



NATIONAL FLOOD INSURANCE PROGRAM

Bureau and Statistical Agent

FEMA

W-03052

MEMORANDUM TO: Write Your Own (WYO) Principal Coordinators and
NFIP Servicing Agent

FROM: WYO Clearinghouse

DATE: October 14, 2003

SUBJECT: Proposed Rule – National Flood Insurance Program (NFIP);
Assistance to Private Sector Property Insurers

Attached is a proposed rule published in the Federal Register that details planned changes to the Financial Assistance/Subsidy Arrangement and related regulations. The amended Arrangement is scheduled to be effective January 1, 2004, for an initial period ending September 30, 2004. Thereafter, the Arrangement shall be effective on an annual basis for the period October 1 through September 30.

FEMA invites comments on this proposed rule; all comments should be received on or before November 13, 2003, as detailed in the attachment.

If you have any questions, please contact your Program Coordinator.

Attachment

cc: Vendors, IBHS, FIPNC, Government Technical Representative

Suggested Routing: Accounting, Claims, Data Processing, Marketing, Underwriting

SUPPLEMENTARY INFORMATION: This proposal addresses the approval of local EDCAPCD Rule 232 and SBCAPCD Rule 360. In the Rules section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: September 3, 2003.

Wayne Nastri,

Regional Administrator, Region IX.

[FR Doc. 03-25801 Filed 10-10-03; 8:45 am]

BILLING CODE 6560-50-U

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY 135-200337(b); FRL-7573-1]

Approval and Promulgation of Implementation Plans for Kentucky: Source-Specific Revision for Marathon Ashland Petroleum Marine Repair Terminal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve a source-specific revision to the State Implementation Plan (SIP) of the Commonwealth of Kentucky. This revision requires the Marathon Ashland Petroleum Marine Repair Terminal (MAPMRT) to implement volatile organic compound (VOC) reasonably available control technology (RACT) for its barge cleaning operation as part of a contingency measure implemented for the Huntington-Ashland 1-Hour Ozone Maintenance Area. In the Final Rules Section of this **Federal Register**, the EPA is approving the State's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no significant, material, and adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse

comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

DATES: Written comments must be received on or before November 13, 2003.

ADDRESSES: Comments may be submitted by mail to: Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.

Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions described in the direct final rule, **SUPPLEMENTARY INFORMATION** (sections VI.B.1. through 3.), which is published in the Rules Section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT:

Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Phone: (404) 562-9031. E-mail: notarianni.michele@epa.gov.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**.

Dated: October 1, 2003.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 03-25799 Filed 10-10-03; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Parts 61 and 62

RIN 1660-AA28

National Flood Insurance Program (NFIP); Assistance to Private Sector Property Insurers

AGENCY: Federal Emergency Management Agency (FEMA), Emergency Preparedness and Response Directorate, Department of Homeland Security.

ACTION: Proposed rule.

SUMMARY: FEMA is proposing to amend the Federal Insurance Administration, Financial Assistance/Subsidy Arrangement ("Arrangement") and related regulations regarding issues of Federal jurisdiction and Federal law for lawsuits involving Write-Your-Own (WYO) Companies and the rules for reimbursing WYO Companies for the cost of litigation, including issues of agent negligence and the relationship of the agent to the WYO Company. Additionally, FEMA is amending procedures for companies seeking to become and ceasing to be WYO Companies.

On September 5, 2003, FEMA published an interim final rule that amends FEMA's Arrangement. The purpose of that rule was to extend the current Arrangement for 8 months to allow FEMA to make the changes proposed in this rulemaking.

DATES: FEMA invites comments on this proposed rule, which should be received on or before November 13, 2003.

ADDRESSES: Please send your comments to the Rules Docket Clerk, Office of the General Counsel, FEMA, 500 C Street, SW., Room 840, Washington, DC 20472, (facsimile) 202-646-4536, or (email) rules@fema.gov.

FOR FURTHER INFORMATION CONTACT:

Charles Plaxico, FEMA, 500 C Street, SW., Washington, DC 20472, (phone) 202-646-3422, (facsimile) 202-646-4327, or (email) Charles.Plaxico@dhs.gov.

