

# National Flood Insurance Program **Litigation Manual**

January 2023



**FEMA**



This Manual is effective January 1, 2023 and thereafter until superseded.  
This Manual supersedes all prior versions.

The January 2023 NFIP Litigation Manual is available at [J Manuals | The National Flood Insurance Program | FloodSmart | NFIPServices](#).

Summaries of material modifications may also be published from time to time in separate documents.

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# 1 Introduction

The Federal Insurance and Mitigation Administration (FIMA) and the Federal Emergency Management Agency's (FEMA) Office of Chief Counsel (OCC) jointly developed this 2022 National Flood Insurance Program (NFIP) Litigation Manual (Manual). The Manual formalizes FEMA's oversight of Write Your Own NFIP litigation and is a tool to improve the defense of NFIP litigation. This Manual does not replace the Financial Assistance/Subsidy Arrangement ([Arrangement](#)) or the National Flood Insurance Act (Act) and its implementing regulations (collectively the "Arrangement Documents").

To the extent that any provision of this Manual is inconsistent with the Arrangement Documents, the Arrangement Documents shall govern. This Manual provides guidance on the Arrangement between FEMA and Write Your Own (WYO) Companies, but does not create any third-party rights or private rights of action.

## 2 National Flood Insurance Program

### 2.1 Role of the Federal Government

FIMA (the Federal Insurance and Mitigation Administration) is part of Resilience, which is a component of FEMA, a federal agency within the U.S. Department of Homeland Security. Pursuant to the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001 *et seq.* (Act), FEMA administers the NFIP, a federal program that makes flood insurance available in participating communities that adopt and enforce floodplain management ordinances that meet or exceed FEMA's minimum requirements.

Pursuant to the Act and its implementing regulations, found at Title 44 of the Code of Federal Regulations Parts 61 and 62, flood insurance may be sold to the public either directly through FEMA (NFIP Direct) or by private sector insurance companies participating in the NFIP WYO program. As the federal agency responsible for administration of the NFIP, FEMA has, *inter alia*, the following programmatic responsibilities:

- Establish a plan to maintain financial control for business written under the WYO Program;
- Provide an NFIP Claims Manual and other guidance about the adjustment and payment of claims;
- Reimburse Special Allocated Loss Adjustment Expenses (SALAE) to the WYO Companies in accordance with guidelines issued by FEMA;

- Monitor WYO Company underwriting, claims, and financial practices to ensure compliance with applicable laws, regulations, and policies; and
- Review federally funded payments for losses incurred by the WYO Companies.

FEMA does the following to discharge its duties under the Act:

- Establishes the Standard Flood Insurance Policy (SFIP), the three forms of which are codified at 44 C.F.R. Part 61, Appendices A(1) through A(3);
- Specifies the risk classes and premiums for covered property;
- Issues policy statements and interpretations;
- Promulgates regulations; and
- Utilizes risk transfer instruments to engage private capital markets in federal flood insurance.

FEMA established and now maintains the National Flood Insurance Fund (Fund) in support of the NFIP. The Fund consists of federal monies, including premium and fee dollars. It is maintained by the United States Treasury and is available for payment of programmatic expenses and insurance claims. FEMA, in its role as guarantor, has a fiduciary responsibility to ensure the proper use of the Fund.

In April 2016, FEMA's OCC established the Write Your Own Oversight Team (WYOT) to strengthen FEMA's oversight of NFIP litigation. The WYOT seeks to better ensure fairness and consistency in litigation through billing oversight and by partnering with WYO Companies to develop litigation strategies that align with FIMA's policies and goals. The WYOT reviews each lawsuit brought against a WYO Company and monitors it from inception through appeal as part of its oversight responsibilities. This oversight also includes diligently reviewing Special Allocated Loss Adjustment Expenses Type 3 (SALAE3) to protect the fiscal integrity of the Program. SALAE3 expenses are those expenses incurred to defend a lawsuit within the scope of the Arrangement brought against a WYO Company based on a claim under an NFIP policy. The WYOT actively engages with WYO Company management and legal counsel retained by the WYO Company to represent the WYO Company (Outside Counsel) to ensure the defense of NFIP litigation is aligned with FEMA's goals, including timely efforts at alternate dispute resolution, accurate assessment of litigation risks, and management of SALAE3 expenses associated with the defense of flood insurance litigation, and to ensure that NFIP lawsuits are handled in a manner that is consistent with the goals of the NFIP.

