Date: April 13, 2018

RE: Initial Comments to the Federal Register
Docket ID FEMA-2018-0006
Information Collection, Comment Request, Property Acquisition and Relocation for Open Space

ASFPM is providing comments specifically on the proposed Severe Risk Property Acquisition Program (SRPA) and may submit additional comments at a later time on the SRPA and/or other acquisition-related forms that are proposed to be updated per this notice.

1) ASFPM recommends that prior to exercise of the authority to provide grants directly to property owners, FEMA work with states, tribes, and communities to develop additional guidance on how such a grant program will function (how FEMA will determine the capacity for states and communities to administer mitigation grants before determining that it can provide these direct grants, consistency with mitigation plans, etc.). The implementation of Section 4104c in statute requires, as a pre-condition of any direct grant to property owners, that the Administrator consult with states and communities and determines that neither the state nor community in which the structure is located has the capacity to manage such grants. The forms and commentary in the Federal Register notice provides zero clarification on how this would occur, nor does the notice even acknowledge this requirement of law. As part of the Congressional deliberations when this section of law was created in 2004, it was recognized that there were instances where both communities and states were unwilling and/or unable to mitigate these properties. This often occurs in communities where there may only be one or two repetitive loss properties and/or a hazard mitigation project is simply not a priority. In other instances, there truly may be no capability to administer these complex grants.

Further, mitigation grants provided under 4104c must be consistent with local mitigation plans. How will FEMA ensure this will occur? This is important because the community may have a very different goal for the property than what a FEMA direct grant to a property owner will result in. Here is an example. Let’s say there is a structure that is a SRL property that FEMA wishes to acquire using Pathway 2 (form 31-B). The result would be the purchase of the structure only, and allow the owner to keep the land and rebuild on it. But the community’s mitigation plan identifies the area as a target for acquisition and demolition so the community can deed restrict the land and turn it into a park. If not careful, FEMA actions could run contrary to the community’s planning goals and undermine a community’s risk reduction and resiliency goals.

ASFPM members who are state, and community officials have expressed significant concerns about FEMA’s lack of clarity in this notice on coordination with them.
2) ASFPM recommends that in implementing the authority for FEMA to provide grants directly to property owners, FEMA be consistent with the law and allow property owners to choose among all eligible mitigation activities identified in 42 USC Section 4104c(c). 42 USC Section 4104c (Sec 1366) is the basic authority for the Flood Mitigation Assistance Program as well as the authority for a direct-to-property owners program that was added in the 2004 reform of the National Flood Insurance Act. Unlike authorities for FEMA’s other hazard mitigation programs under Hazard Mitigation Grant Program and Pre-disaster Mitigation, eligible activities for any authority exercised under 4104c are specifically listed in subsection c, and also include activities such as demolition or relocation of structures, elevation, floodproofing and the demo-rebuild. In 2004, ASFPM was heavily involved in working with Congress in developing this additional authority. At that time, many states had a significant numbers of Severe Repetitive Loss (SRLs) that were non-residential structures (structures where acquisition was impractical). It was envisioned then that the direct program would be most helpful in mitigating these properties as non-residential structures (typically are not high priorities in local mitigation projects). It was also envisioned that acquisition would be something FEMA would avoid or minimize given the issue of who holds the land after the acquisition was complete and FEMA was not in the business of owning/managing land. The implementation of FEMA’s authority to provide direct grants to property owners for mitigation was never intended to be limited to acquisition only. Rather, it was envisioned that acquisition would probably be the last form of mitigation be used. It is therefore surprising to see that as FEMA is finally trying to implement this authority in the law 14 years after it was provided in law, that seemingly the only mitigation option identified is acquisition.

3) ASFPM strongly opposes Pathway 2, as written, under form 086-0-31B, which would allow acquisition and demolition of the structure only and allow the property owner to retain ownership. Instead FEMA should replace Pathway 2 to allow the owner to either demolish, elevate, floodproof, or demolish and rebuild a structure consistent with currently authorized mitigation options allowed under 42 USC 4104c.

What is so disconcerting about this notice is that it appears FEMA intends to allow for a new acquisition option (FEMA would pay the pre-flood fair market value of the structure ONLY) under the Severe Risk Property Acquisition (SRPA) grant that’s not identified as an eligible mitigation activity:

*If the property owner retains the land after demolition, the property must be deed restricted and maintained consistent with sound land management practices. This ensures a reduction in flood damages on that property, limits future disaster assistance provided, and ideally, eliminates or decreases the insurance payments made as a result of damages to that property.*

Pathway 2 is inconsistent with the law under 42 USC 4104c, inconsistent with 44 CFR Part 80, inconsistent with current HMA guidance for the acquisition of properties, and inconsistent with the way FEMA has implemented acquisition projects to date. Under 42 USC 4104c, only the following activities are eligible mitigation options when it comes to either acquiring or demolishing properties:

*(A) demolition or relocation of any structure located on land that is along the shore of a lake or other body of water and is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or flooding;*
(B) elevation, relocation, demolition, or floodproofing of structures (including public structures) located in areas having special flood hazards or other areas of flood risk;
(C) acquisition by States and communities of properties (including public properties) located in areas having special flood hazards or other areas of flood risk and properties substantially damaged by flood, for public use, as the Administrator determines is consistent with sound land management and use in such area;
(4) The Administrator shall consider as an eligible activity the demolition and rebuilding of properties to at least base flood elevation or greater, if required by the Administrator or if required by any State regulation or local ordinance, and in accordance with criteria established by the Administrator

If FEMA wishes to acquire a building, in accordance with the law, it must acquire the property. The term properties, even as used in the proposed forms, includes the land as well. If a property owner wanted their flooded home demolished, and keep their property, there are two options that exist now, under the law: FEMA could pay for demolition and the property could be retained/rebuilt upon; or the property owner could opt for the demolition-rebuild (option). The point is that the law is constricted in this way for good reason. Investing a large amount of taxpayer funds to pay for the pre-flood market value of a home should result in the public benefit of the deed-restricted land so that no future disaster assistance is provided on it, so that there is no flood insurance available on it (another potential taxpayer exposure).

Pathway 2 as proposed is also inconsistent with 44 CFR part 80.19. Specifically, 44 CFR part 80.19 requires that:

1. The property shall be dedicated and maintained in perpetuity as open space for the conservation of natural floodplains;
2. No new structures or improvements will be built on the property (with the exception of open sided public facilities, public restrooms, or open space compatible structures);
3. After the date of property settlement, no Federal entity or source may provide disaster assistance for any purpose with respect to the property, and
4. That the property is not eligible for coverage under the NFIP for damage to structures on the property occurring after the date of settlement.”

It would seem that Condition 6 under Section 7 of form 086-0-31B, which is a deed notice that flood insurance must be maintained during the life of the property, is inconsistent with 44CFR part 80.19 for property acquisition projects that states the property is not eligible for coverage under the NFIP.

The Federal Register notice also introduces a new type of deed restriction for the proposed option of acquiring structures: “If the property owner retains the land after demolition, the property must be deed restricted and maintained consistent with sound land management practices.” This restriction will end up being more confusing for all HMA acquisition projects in the future as there will be more pressure to use a similar type of restriction under other HMA programs since FEMA is setting a precedence here. By what logic would FEMA say no to the lesser deed restriction since FEMA itself is proposing it under the
SRPA? States and communities are well aware of other programs like CDBG-DR that can be used in a more flexible way if this is desired.

Finally, the acquisition of the structure only is inconsistent with current HMA program guidance for acquisitions covering all HMA programs. The 2015 HMA Addendum A2.2.2 states:

*To be eligible, a project must result in property acquisition and structure demolition or relocation, and the acquisition and demolition or relocation must meet all of the requirements of 44 CFR Part 80 and adhere to the following guidance on open space restrictions governing the use of awarded funds and the use of acquired real property.*

ASFPM is concerned that by creating a new acquisition option for the structure only would open the door for this option to be more widely available under other HMA programs and result in the erosion of acquisition and protecting floodplain lands as open space. The bottom line is that floodplains are hazardous areas and the acquisition option as it currently exists is the one option that exists that not only ensures taxpayers on not on the hook for future costs, but protects and preserves the natural floodplain function.

4) ASFPM requests that Pathway 1, as written, under form 086-0-31B explicitly require that as part of the transaction, a deed restriction be required that limits future uses of the property to open space, in perpetuity, consistent with FEMA’s current HMA guidance and 44CFR80.19. It seems that it is possible FEMA wishes to include this condition as evidenced by the text in the notice itself:

*If the property owner chooses to sell the property, the local government or qualifying organization must deed restrict the land in perpetuity for compatible uses of open space.*

However, Section 6 of Form, which are the conditions of the voluntary participation agreement has no mention of this requirement whatsoever. And absent any additional guidance on how this new program would work, we want to make sure it is FEMA’s intent to deed restrict these properties as open space should a property owner elect this option.

ASFPM is disappointed that we had to rely on several follow-up contacts with point of contact listed in the notice to obtain the draft forms (they are still not on the docket), and try to discern from the forms themselves to figure out what FEMA is proposing under the SRPA. There is no guidance on how FEMA would consult with states and communities, no guidance on consistency with mitigation plans, no guidance on how deed restrictions would be ensured on acquired properties, and no guidance on how any deed restrictions would be monitored. In short, it seems inappropriate to us that FEMA would implement such an important authority based on posting a couple of forms on the Federal Register versus a more open and transparent process that we would have expected from FEMA when contemplating the implementation of a new program. As stated earlier, ASFPM recommends FEMA develop guidance on how this program would be implemented in partnership with its state, tribal, and community partners.
In conclusion, ASFPM very much supports FEMA exercising its authority to implement a grant program directly to property owners for the reasons stated earlier. After all, we helped Congress get it into statute. However, like in 2004, we reiterate the importance of only implementing this after careful consultation with states, tribes and communities and making the full array of mitigation options available to property owners. At that time, we knew acquisition would likely be the most difficult option to implement due to land ownership and deed restriction issues. Instead of creating a new option that has the potential of diminishing the incredibly successful acquisition program that started with HMGP in 1988, FEMA should implement this direct grant program using existing mitigation options. The list of eligible mitigation options exists for good reason.