SUPPLEMENTARY INFORMATION: Under the Arrangement, approximately 100 private sector property insurers issue flood insurance policies and adjust flood insurance claims under their own names, based on an arrangement with the Federal Insurance Administration (FIA) (44 CFR Part 62, Appendix A). The WYO insurers receive an expense allowance and remit the remaining premium to the Federal Government. The Federal Government pays WYO insurers for flood losses and pays loss adjustment expenses based on a fee schedule. Litigation costs, including court costs, attorney fees, judgments, and settlements, are paid by FIA based on submitted documentation. The Arrangement provides that under certain circumstances reimbursement for litigation costs will not be made. FEMA proposes several changes to the Arrangement and related regulations.

FEMA proposes to clarify 44 CFR 61.5 by creating a new Section f from the current text of Section e. FEMA proposes to add 44 CFR 61.5(f) to provide that agents utilized by a WYO

Company, like agents utilized by FEMA, act for the insured and are not agents of the WYO Company.

FEMA proposes to amend 44 CFR 62.22(a) to clarify that its provisions for Federal jurisdiction include WYO Companies.

FEMA proposes to amend 44 CFR 62.23(g) to recognize WYO Companies as fiscal agents of the Federal Government. This is based on section 1340(a)(1) of the National Flood Insurance Act of 1968, as amended. FEMA believes this change will clarify matters of jurisdiction and choice of law for WYO Companies. However, WYO Companies are not recognized as general agents of the Federal Government. The proposed amendment also provides that the Federal Government is not a proper party defendant in any lawsuit arising out of a WYO policy.

The remaining proposed amendments apply to Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/ Subsidy Arrangement.

In Article I, FEMA proposes to amend the fifth paragraph to refer to the Federal Treasury, to clarify that WYO Companies are responsible for Federal funds. A companion proposed amendment to Article III, Section D.1, also refers to Federal funds. FEMA proposes to add two new paragraph clauses to Article I to emphasize the Federal nature of the WYO Companies' activities under the Arrangement, and support the application of Federal law in Federal Court to lawsuits arising under the Arrangement.

FEMA proposes to delete the tenth paragraph as currently drafted in Article I to clarify that policyholders and applicants are not direct beneficiaries of the Arrangement.

FEMA proposes to amend Article II, Section G to clarify the WYO Company's duty to comply with written standards, procedures, and guidance issued by FEMA or FIA.

FEMA proposes to amend Article III, Section B to delete the word "their" before the phrase "insurance agents" to be consistent with the proposed amendment to 44 CFR 61.5(e), as discussed above, that provides that the WYO agent is not the agent of the WYO Company.

FEMA proposes to amend Article III, Section D.2 to provide that failure to meet these requirements may result in no reimbursement, which is similar to a statement in the deleted Article III, Section D.3. The reference to Article IX in Article III, Section D.2 would be deleted in light of FEMA's proposed amendment of Article IX to restrict it to

matters not in litigation. FEMA proposes to delete Article III, Section D.3 because its litigation documentation and notification requirements have been established by FEMA outside the Arrangement.

FEMA proposes to amend Article III, Section D.4 (now renumbered as Article III, Section D.3), concerning reimbursement for WYO Company litigation costs, to delete the reference to insurer negligence and the cross-reference to Article IX. The issue of insurer negligence for matters in litigation will be dealt with in the context of the other standards in the new Article III, Section D.3. Article IX would now only apply to insurer negligence that has not resulted in litigation. The existing "significantly outside the scope" standard will be left in the new Article III, Section D.3. A provision will be added relating to a pattern of errors found in operation reviews, audits, or a review after litigation has been filed.

Agent negligence would continue to be grounds for non-reimbursement of litigation costs. FEMA would continue to evaluate whether a WYO Company would be reimbursed for costs, fees, and settlement payments (when appropriate) when agent negligence is alleged against that WYO Company for which they could be held financially responsible. Where FEMA determines that there is no agent negligence, the WYO Company would be reimbursed for the litigation costs of defending itself against the possibility that it could be held financially responsible for agent negligence; where FEMA determines that there is agent negligence, the WYO Company may still be reimbursed for litigation costs for the defense of policy provisions and for its own negligence. FEMA has not changed the general rule that litigation costs are not reimbursable if they relate to actions that are significantly outside the scope of the Arrangement.