Any questions regarding this Manual or NFIP-related litigation should be directed to the WYOT at [FEMA-NFIP-WYO-Litigation@fema.dhs.gov](mailto:FEMA-NFIP-WYO-Litigation@fema.dhs.gov).

## 2.2 Role of WYO Companies

WYO Companies are private insurance companies that elect to participate in the NFIP and that are able to satisfy the eligibility criteria in 44 C.F.R. Part 62.

The Arrangement establishes the relationship between FEMA and WYO Companies and authorizes WYO Companies to sell and administer the Standard Flood Insurance Policies under their own name. WYO Companies are reimbursed for their expenses and claim payments for participating in

the program as set forth in the Arrangement. WYO Companies assume no insurance risk. WYO Companies serve as fiscal, not general, agents of the United States and any funds collected from policyholders are federal funds.

All federal flood insurance policies offered through the NFIP must be sold and administered in accordance with the Act, its implementing regulations, and the policies developed by FEMA. Additionally, as stewards of federal funds, WYO Companies must act in furtherance of the fiduciary obligation to FEMA. The Arrangement and the WYO Financial Control Plan specify the financial procedures WYO Companies must follow as a condition for reimbursement of expenditures.

Under the SFIP, and consistent with FEMA's regulations, policyholders may sue WYO Companies for a denial, in whole or part, of their claim under the SFIP and Arrangement. Pursuant to the Arrangement and 44 C.F.R. § 62.23(g), FEMA is not a proper party to any NFIP litigation stemming from policies sold pursuant to the Arrangement, and WYO Companies are responsible for the defense of such litigation. The WYO Company may enlist Outside Counsel and direct Outside Counsel in the defense of any lawsuits filed against a WYO Company under the NFIP subject to the oversight of FEMA. FEMA will reimburse the WYO Companies for eligible SALAE3 expenses incurred in defending NFIP litigation as set forth in the Arrangement, this Manual, and the SALAE3 Billing Requirements (Appendix B).<sup>1</sup> The WYO Company must comply with the litigation documentation and notification requirements established by FEMA. Failure to comply with these requirements may result in a decision by FEMA not to reimburse SALAE3 expenses. In addition, as described in more detail below, FEMA is not responsible for reimbursing the WYO Company for any award or judgment for damages or expenses of litigation that are either grounded in actions by the WYO Company that are significantly outside the scope of the Arrangement or that involve issues of agent error or malfeasance.

WYO Companies must handle NFIP litigation with the same level of efficiency that is applied to the handling of litigation for their other lines of insurance, including, but not limited to, their property and casualty insurance litigation. FEMA seeks the most expeditious and appropriate resolution of NFIP litigation, while maintaining the integrity of both the WYO Company's defense and the NFIP. Consistent with these goals, FEMA expects the WYO Companies and their Outside Counsel to carefully manage time and expenses.

Prior to requesting reimbursement from FEMA, the WYO Company must confirm that it completed a thorough review of each invoice submitted for compliance with the governing Arrangement, this Manual, and the SALAE3 Billing Requirements (Appendix B) to ensure that all SALAE3 expenses submitted for reimbursement to FEMA have been subjected to the same review and scrutiny that the WYO Company applies to invoices submitted in litigation for its private lines of insurance. Each submission must include the contact information of any persons who conduct this compliance review or facilitate payment of invoices to the Outside Counsel. Additionally, because this is a reimbursement program, it is expected that the WYO Company will generally issue payment directly to the Outside Counsel prior to requesting reimbursement from FEMA.

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<sup>1</sup> WYO Companies must annually provide the WYOT with a signed copy of Appendix B. The WYO Companies must also have Outside Counsel provide the WYO Company with a signed copy of Appendix B at the outset of each NFIP lawsuit in which Outside Counsel is retained to represent the WYO Company.



## 2.3 Retaining Counsel and Experts for the Defense of NFIP Claims

### A. Outside Counsel Qualifications

WYO Companies are responsible for retaining qualified Outside Counsel.

Outside Counsel litigate on behalf of a Federal program and are paid with Federal funds. FEMA expects Outside Counsel to cooperate with the WYOT and to manage litigation in a cost-effective manner. Outside Counsel must be in good standing in the jurisdiction in which they are retained and in the state in which they are licensed to practice law.

