receiving the full payment. FEMA has used a strict and literal interpretation of the statute to limit severely the amount available, contending that only a portion of the work is required for “compliance,” i.e., demolition of the building, terminating utilities, and clearing the debris. Costs that are eligible for ICC must be expanded to cover all elements of demolition that are required by the FEMA grant programs in order to return a lot to open space. A comprehensive list of all such elements should be developed, but includes at least the following: demolition and disposal of the primary structure, driveway, sidewalks, and appurtenant structures; conducting environmental surveys and subsequent remediation of asbestos or lead; capping wells; terminating utilities; removing/filling septic tanks; filling in below-grade spaces (basements and swimming pools); final grading and vegetative stabilization; and certain costs associated with relocating the owner to a new home.

FEMA should not have separate eligibility criteria when an ICC claim is used for demolition of a building that is not part of a grant-funded project. Using ICC to help pay the costs of the above-listed elements will encourage property owners and communities to negotiate donation of the land to the community or non-profit land trusts.

A further note regarding “pollutants” is warranted. Under basic coverage, the flood claim covers costs to repair of a building, including disposal of asbestos materials. However, under ICC an explicit exclusion precludes use of the ICC claim to cover the “cost associated with enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.” The inconsistency has the effect of discouraging use of ICC funding and causes confusion and inconsistent interpretations by claims adjusters. FEMA should delete the ICC exclusion in its entirety.

F. Expand Costs Eligible for ICC – Elevation Projects

In the early years of ICC, FEMA suggested that the ICC coverage amount was established, at least in part, by an estimate of 75% of the cost of the average elevation projects (which with a $30,000 cap suggests an average cost of $40,000). Although ASFPM members report a wide range of costs for elevation projects, few are in the range of $40,000. Regardless, the above-noted data indicate that the average ICC claim payment for elevation is significantly less than the $30,000 maximum.

FEMA should re-examine the costs of elevation projects and expand those that are eligible under ICC. The best way to do this is to allow ICC to be used for all cost elements that are required
and eligible under the grant programs. For consistency, all those costs should be eligible even if ICC is used to elevate a building that is not part of a FEMA-funded grant. As noted above, costs to remediate asbestos and lead should be covered if required as part of demolition of the old foundation.

ASFPM has previously expressed a concern regarding the high cost of elevation projects that are supported by FEMA grants (including those where ICC is made available). There is anecdotal evidence that extraordinary level of involvement of FEMA staff in developing specifications, and in “nit-picking” which cost elements are or are not eligible, drives up the costs. This level of involvement often continues into the project implementation phase, creating an unacceptable level of uncertainty that strains the NFIP/state/local/home-owner relationship and can dampen the number of successful mitigation opportunities.

G. Increase the ICC Cap to $50,000

As noted in the discussions in E and F above, costs for elevation significantly exceed the current cap of $30,000, despite the fact that current claims paid are now in the $24,000 range. Increasing the eligible cost items, as well as increasing the cap are both necessary. In medium to high cost areas, $50,000 is needed to cover 75% of legitimate costs for elevating a structure. If it is slightly more than the 75% in low cost areas, the resulting payments will be capped by the amount of eligible costs. A “no harm—no foul result. The NFIP should encourage mitigation by supporting cost effective measures whenever possible. By not covering legitimate costs, either because of the cap, or because of not covering actual legitimate costs, discourages property owners from mitigation, leaving more people and property at risk. This will result in additional claims following future flooding.

H. Mitigation Reconstruction and ICC

Buildings that have been flooded repetitively often are in poor condition, especially where flooding is long-duration and wood becomes saturated and prone to rotting or toxic black mold invades, creating unsafe environments. Elevation-in-place is an effective and feasible measure in many instances. In others instances, it is not feasible or cost-effective to elevate – in which case the “mitigation reconstruction” (demolish and rebuild) option may be a viable option. Elevation of an old building results in an elevated old building which may not be able to withstand the process— in many ways it can more effective to demolish and rebuild fully compliant with all the codes (flood, wind, fire, seismic).