FEMA proposes to expressly recognize that a part of litigation could be "significantly outside the scope" of the Arrangement while part is within the scope. In such a case, reimbursement would be based on the appropriate division of responsibility, if possible. Reimbursement for legal expenses ("costs to defend such litigation") will now be explicitly treated the same way as reimbursement for awards or judgments. A WYO Company can now petition the Federal Insurance Administrator, ("Administrator") instead of the Standards Committee, for reconsideration of a decision not to reimburse for litigation. The

Administrator could then seek the advice of the Standards Committee. There will no longer be a deadline for a decision.

FEMA proposes to amend Article III, Section E to clarify that WYO Companies must follow the refund rules established by FIA since flood insurance premiums are funds of the Federal Government.

FEMA proposes to amend Article V to clarify the procedures for a company to become, or to cease to be, a WYO Company. Companies will also be required to inform FEMA of their intent to continue in or leave the program within 30 days of the offer.

In Article V, Section C, the time during which the WYO Company can be required to continue performance while it exits the program by running off or transferring its business will be extended from 1 year to 18 months. Notice and billing cycles make the one-year limit impractical. The proposed amendment will also require a WYO Company to tell FEMA if it plans to leave the program during the Arrangement year.

FEMA proposes to amend Article V, Section C.1.a to set out the requirements when the business is to be transferred to FIA. The proposed amendment also would establish in Article V, Section C.2 the requirement for FIA approval of transfer of the business to another WYO Company.

FEMA proposes to amend Article V, Section D to formalize the possibility of non-renewal of the Arrangement by FIA for material failure of the WYO Company to comply with the Arrangement or to take corrective action required by the FIA, and to offer the alternative of permitting the transfer by sale, subject to FIA approval, as in Article V, Section C.2.

FEMA proposes to re-designate Article V, Section F (cancellation of the Arrangement resulting from an order or directive issued by a Department of Insurance) to Section E so that it immediately follows Section D (cancellation of the Arrangement by FIA) because these two sections are parallel in purpose and construction and should be placed together. This results in existing Section E being re-designated as Section F. The new Section E allows the possibility of the sale of the book of business, subject to FIA approval, similar to the proposed revision to Section D.

FEMA proposes to amend Article VII, Section C to make its provisions regarding settlement of accounts when the WYO Company's participation ends applicable to situations where the WYO Company is unable to or not permitted

to participate, as well as where the WYO Company elects not to participate. In addition, the final settlement will now be made subject to audit.

FEMA proposes to amend Article IX to address only matters not in litigation. Its provisions regarding reimbursement of the WYO Company are consistent with the new Article III, Section D.3, which addresses matters in litigation. To be consistent with Article III, Section D.3, FEMA amends the existing Article IX language, "error or omission," to "negligence." It provides that there will be no reimbursement for claims against the WYO Company grounded in actions "significantly outside the scope."

FEMA proposes to amend Article XVI to reflect the proposed changes to 44 CFR 62.23(g), as discussed above.

On September 5, 2003, FEMA published an interim final rule, 68 FR 52700, that amends the Arrangement. The purpose of that rule was to extend the current Arrangement for three months to allow FEMA to make the changes proposed in this rulemaking.

National Environmental Policy Act

This proposed rule falls within the exclusion category 44 CFR part 10.8(d)(2)(ii), which addresses the preparation, revision, and adoption of regulations, directives, manuals, and other guidance documents related to actions that qualify for categorical exclusions. Because no other extraordinary circumstances have been identified, this proposed rule will not require the preparation of either an environmental assessment or an environmental impact statement as defined by the National Environmental Policy Act.

Executive Order 12866, Regulatory Planning and Review

We have prepared and reviewed this proposed rule under the provisions of Executive Order 12866, Regulatory Planning and Review. Under Executive Order 12866, 58 FR 51735, Oct. 4, 1993, a significant regulatory action is subject to review by the Office of Management and Budget ("OMB") and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in th[e] Executive [O]rder.

For the reasons that follow, FEMA has concluded that this proposed rule is neither a significant regulatory action nor an economically significant rule under the Executive Order. This proposed rule amends the Arrangement and related regulations to clarify issues of Federal jurisdiction and Federal law for disputes involving WYO Companies and the rules for reimbursing WYO Companies for the cost of litigation. It will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, the insurance sector, competition, or other sectors of the economy. It will create no serious inconsistency or otherwise interfere with an action taken or planned by another agency. It will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Finally, it does not raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

OMB has not reviewed this rule under the principles of Executive Order 12866.