Outside Counsel litigate NFIP issues arising under the Act, its implementing regulations, and related federal laws. WYO Companies are expected to retain Outside Counsel that have the necessary experience to litigate NFIP claims.

### B. Experts

Subject to FEMA SALAE3 Requirements, WYO Companies and their Outside Counsel may engage experts, claim adjusters, and other contractors (Litigation Contractors) to assist with NFIP litigation.

### C. Equal Employment Opportunity

The United States Government does not discriminate in employment on the basis of race, color, religion, sex (including pregnancy and gender identity), national origin, political affiliation, sexual orientation, marital status, disability, genetic information, age, membership in an employee organization, retaliation, parental status, military service, or other non-merit factor. All WYO Companies, their Outside Counsel, and any other Litigation Contractors participating in the defense of NFIP litigation, are expected to follow the same guidelines.

FEMA is committed to increasing and sustaining diversity and inclusivity in the NFIP community. FEMA encourages WYO Companies to expand and create opportunities at all levels of responsibility for attorneys of diverse backgrounds to participate in the defense of NFIP cases. As part of this commitment, FEMA calls on WYO Companies to expand and create these opportunities by considering legal representation by diverse attorneys and Outside Counsel that provide legal services to them under the NFIP. FEMA also encourages the WYO Companies to require their Outside Counsel to complete the American Bar Association Model Diversity Survey on an annual basis and for the WYO Companies to utilize the information obtained through the Model Diversity Survey as a factor in selecting Outside Counsel to represent the WYO Companies in NFIP litigation.

## **D. Conflicts of Interest**

Outside Counsel for the WYO Companies must be free of any actual or apparent conflict of interest involving the NFIP, WYO Companies, or Litigation Contractors assisting with NFIP litigation. Any other Litigation Contractors must also be free of actual or apparent conflicts of interest.

“Conflict” includes, but is not limited to, matters where there is a significant risk that the ability to recommend or carry out a particular course of action will be materially limited as a result of other responsibilities to another client, a former client, a third person, or by a personal interest. “Conflict” also includes representation in litigation by Outside Counsel (or any attorney in the Outside Counsel’s firm) in a case or a position adverse to FEMA or a WYO Company litigating NFIP issues, and any other Litigation Contractors against FEMA or a WYO Company litigating NFIP issues. For example, the same Outside Counsel should not be retained to defend the WYO Company for a case involving both wind and flood insurance policies or where the Outside Counsel already represents another wind insurance carrier for the same loss.

Failure to promptly disclose actual or potential conflicts of interest, or matters with the potential to create the appearance of a conflict, may result in denial of reimbursement, in whole or in part, of submitted SALAE3 expenses, and/or the implementation of other corrective actions. FEMA may ask Outside Counsel and any other Litigation Contractors to provide information regarding any system maintained for tracking conflicts and a copy of any written policy that governs the resolution of conflicts. Actual or apparent conflicts may not be waived without the prior approval of FEMA. A WYO Company should contact the WYOT for guidance or a waiver as soon as it becomes aware of an actual or potential conflict.

WYO Companies must immediately inform the WYOT of any termination of a WYO Company’s Outside Counsel or other Litigation Contractor due to a conflict of interest or the appearance of impropriety. Failure to promptly notify the WYOT may result in a delay or denial of reimbursement of SALAE3 expenses.

## **E. Other Ethical Considerations**

FEMA expects the WYO Companies’ Outside Counsel to observe the highest ethical standards and to comply with all applicable laws, rules, and regulations governing ethical conduct. Attorneys, experts, and other contractors supporting WYO Companies are retained by the WYO Company, not by FEMA. Even though their obligation is to the WYO Company, Outside Counsel are compensated with federal funds and have a fiduciary duty to protect taxpayer dollars.

FEMA administers a Suspension & Debarment (S&D) program to prevent waste, fraud, and abuse in Federal procurement and non-procurement actions. See Federal Acquisition Regulation, 48 C.F.R. § 9.4, and the Federal Non-procurement Common Rule, 2 C.F.R. § 180. As recipients and managers of Federal funds, WYO Companies and their contractors, including but not limited to Outside Counsel and any other Litigation Contractors, are subject

to FEMA's S&D requirements. As such, they may be suspended from government-wide activities or debarred from receiving Federal funds for up to three years for failure to adhere to the appropriate standards of conduct and performance.