In those instances when reconstruction is appropriate and undertaken, the owner should have the standard flood claim payment and the entire ICC payment to help pay for a new home, with any remaining costs the responsibility of the owner. This is one way to help communities deal with flood-prone neighborhoods where the quality of homes deteriorates with every event, depressing property values and consigning many owners to living in unhealthy and unsafe housing.
I. Implement ICC When “Substantial Damage” Occurs

The 2004 Reform Act amended the definition of “substantially damaged structure” such that the damage may be from any cause. Communities are required to make substantial damage determinations regardless of the cause of damage, not just for flood damage. Section 1304(b) makes such structures that meet the statutory definition of “substantially damaged structure” eligible for ICC claim payments. ASFPM recognizes that implementing this provision is a challenge, but if local officials are aware that NFIP-insured buildings that sustain substantial damage from any cause are eligible for ICC, they can advise property owners.

J. Require ICC-Supported Elevations to Use BFE + 1-Foot (or the Advisory Base Flood Elevation)

The recently completed NFIP evaluation reports provide evidence for the benefits of exceeding the minimum requirement to place the lowest floor at the base flood elevation (BFE). The benefits of avoided damage and lower NFIP premiums offset the added costs. FEMA reports that in the aggregate, post-FIRM buildings sustain 70 to 80% less damage than pre-FIRM buildings. Therefore, ASFPM recommends that all ICC-supported elevations (and reconstructions) should be required to have the lowest floors at the BFE plus one-foot, even if not required by local ordinances, and that the ICC claim should cover the additional costs. Similarly, if FEMA has developed Advisory Base Flood Elevations in the post-disaster period, ICC should pay costs to elevate to the ABFEs.

K. Adjuster Responsibilities for ICC

FEMA should communicate to insurance adjusters that their responsibility, with respect to ICC, is to encourage property owners to work with communities for substantial damage determinations. ICC is unlike any other form of claim payment – when adjusters typically try to minimize the amount of payments made. It is in the best interests of the NFIP to have adjusters actively encourage mitigation through the ICC mechanism.

Increased efforts should be made to communicate to policyholders that they have ICC coverage and may be able to file a claim. Policyholders should also be aware that the total combined claim amount for building damage and ICC cannot exceed $250,000 (residential). When adjusting building damage, the adjuster should give the policyholder a letter stating that ICC may be available and outlining the exact process that the policyholder must follow to file an ICC claim and receive an ICC payment.

L. Inform Policyholders About ICC

The November 13, 2006 edition of the Flood Insurance Claims Handbook that is mailed to all policyholders has no content regarding ICC. At a minimum, it should have a brief explanation and emphasize that determining eligibility involves the owner, adjuster and community official.
The FloodSmart webpage ([www.floodsmart.gov](http://www.floodsmart.gov)) does not have obvious links to the materials prepared for consumers to inform them about ICC, and it only has a brief paragraph on ICC:

**What is Increased Cost of Compliance (ICC) coverage?**

If a flood damages your property, you may be required by law to bring your home up to community and/or state safety standards. If you have NFIP insurance, and your home has been declared substantially damaged by your community, ICC coverage is provided to cover up to $30,000 of the cost to elevate, flood proof, demolish or relocate your property. ICC coverage is in addition to the coverage you receive to repair flood damages; however, the total payout on a policy may not exceed $250,000 for residential buildings and $500,000 for non-residential buildings.

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**M. Share Data Collected by Adjusters**

The Adjuster’s Manual directs adjusters to complete and submit the Adjuster Preliminary Damage Assessment (Form 81-109) when the cost of repair appears to be substantial damage (and notes that the form is based on of replacement value, while communities use market value to make formal substantial damage determinations). It is also important to know that communities must use the entire cost of work required to repair to pre-damage condition, while adjusters may look only at repair costs that are eligible under the policy. To our knowledge, this form is not being used or, if used by adjusters, the information is not being shared with states and communities.