Paperwork Reduction Act

This proposed rule does not contain a collection of information and is therefore not subject to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, agencies must consider the impact of their rulemakings on "small entities" (small businesses, small organizations and local governments). When 5 U.S.C. 553 requires an agency to publish a notice of proposed rulemaking, the Act requires a regulatory flexibility analysis for both the proposed rule and the final rule if the rulemaking could "have a significant economic impact on a substantial number of small entities." The Act also provides that if a regulatory flexibility analysis is not required, the agency must certify in the rulemaking document that the rulemaking will not "have a significant economic impact on a substantial number of small entities."

A regulatory flexibility analysis is not required for this proposed rule because it would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132, Federalism

Executive Order 13132, Federalism, dated August 4, 1999, sets forth principles and criteria to which agencies must adhere in formulating and implementing policies that have federalism implications; that is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and must consult with State and local officials before implementing any such action to the extent practicable.

FEMA has reviewed this proposed rule under Executive Order 13132 and concludes that the proposed rule has no federalism implications as defined by the Executive Order. FEMA has determined that the rule does not significantly affect the rights, roles, and responsibilities of States, involves no preemption of State law and does not limit State policymaking discretion.

Executive Order 12778, Civil Justice Reform

This proposed rule meets the applicable standards of § 2(b)(2) of Executive Order 12778.

List of Subjects in 44 CFR Parts 61 and 62

Claims, Flood insurance.

Accordingly, we propose to amend 44 CFR parts 61 and 62 as follows:

PART 61—INSURANCE COVERAGE AND RATES

1. The authority citation for part 61 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

2. Amend § 61.5 by revising paragraph (e) and add a new paragraph (f) to read as follows:

§ 61.5 Special terms and conditions.

* * * * *

(e) The standard flood insurance policy is authorized only under the terms and conditions established by Federal statute, the program's regulations, the Administrator's

interpretations, and the express terms of the policy itself. Any representations regarding the extent and scope of coverage which are not consistent with the National Flood Insurance Act of 1968, as amended, or the Program's regulations are void.

(f) Any duly licensed property or casualty agent selling and servicing NFIP policies acts for the insured, and does not act as agent for the Federal Government, the Federal Emergency Management Agency, the Federal Insurance Administration, the servicing agent, or the Write-Your-Own Company.

PART 62—SALE OF INSURANCE AND ADJUSTMENT OF CLAIMS

3. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of Mar. 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

4. Amend § 62.22 by revising paragraph (a) to read as follows:

§ 62.22 Judicial review.

(a) Upon the disallowance by the Federal Insurance Administration, a participating Write-Your-Own Company, or the servicing agent of any claim on grounds other than failure to file a proof of loss, or upon the refusal of the claimant to accept the amount allowed upon any claim after appraisal pursuant to policy provisions, the claimant within one year after the date of mailing by the Federal Insurance Administration, the participating Write-Your-Own Company, or the servicing agent of the notice of disallowance or partial disallowance of the claim may, pursuant to 42 U.S.C. 4072, institute an action on such claim against the insurer only in the U.S. District Court for the district in which the insured property or the major portion thereof shall have been situated, without regard to the amount in controversy.

5. Amend § 62.23 by revising paragraph (g) to read as follows:

§ 62.23 WYO Companies authorized.

(g) A WYO Company shall act as a fiscal agent of the Federal Government, but not as its general agent. WYO Companies are solely responsible for their obligations to their insured under any flood insurance policies issued under agreements entered into with the Administrator, such that the Federal Government is not a proper party

defendant in any lawsuit arising out of such policies.

6. In Appendix A to part 62, revise the *Effective Date* to read as follows:

Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement

Effective Date: January 1, 2004.

7. In Appendix A to part 62, revise Article I to read as follows:

Appendix A to Part 62—Federal Emergency Management Agency, Federal Insurance Administration, Financial Assistance/Subsidy Arrangement

Article I—Findings, Purpose, and Authority

Whereas, the Congress in its "Finding and Declaration of Purpose" in the National Flood Insurance Act of 1968, as amended, ("the Act" or "Act") recognized the benefit of having the National Flood Insurance Program (the "Program" or "NFIP") "carried out to the maximum extent practicable by the private insurance industry"; and

Whereas the Federal Insurance Administration (FIA) recognizes this Arrangement as coming under the provisions of section 1345 of the Act (42 U.S.C. 4081); and