Furthermore, FEMA will not reimburse legal expenses incurred by Outside Counsel hired to represent a WYO Company if that Outside Counsel is, or becomes, suspended, disbarred, or otherwise ineligible to practice law during the pendency of the case. Additionally, FEMA will not reimburse a WYO Company for any sanctions imposed for discovery violations or misconduct or for any additional briefings or filings required as a result of such violations or misconduct.

## F. Contacts with the Media and the Public

**Media.** Neither WYO Companies nor their Outside Counsel should discuss NFIP litigation with representatives of the media. If media representatives contact a WYO Company or its Outside Counsel concerning an NFIP lawsuit, the inquiry should be forwarded at the first opportunity<sup>2</sup> to the WYOT, which will coordinate with FEMA's Office of External Affairs to respond to the inquiry. Under no circumstances should the WYO Company or its Outside Counsel comment to the media on the specifics of a case or on more general matters involving the policies and procedures of the NFIP or Program decision-making.

**Public Statements.** WYO Companies, their Outside Counsel, or Litigation Contractors who address the public orally or in writing (including by electronic means) on general topics pertaining to the NFIP, or laws and regulations affecting it, must prominently disclose to the audience that they are making the presentation on their own behalf and not on behalf of the NFIP.

## 2.4 Referral of Criminal and Civil Misconduct

During the course of the defense of any NFIP litigation, WYO Companies and their Outside Counsel are required to notify FEMA of any conduct that may constitute a violation of criminal or civil fraud laws. WYO Companies must at the first opportunity forward any information indicative of possible criminal or fraudulent behavior to the WYOT. If requested, Outside Counsel and the WYO Company are required to submit supporting information regarding the alleged misconduct. In some circumstances, the WYO Company or its Outside Counsel may be requested to assist law enforcement officials, including FEMA's Fraud Prevention and Investigation Branch and the Department of Homeland Security's Office of the Inspector General, in the investigation of any alleged fraud.

In the event Outside Counsel is specifically requested by the WYO Company and/or FEMA to provide information concerning an investigation of fraudulent activity, expenses incurred in connection with any such request may be eligible for reimbursement as SALAE3 expenses. To be eligible for reimbursement as SALAE3 expenses, the WYO Company must submit, and have

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<sup>2</sup> "At the first opportunity" throughout this document and its appendices means immediately, if possible, and, if that is not possible, it is anticipated that this will be a matter of hours and not days.

approved by the WYOT, a proposed budget for such work. No additional investigative activity should be conducted by Outside Counsel unless specifically requested by the WYO Company with the express consent of the WYOT.

Fraudulent activities related to NFIP flood insurance policies administered by a WYO Company constitute fraud against the federal government and subject the perpetrator to a range of criminal and civil penalties under federal criminal and civil anti-fraud statutes, including the False Claims Act. See 31 U.S.C. § 3729.

## 3 Litigation Coordination and Case Management

### 3.1 Joint Defense

FEMA and WYO Companies share a unique and common interest in the defense of NFIP litigation. Among the factors that give rise to this shared interest are the fiduciary responsibilities of the WYO Companies, the statutory and regulatory foundation of the NFIP, federal administrative and oversight responsibilities, the need to share confidential and privileged information, and the risk to federal funds. Accordingly, as fiscal agents of the United States acting under the Arrangement, FEMA and WYO Companies participating in the NFIP effectively operate under a joint defense agreement in furtherance of the partnership established by the Arrangement (The Joint Defense Agreement). The Joint Defense Agreement ensures that litigation-related information, whether provided in writing or orally, shared between FEMA, WYO Companies, and Outside Counsel will be treated as privileged and confidential information.

### 3.2 Communications with FEMA/WYOT

The WYO Company representative responsible for oversight of NFIP litigation and/or its Outside Counsel should copy [FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov](mailto:FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov) on all written communications with any member of the WYOT or the Office of Chief Counsel (OCC).

Documents required to be provided with the submission of any Case Plan & Budget (CP&B) should be uploaded to Pivot. Drafts of any documents that are required to be submitted to the WYOT for review must not be submitted through Pivot, but must be attached to an email with a copy sent to the WYOT mailbox identified above. There is no need to send a hard copy of documents uploaded to Pivot or emailed to the WYOT.