Although we have not heard of recent cases where an adjuster challenges a community’s substantial damage determination, it is important that FEMA make it clear that making the determination is the community’s responsibility. Adjusters must not second-guess the community’s determination. Indeed, they should help the insured understand the benefits of receiving a substantial damage determination because it makes the ICC claim available.

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**N. Suspend Basic Flood Claim when Damage Appears to be Substantial Damage**

While it is recognized that there is a legitimate need to make claim payments expeditiously, doing so may undermine the community’s duty to make substantial damage determinations. The Adjuster’s Manual directs adjusters to complete and submit the Adjuster Preliminary Damage Assessment (Form 81-109) when the cost of repair appears to be substantial damage. If this form is properly used, then FEMA should direct the adjuster to suspend payment under the basic flood policy until receipt of documentation from the community official. If the determination is that substantial damage has occurred, it is in the owner’s best interest to coordinate repairs and work required for compliance, which should yield the most cost-effective recovery. To address the concern that this may delay repairs, see recommendation below regarding use of Public Assistance funding to support making substantial damage determinations when an event exceeds and community’s capacity.
O. Cost Estimates Required by Adjusters

In order to settle an ICC claim for elevation or relocation, adjusters require the owner to provide two cost estimates. We have recommended that when ICC will be used as part of a grant-funded project, the grant process for determining cost estimates (and eligible costs) should be followed rather than have two separate processes. Thus, the grant guidelines regarding obtaining cost estimates to prepare both benefit/cost analyses and to determine the amount of grant award would govern.

When ICC is to be used by the owner directly (no grant involvement), one cost estimate is sufficient. The requirement for two cost estimates has been waived after some flood disasters, suggesting that it may not be an important cost-containment requirement. In addition, members have indicated that competitively bid elevation projects typically exceed $50-60,000 per house, while FEMA reports that that average ICC payment for elevation projects is only $23,000.

P. Timing to Close Out ICC Claim Payments

When ICC is used to pay for elevation of a building, the adjuster is required to have the community’s certificate of occupancy in order to close out and may the final payment. This unnecessarily delays payment, sometimes for months after the lowest floor elevation is established. Often times, the mitigation contractor requires payment at the time services are rendered and the policyholder is faced with financial burden until the final claims payment is made. ASFPM acknowledges that it is valid to withhold the final payment until the community confirms that all aspects of the new foundation are compliant, including enclosures and elevated utilities. ASFPM recommends that FEMA reduce the amount reserved for the final payment to minimize the financial burden on the owner.

Q. Reverse Policy that Precludes Public Assistance to Prepare SD Determinations

In order for ICC to function as intended by Congress, communities make determinations when damage is substantial damage. Most communities can handle this responsibility unless a significant flood overwhelms their capacity, something that can happen quickly in many of the Nation’s small communities where the code official often works only part time. Coordinating ICC in a post-disaster environment is a concern to policyholders and community officials. The concern for the policyholder is in trying to acquire the four documents during or soon after the flood event. Local officials handling the response are overwhelmed and frustrations build as the policyholder tries to juggle work, family, displacement, and document acquisition. Schedule conflicts are a concern when trying to set up meetings with agencies and policyholders. To address this situation, ASFPM recommends that FEMA reverse a policy that precludes access to public assistance funding to help communities undertake substantial damage determinations, which in turn would result in more mitigation of older buildings, including those eligible for ICC.
In a letter dated October 19, 2004, ASFPM requested that FEMA immediately reexamine its policy guidance, RR9523.2 -- Eligibility of Building Inspections in a Post-Disaster Environment. This policy disallows reimbursement of the costs of performing post-disaster substantial damage determinations for compliance with National Flood Insurance Program (NFIP). In his letter dated January 25, 2005, Daniel Craig asserted that the policy is consistent with the Stafford Act.