Whereas, the goal of the FIA is to develop a program with the insurance industry where, over time, some risk-bearing role for the industry will evolve as intended by the Congress (section 1304 of the Act (42 U.S.C. 4011)); and

Whereas, the insurer (hereinafter the "Company") under this Arrangement shall charge rates established by the FIA; and

Whereas, FIA has promulgated regulations and guidance implementing the Act and the Write-Your-Own Program whereby participating private insurance companies act in a fiduciary capacity utilizing Federal funds to sell and administer the Standard Flood Insurance Policies, and has extensively regulated the participating companies' activities when selling or administering the Standard Flood Insurance Policies; and

Whereas, any litigation resulting from, related to, or arising from the Company's compliance with the written standards, procedures, and guidance issued by FEMA or FIA arises under the Act, regulations, or FIA guidance, and

legal issues thereunder raise a Federal question; and

Whereas, through this Arrangement, the Federal Treasury will subsidize all flood policy claim payments by the Company; and

Whereas, this Arrangement has been developed to enable any interested qualified insurer to write flood insurance under its own name; and

Whereas, one of the primary objectives of the Program is to provide coverage to the maximum number of structures at risk and because the insurance industry has marketing access through its existing facilities not directly available to the FIA, it has been concluded that coverage will be extended to those who would not otherwise be insured under the Program; and

Whereas, flood insurance policies issued subject to this Arrangement shall be only that insurance written by the Company in its own name under prescribed policy conditions and pursuant to this Arrangement and the Act; and

Whereas, over time, the Program is designed to increase industry participation, and accordingly, reduce or eliminate Government as the principal vehicle for delivering flood insurance to the public.

Now, therefore, the parties hereto mutually undertake the following:

8. In Appendix A to part 62, revise Article II, section G to read as follows:

Article II—Undertaking of the Company

G. Compliance with Agency Standard and Guidelines.

1. The Company shall comply with written standards, procedures, and guidance issued by FEMA or FIA relating to the NFIP and applicable to the Company.

2. The Company shall market flood insurance policies in a manner consistent with marketing guidelines established by FIA.

9. In Appendix A to part 62 amend Article III to revise the second paragraph of section B; revise section D; and add a sentence to the end of section E to read as follows:

Article III—Loss Costs, Expenses, Expense Reimbursement, and Premium Refunds

B. * * *

The Company may retain fifteen percent (15%) of the Company's written premium on the policies covered by this Arrangement as the commission allowance to meet commissions or

salaries of insurance agents, brokers, or other entities producing qualified flood insurance applications and other related expenses.

* * * * *

D. Loss Payments.

1. Loss payments under policies of flood insurance shall be made by the Company from Federal funds retained in the bank account(s) established under Article II, section E and, if such funds are depleted, from Federal funds derived by drawing against the Letter of Credit established pursuant to Article IV.

2. Loss payments include payments as a result of litigation that arises under the scope of this Arrangement, and the Authorities set forth herein. All such loss payments and related expenses must meet the documentation requirements of the Financial Control Plan and of this Arrangement, and the Company must comply with the litigation documentation and notification requirements established by FEMA. Failure to meet these requirements may result in the Administrator's decision not to provide reimbursement.

3. Limitation on Litigation Costs.

a. Following receipt of notice of such litigation, the FEMA Office of the General Counsel ("OGC") shall review the information submitted. If the FEMA OGC finds that the litigation is grounded in actions by the Company that are significantly outside the scope of this Arrangement, and/or involves issues of agent negligence, then the FEMA OGC shall make a recommendation to the Administrator regarding whether all or part of the litigation is significantly outside the scope of the Arrangement.

b. If the Administrator makes a determination that an Operation Review or audit conducted pursuant to the WYO Financial Control Plan, 44 CFR part 62, appendix B, or an audit conducted by the Department of Homeland Security Office of Inspector General, or a review of the Company's business after a lawsuit has been filed against the Company reveals that the Company has a pattern of errors, and an error of that type has resulted in litigation, that litigation will be considered significantly outside the scope of the Arrangement.

c. In the event the Administrator agrees with the determination of the FEMA OGC under Article III, section D.3.a, or makes the determination regarding a pattern of errors under Article III, section D.3.b, the Company will be notified in writing within thirty (30) days of the Administrator's

decision that any award or judgment for damages and any costs to defend such litigation will not be recognized under Article III as a reimbursable loss cost, expense or expense reimbursement.