### 3.3 Litigation Obligations of WYO Companies

WYO Companies must timely inform the WYOT of an NFIP lawsuit. Reimbursement of SALAE3 expenses may be delayed, jeopardized, or reduced if the WYO Company fails to comply with this requirement. Multiple failures to promptly notify FEMA of all material aspects of NFIP-related lawsuits will trigger referral of the non-compliance for review, pursuant to the Arrangement, by the Standards Committee or may lead to denial of reimbursement. The specific requirements for WYO Companies with respect to new litigation are detailed below.

## A. Provide Notice

FEMA requires all WYO Companies to notify the WYOT of the service of an NFIP lawsuit upon the WYO Company within 10 days<sup>3</sup> of service (the “Initial Notification”) or at the same time the WYO Company notifies Outside Counsel, whichever occurs earlier. The Initial Notification should be provided via email to [FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov](mailto:FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov) and the Federal Insurance Mitigation Legal Division's (FIMLD) Deputy Associate Chief Counsel for Litigation, Kristina Pett ([kristina.pett@fema.dhs.gov](mailto:kristina.pett@fema.dhs.gov)). In addition, within 30 days after service of a Complaint, the WYO Company must provide the WYOT with the documents listed below, which will allow the WYOT to monitor and meaningfully participate and assist in the disposition of NFIP litigation:

- A copy of the Summons and Complaint; and
- The Case Plan and Budget (CP&B) described in Subsection B below (collectively Initial Case Documents).

In addition, at least five days before being filed in court, the WYO Company or Outside Counsel must provide the WYOT with a draft Answer or other initial responsive pleading(s) unless exigent circumstances require filing prior to WYOT review.

The Initial Case Documents must be submitted via Pivot utilizing the instructions contained in the FEMA Pivot Claims Operations Litigation and Expense Quick Reference Guide.

## B. Case Plans and Budgets

The CP&B must set forth the WYO Company’s preliminary assessment of the case and plan for the litigation. The CP&B contains privileged attorney work product and attorney-client communications and is protected from release under the Joint Defense Agreement with FEMA and should be prominently identified as such. See Appendix A for a CP&B template.

If a case is filed as a class action, or if a case has multiple insured plaintiffs claiming under different policies, the WYOT should be consulted before submitting the CP&B to identify the appropriate format and protocol.

The WYO Company/Outside Counsel must comply with the following requirements before the CP&B will be approved:

1. Each CP&B submitted to the WYOT must include the following information:
  - Names of the parties, including the identity of any codefendants and the attorneys representing them;
  - Name(s) of the policyholder(s) and the policy number at the time of the loss;
  - Case/docket number and jurisdiction;
  - Identity of the Judge assigned and a brief description of the Judge’s NFIP experience or notable NFIP cases. This should solely be based on the WYO Company’s or Outside Counsel’s experience, and research should not be conducted on this issue unless requested by the WYOT;

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<sup>3</sup> “Days” in this Manual and in the accompanying appendices refers to calendar days unless indicated otherwise.

- Identity of WYO Company (Insurer of SFIP in question or assignee) if not included as a named party;
- Date of loss;
- Date of service of the Complaint and the date a responsive pleading is due;
- The identity of Outside Counsel retained to defend the litigation and the identity of any local counsel and their geographical location;<sup>4</sup>
- The identity of the legal counsel or other point of contact for the litigation within the WYO Company; and
- Itemized expenses incurred to date.