It is ASFPM’s position that the 1998 policy guidance is based on flawed assumptions, does not recognize the overwhelming nature of conducting such inspections, and is therefore an unnecessary hurdle to compliant reconstruction and future mitigation opportunities. Further, it was ASFPM’s position that the Stafford Act authorizes reimbursement of costs when a declared disaster event is determined to exceed state and local capacities. Based on that, we requested that the policy guidance be rescinded and that FEMA issue new guidance that clearly states that the costs of making damage determinations in compliance with the NFIP be eligible for reimbursement under FEMA’s public assistance program.

R. Extend Period During Which ICC Must be Used

Re-examine the time limitation on use of ICC payments whether used independently by owners or as match for mitigation grants. States have expressed concerns about the 2-year time limit on use of ICC payments, especially when used as part of a community-based project. Because of the time necessary to develop a project, prepare a grant application, and receive award of a grant, the 2-year limitation is unreasonable, especially a property eligible for ICC is part of a large project. FEMA has extended the period after some disasters; rather than a case-by-case decision. ASFPM understands that a recent policy has extended the period to 4 years; this policy needs to be incorporated into the standard policy. While four years may be sufficient for ICC claims paid directly to policyholders, unfortunately there remain situations where grant-funded projects cannot be closed out in 4 years. Therefore, when used to support a mitigation grant FEMA should automatically tie the period during which ICC must be used directly to completion of the grant, and then the NFIP will not have to separately track it.

S. Improve General Awareness of ICC (Adjusters, Policyholders, State/Local Officials, FEMA Staff/Contractors)

FEMA and the states need to continue to improve awareness of ICC. Suggestions include:
- Overcome the perception that ICC is a “program”, rather than a right of the policyholder.
- Make everyone aware that ICC is available based on eligibility of the damage, not declaration of a disaster.
- Create an ICC office or hotline to field questions and require very knowledgeable people to staff the telephone/email box. With so many involved in making ICC work, it is all too common to get different answers from different people.
- Address the disconnect between post-disaster field office activities focusing on mitigation and the discussion of using ICC. DFO personnel should always ask property owners if their damaged buildings are NFIP-insured, which may make them eligible for ICC.
• Ensure that Regional staff involved in post-disaster work equally communicate the merits of acquisition and elevation-in-place, and ensure that all FEMA staff understand that choosing the most suitable mitigation activity is a decision that must be made by the community and property owners. Despite the multiple benefits of acquisition (realized when contiguous areas are acquired or when the floodway is cleared), elevation-in-place is a reasonable measure in many communities, especially if new construction in flood hazard areas is continuing and if buyouts would result in non-contiguous (patchwork) ownership.

T. Prepare Annual Report on ICC

FEMA should publish an annual report on ICC to report on income associated with the premium, and the number and amount of claims filed and settled. Importantly, the report should provide a breakdown by the nature of the work performed, such as elevation-in-place, relocation, demolition, mitigation reconstruction, floodproofing, or to support floodplain buyout projects. The report should also detail progress on improvements to how ICC is administered and efforts to improve awareness and utilization of ICC.

U. Regulated Flood Hazard Areas Outside of FEMA’s SFHA

Communities are required, at a minimum, to adopt and administer land use and control measures based on the flood hazard map issued by FEMA (the Flood Insurance Rate Map). A growing number of communities are electing to regulate based on maps that show flood-prone areas in addition to those shown on FIRMs. For example, many communities have undertaken mapping on waterways that have smaller watersheds or for waterways that were not included at all in FEMA’s study; others have prepared maps based on future upland development. ASFPM recommends that ICC claims be paid when an insured building that is subject to a community’s floodplain regulations sustains damage that would otherwise trigger ICC even if the building is located outside of the FEMA-delineated Special Flood Hazard Area.