d. In the event a question arises whether only part of a litigation is reimbursable, the FEMA OGC shall make a recommendation to the Administrator about the appropriate division of responsibility, if possible.

e. In the event that the Company wishes to petition for reconsideration of the determination that it will not be reimbursed for any part of the award or judgment or any part of the costs expended to defend such litigation made under Article III, section D.3.a–d, it may do so by mailing, within thirty (30) days of the notice that reimbursement will not be made, a written petition to the Administrator, who may request the advice of the WYO Standards Committee established under the WYO Financial Control Plan. The WYO Standards Committee will consider the request at its next regularly scheduled meeting or at a special meeting called for that purpose by the Chairman and issue a written recommendation to the Administrator. The Administrator's final determination, after advisement from the Standards Committee (if sought), will be made in writing to the Company.

E. * * * As fiscal agent, the Company shall not refund any premium to applicants or policyholders in any manner other than as specified in the NFIP's "Flood Insurance Manual" since flood insurance premiums are funds of the Federal Government.

10. In Appendix A to part 62, revise Article V to read as follows:

Article V—Commencement and Termination

A. The initial period of this Arrangement is from January 1, 2004 through September 30, 2004. Thereafter the Arrangement will be effective on an annual basis for the period October 1 through September 30. The FIA shall provide financial assistance only for policy applications and endorsements accepted by the Company during this period pursuant to the Program's effective date, underwriting and eligibility rules.

B. Each year, the FIA shall publish in the **Federal Register** and make available to the Company the terms for subscription or re-subscription to this Financial Assistance/Subsidy Arrangement. The Company shall notify the FIA of its intent to re-subscribe or not re-subscribe within thirty days of publication.

C. In order to assure uninterrupted service to policyholders, the Company shall promptly notify the FIA in the event the Company elects not to participate in the Program during the Arrangement year. If so notified, or if the FIA chooses not to renew the Company's participation, the FIA, at its option, may require the continued performance of all or selected elements of this Arrangement for the period required for orderly transfer or cessation of business and settlement of accounts, not to exceed 18 months, and may either require Article V.C.1 or allow Article V.C.2:

1. The delivery to the FIA of:

a. A plan for the orderly transfer to the FIA of any continuing responsibilities in administering the policies issued by the Company under the Program including provisions for coordination assistance; and
b. All data received, produced, and maintained through the life of the Company's participation in the Program, including certain data, as determined by FIA, in a standard format and medium; and

c. All claims and policy files, including those pertaining to receipts and disbursements that have occurred during the life of each policy. In the event of a transfer of the services provided, the Company shall provide the FIA with a report showing, on a policy basis, any amounts due from or payable to insureds, agents, brokers, and others as of the transition date; and

d. All funds in its possession with respect to any policies transferred to FIA for administration and the unearned expenses retained by the Company.

2. Submission of plans for the renewal of the business by another WYO Company or Companies or the submission of detailed plans for another WYO Company to assume responsibility for the Company's NFIP policies. Such plans shall assure uninterrupted service to policyholders and shall be accompanied by a formal request for FIA approval of such transfers.

D. Financial assistance under this Arrangement may be canceled by the FIA in its entirety upon thirty (30) days written notice to the Company by certified mail stating one of the following reasons for such cancellation: (i) Fraud or misrepresentation by the Company subsequent to the inception of the Arrangement; or (ii) Nonpayment to the FIA of any amount due the FIA; or (iii) Material failure to comply with the requirements of this Arrangement or with the written standards, procedures, or guidance issued by FEMA or FIA relating to the NFIP and applicable to the Company. Under these specific

conditions, the FIA may require the transfer of administrative responsibilities and the transfer of data and records as provided in Article V, section C.1.a through d. If transfer is required, the unearned expenses retained by the Company shall be remitted to the FIA. In such event, the Government will assume all obligations and liabilities owed to policyholders under such policies, arising before and after the date of transfer. The FIA, at its option, may alternatively consider proposals and plans for the assumption of responsibilities by another WYO Company as provided in Article V, section C.2.