2. Each CP&B submitted to the WYOT must also include the following sections:

- **Pleadings:** This section should contain a brief summary of the Complaint, including the nature of the claims made against the WYO Company and the type and amount of damages sought, as well as a brief summary of any other pleadings filed to date. If there are allegations of agent error, those allegations must be included in the summary of the allegations. This should also include a brief summary of the allegations made against any codefendants in the case;
- **Defense Theories and Regulatory Defenses:** This section should contain a summary of the legal bases upon which the case will be defended. This should include a brief summary of the key defenses applicable to the particular case, not a pro forma itemization of all defenses theoretically available under the NFIP. While citations to the United State Code and the Code of Federal Regulations may be helpful in certain cases, this section should not be a mere recitation of the relevant statutory and regulatory provisions, but rather should be a brief statement of how the statute and/or regulatory provision provide the basis for a defense under the facts of the case (e.g., “plaintiff failed to submit a timely proof of loss as required by 44 C.F.R. Pt. 61, App. A(1), art. VII.J.4”). Only defenses applicable to the specific case should be included in the CP&B;
- **Potential liability/damages:** This section should include the following:
  - The amount the plaintiff is seeking in the Complaint;
  - The amount of the plaintiff’s pre-suit demand or adjuster’s report;
  - The policy limits;
  - Any amounts paid to the plaintiff to date under each coverage type under the policy; and
  - The total amount believed to actually be at issue;
- **Discovery:** The CP&B should address whether it would be appropriate to ask the court for an enhanced initial disclosure order. See Example at Appendix C;

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<sup>4</sup> See Section 2.3(G) of this Manual regarding requirements for obtaining approval for retention of local counsel and the billing requirements for the procedures for local counsel reimbursement.

- **Potential for settlement/early resolution:** This section should include an assessment of both the potential for early settlement and the potential for early resolution through a motion to dismiss (e.g., for failure to submit a timely proof of loss). The CP&B should address whether the damages sought justify the amount of estimated fees it will cost to defend the case, as opposed to negotiating a settlement;
- **Alternate Dispute Resolution (ADR) options:** This section should include a brief discussion of why ADR is or is not appropriate for the case or, in the alternative, why that determination cannot yet be made;
- **Litigation strategy:** This section should include a discussion of the plan for litigation, including responding to pleadings, filing motions, conducting discovery, and engaging in settlement negotiations. There should also be a discussion of the strengths and weaknesses of the case and an estimation of the likelihood of success. If there is an issue that could potentially impact the NFIP programmatically, that should be discussed as well. If agent error has been alleged, there should be a discussion of that claim and an explanation as to why the WYO Company believes that the defense of this claim is covered by the Arrangement;
- **Any unusual circumstances:** The CP&B should identify if the case arises from a catastrophic flooding event and include the NFIP Event Designation Number for catastrophic events. Each CP&B must also indicate whether the case may involve the deposition of federal employees, agent error, or any extraordinary issues that may significantly increase the cost of litigation;
- Each CP&B submitted to the WYOT must include a projection of the legal hours and hourly rates that will be incurred for each litigation-related action/activity in the defense of the subject litigation and must identify the timekeeper who will be performing the work. Projected hours and rates should be presented in the following five categories:
  - Initial handling (review of Complaint, review of claim file, preparation of responsive pleading(s), any notice of removal, and preparation of CP&B);
  - Motion practice (dispositive motions and hearing preparation);
  - Discovery (preparation of written discovery requests, preparation of written discovery responses, discovery motions, discovery hearings and depositions);
  - Pretrial preparation (additional investigation, including Legal Contractor retention and preparation); and
  - Court Ordered Alternative Dispute Resolution (Mediation/Settlement Conferences).

The CP&B should not include any cost projections for trial. Section 3.3(F) below explains when a WYO Company must submit a Trial CP&B.



If a WYO Company reaches or exceeds the approved budget in the original CP&B, a WYO Company is required to submit a supplemental CP&B. This supplemental CP&B must contain the dollar amounts of all attorney fees and costs incurred to date, updated dollar estimates for anticipated litigation activities that have not yet occurred, and a detailed explanation justifying the WYO Company's requested budget increase. This supplemental CP&B should not include a trial budget.

3. As stated in Section 3.2 above, the WYO Company must upload the Initial Case Documents to Pivot and complete the required fields in Pivot. Failure to complete all the fields in Pivot may result in denial of part or all of the requested reimbursement.

## **C. Coordination with FEMA's WYOT and Assignment of WYOT Counsel to Monitor and Assist in Case**

As set forth in Section 2.2 above, FEMA's OCC is required by the Arrangement to review claims in litigation and determine whether it believes a claim is grounded in actions that are significantly outside the scope of the Arrangement, the Act and its implementing regulations, or involves an issue of insurer/agent negligence or agent error. FEMA will determine whether reimbursement of SALAE3 expenses by FEMA is warranted and whether it is appropriate to use federal funds to pay a settlement or judgment in consultation with the WYOT. The WYOT is also a resource for legal and programmatic assistance. After receipt of the Initial Notification from a WYO Company, the WYOT will assign an attorney to monitor the case. The WYOT will notify the WYO Company of the identity of the WYOT attorney assigned to the case. Once the WYOT notifies the WYO Company of the attorney assigned to a case, all communications regarding the case must be directed to the assigned WYOT attorney with a copy to the Deputy Associate Chief Counsel of the FIMLD Litigation Branch. The WYOT attorney monitoring the case will also be the lead FEMA resource for all matters in the case, such as legal strategy and motion practice, deposition requests, settlement discussions and concurrence requests, and coordinating government witnesses.

