David Maurstad, Administrator
FEMA
500 C Street SW
Washington, DC 20742

RE: Serious Consequences of Sec. 80.19(d) and (e)

I am writing to bring to your attention what the Association of State Floodplain Managers believes is an unintended consequence of a part of the Interim Rule published in the Federal Register on October 31, 2007. We are requesting that two specific provisions of that rule be suspended or clarified in writing immediately. Because of this portion of the rule, a number of states have expressed great concern and at least two have suspended their support of floodplain acquisition projects. We expect more states to follow as they begin to understand the significant new mandates placed on them.

The new Part 80, Property Acquisition and Relocation for Open Space requirements, applies to all acquisition projects regardless of the source of funding. The section of concern is Section 80.19, specifically subsections (d), and (e), which describe certain grantee (state) and subgrantee (local jurisdictions) responsibilities:

- Monitoring and reporting: Every 3 years the subgrantee, through the grantee, shall submit a report to the FEMA Regional Administrator certifying that the subgrantee has inspected the property and the property remains open space.
- Enforcement: The subgrantee, grantee and FEMA have concurrent responsibility for enforcing the deed restriction. The rule requires the grantee to notify the subgrantee whenever a violation is discovered. And then, if the subgrantee does not take action, the rule requires the grantee to enforce the restriction by taking measures deemed appropriate (including litigation). Further, FEMA can enforce the deed restriction (including litigation); however FEMA also can "withhold FEMA mitigation awards or assistance from the state and subgrantee."

This issue was not previously addressed in regulation; instead, guidance is included in the HMGP Desk Reference, which states the following (pg. 11-18):

In order to carry out tasks associated with monitoring, the subgrantee, State, or FEMA has the right to enter the parcel, with notice to the property owner, to ensure compliance with land use restrictions. Subgrantees may identify the open space nature of the property on the local tax maps to assist with monitoring.

Whenever the subgrantee obtains full title or a conservation easement on the parcel, the State will work with the subgrantee to ensure that the property is maintained in accordance with land use restrictions.
Specifically, the State may (emphasis added):

- Monitor and inspect the parcel every two years and certify that the inspected parcel continues to be used for open space or agricultural purposes; and
- Take measures to bring a non-compliant parcel back into compliance within 60 days of notice.

Only as a last resort, FEMA reserves the right to require the subgrantee to bring the property back into compliance and transfer the title and easement to a qualified third party for future maintenance.

This guidance has been supplemented by other guidance developed by the FEMA Regional Offices and guidance elsewhere in the Desk Reference. Essentially, the following basic principles are addressed and have long been accepted by states and subgrantees:

- Each party (Federal, state and subgrantee) has identified roles.
- Primary responsibility for monitoring occurs at the subgrantee level, with permissive authority given to the state to monitor and work with subgrantees to ensure that properties are maintained in accordance with the deed restrictions.
- Permissive authority given to the state to take enforcement measures.

In contrast, the new regulation is dramatically different in that it:

- Mandates a state role in monitoring.
- Mandates follow-up and enforcement by the state, specifically including litigation.
- Identifies penalties that may be imposed on states and/or subgrantees for not carrying out enforcement measures.

We accept the importance of periodic monitoring and concur that it is appropriate that the subgrantee’s responsibilities include monitoring and submitting reports. However, because communities must revise and update their mitigation plans every 5 years, we believe it is reasonable to require reporting on the same schedule.

The provisions at Sec. 80.19(d) for enforcement are much more problematic, especially because of variations in state authorities to take legal action, variations in state capacities, and the unknowns of the budgetary implications of assuming the enforcement responsibilities. It is particularly disturbing that the rule gives FEMA the authority to withhold mitigation awards or assistance from the entire state even if enforcement is warranted for a single community – perhaps simply for failing to submit a report.

This level of consequence is contrary to the larger National Mitigation Strategy objective of encouraging states and communities to engage in mitigating flood losses. We believe that is it appropriate for consequences to be focused at the community level and that, while states are cooperating partners in administering mitigation grants, it is inappropriate to penalize an entire state for problems in a single community. FEMA has at least two models for addressing problems:

- In the Community Assistance Program, if a community is found to have programmatic problems and a pattern and practice that results in non-compliant development, sanctions are imposed on the community, not the state as a whole.
- Under Sec. 1316 of the National Flood Insurance Program, if a community and state have been unable to resolve a violation due to the owner’s continued refusal to cooperate, the owner is sanctioned, not the community as a whole.
We understand that FEMA will continue to evaluate and work with interested parties during implementation of the Interim Rule and that the agency will consider comments in preparing the Final Rule. However, because some states are suspending their involvement in acquisition projects, we urge that you immediately suspend or clarify in writing Sections 80.19(d) and (e) pending resolution of the above concerns. We recommend the following:

- Modify the reporting period to be every 5 years, which could then be timed to coincide with revisions of local mitigation plans.
- Modify the mandated enforcement requirements, especially the requirement that states take legal action, in recognition that state authorities vary.
- Modify the consequence to apply only to communities, rather than a state as a whole.

If you have any questions, please contact me or Larry Larson at the Executive Office.

Sincerely,

Al W. Goodman, Jr., CFM
Chair

Cc: Deborah Ingram, FEMA
    Mike Grimm, FEMA
    ASFPM Board of Directors
    ASFPM Committee Chairs