E. In the event that the Company is unable or otherwise fails to carry out its obligations under this Arrangement by reason of any order or directive duly issued by the Department of Insurance of any jurisdiction to which the Company is subject, the Company agrees to transfer, and the Government will accept, any and all WYO policies issued by the Company and in force as of the date of such inability or failure to perform. In such event the Government will assume all obligations and liabilities within the scope of the Arrangement owed to policyholders arising before and after the date of transfer, and the Company will immediately transfer to the Government all needed records and data and all funds in its possession with respect to all such policies transferred and the unearned expenses retained by the Company. The FIA, at its option, may alternatively consider proposals for the assumption of responsibilities by another WYO Company as provided by Article V, section C.2.

F. In the event the Act is amended, or repealed, or expires, or if the FIA is otherwise without authority to continue the Program, financial assistance under this Arrangement may be canceled for any new or renewal business, but the Arrangement shall continue for policies in force that shall be allowed to run their term under the Arrangement.

11. In Appendix A, part 62, revise Article VII section C. to read as follows:

Article VII—Cash Management and Accounting

* * * * *

C. In the event the Company elects not to participate in the Program in this or any subsequent fiscal year, or is otherwise unable or not permitted to participate, the Company and FIA shall make a provisional settlement of all amounts due or owing within three months of the expiration or termination of this Arrangement. This settlement shall include net premiums collected,

funds drawn on the Letter of Credit, and reserves for outstanding claims. The Company and FIA agree to make a final settlement, subject to audit, of accounts for all obligations arising from this Arrangement within 18 months of its expiration or termination, except for contingent liabilities that shall be listed by the Company. At the time of final settlement, the balance, if any, due the FIA or the Company shall be remitted by the other immediately and the operating year under this Arrangement shall be closed.

12. In Appendix A to part 62, revise the first paragraph of Article IX to read as follows:

Article IX—Errors and Omissions

In the event of negligence by the Company that has not resulted in litigation but has resulted in a claim against the Company, FEMA will not consider reimbursement of the Company for costs incurred due to that negligence unless the Company takes all reasonable actions to rectify the negligence and to mitigate any such costs as soon as possible after discovery of the negligence. Further, (i) if the claim against the Company is grounded in actions significantly outside the scope of this Arrangement, (ii) if there is negligence by the agent, or (iii) if there is an error that is the type of error for which there has been a determination by the Administrator of a pattern of errors as described in Article III, section D.3.b, FEMA will not reimburse any costs incurred due to that negligence or error. The Company will be notified in writing within thirty (30) days of a decision not to reimburse. In the event the Company wishes to petition for reconsideration of the decision not to reimburse, the procedure in Article III, section D.3.e shall apply.

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13. In Appendix A to part 62, revise Article XVI to read as follows:

Article XVI—Relationship Between the Parties (Federal Government and Company) and the Insured

Inasmuch as the Federal Government is a guarantor hereunder, the primary relationship between the Company and the Federal Government is one of a fiduciary nature, *i.e.*, to assure that any taxpayer funds are accounted for and appropriately expended. The Company is a fiscal agent of the Federal Government, but is not a general agent of the Federal Government. The Company is solely responsible for its obligations to its insured under any policy issued pursuant hereto, such that the Federal Government is not a proper

party to any lawsuit arising out of such policies.

Dated: October 7, 2003.

Michael D. Brown,

Under Secretary, Emergency Preparedness and Response, Department of Homeland Security.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 030917233-3233-01; I.D. 082703A]

RIN 0648-AP50

Fisheries of the Gulf of Mexico; Coastal Migratory Pelagic Resources; Stock Status Determination Criteria

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: In accordance with the framework procedure for adjusting management measures of the Fishery Management Plan for the Coastal Migratory Pelagic Resources of the Gulf of Mexico and South Atlantic (FMP), NMFS proposes to incorporate into the FMP biomass-based stock status determination criteria consistent with the requirements of the Magnuson-Stevens Fisheries Conservation and Management Act (Magnuson-Stevens Act). Criteria to be incorporated include maximum sustainable yield (MSY), optimum yield (OY), minimum stock size threshold (MSST) and maximum fishing mortality threshold (MFMT) for king and Spanish mackerel and cobia stocks under the jurisdiction of the Gulf of Mexico Fishery Management Council (Council).

DATES: Written comments must be received on or before November 13, 2003.

ADDRESSES: Written comments on the proposed rule should be mailed to Dr. Steve Branstetter, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments may also be sent via fax to 727-522-5583. Comments will not be accepted if submitted via e-mail or Internet.

Requests for copies of the regulatory amendment, which includes an