## **D. Quarterly Status Updates**

A WYO Company must provide the WYOT with quarterly status updates for each NFIP case it is defending. The status update should include the status of the case and indicate whether any changes have occurred during the past quarter, including any updates to proposed motion practice, case deadlines, or changes in strategy. It should also highlight significant activities, including changes related to federal jurisdiction, court ordered mediation, or attempts to settle the matter. These updates should not be lengthy. Often, a few sentences describing the status of the case will suffice. If the WYO Company fails to provide an update by the quarterly deadline, any invoices submitted for reimbursement on the matter may be denied wholly or in part. If this presents a difficulty for a WYO Company because of a catastrophic flooding event, the WYOT should be contacted for guidance.

## **E. Scheduling and Trial Orders**

Within seven days of receipt from a court, the WYO Company or its Outside Counsel must provide to the WYOT a copy of all scheduling and trial orders.

## **F. Trial Case Plans and Budgets**

A Trial CP&B must be submitted if a case is reaching the trial stage. This Trial CP&B should not reiterate any prior CP&Bs in the case, but is a supplement to any prior CP&Bs. A Trial CP&B must include the following:

- Any updates to the prior CP&B and quarterly status updates;
- A list of witnesses to be offered by both parties;
- A brief summary of any pre-trial orders;
- A discussion of the issues to be raised at trial, including any court orders narrowing the issues from those raised in the Complaint;
- A discussion of the key legal defenses to be raised at trial;
- A brief summary of the key applicable legal precedent in the relevant jurisdiction;
- A discussion of how the court is likely to rule and the basis for that conclusion;
- A discussion of any other known active cases in the relevant jurisdiction where similar legal issues are being raised that may impact, or be impacted by, the case;
- A summary of settlement negotiations that have occurred to date; and
- The projected fees and costs for trial preparation and trial, including the identity of each timekeeper who will be participating in the trial or in trial preparation, along with the hourly rates for each timekeeper. The projected costs should also include amounts to be paid to any Legal Contractor. These projected fees and costs should be uploaded to Pivot at least 60 days prior to trial, or, if the court's trial notice first schedules the trial date within less than 60 days after the notice, the projected fees and costs should be uploaded within five days of receipt of the court's order scheduling trial.

## **G. Enlisting Local Counsel**

WYO Companies must generally hire Outside Counsel admitted to practice in the jurisdiction in which the litigation has been filed or in the jurisdiction to which the case will be removed. If the WYO Company intends to hire Outside Counsel in that jurisdiction for which local counsel will be required, it must consult with the WYOT in advance and justify that decision. If the WYO Company hires Outside Counsel that requires local counsel and the WYOT does not agree with that course of action, FEMA will not reimburse any legal expenses incurred for the use of local counsel. If the WYOT concurs with the use of local counsel, the CP&B should include an analysis of how hiring local counsel will minimize litigation travel expenses, will avoid duplicative legal expenses, and will otherwise be more cost effective. See Appendix B for more detailed requirements and guidelines.

## 3.4 Substantive Filings

At least three days prior to filing with a court or serving opposing counsel, the WYO Company must provide to the WYOT a draft of any pleading, motion, or brief addressing any of the following:

- An issue of first impression in the relevant jurisdiction;
- Alleged fraud or extra-contractual claims;
- A new or amended statute, regulation, policy, guideline, or bulletin;
- A change or deviation from a current interpretation of SFIP provisions;
- Ripeness or jurisdictional issues;
- An issue that has the potential to impact the operation of the NFIP; and
- Any other issue requested by the WYOT.

These should be sent to [FEMA-NFIP-WYO-Litigation@fema.dhs.gov](mailto:FEMA-NFIP-WYO-Litigation@fema.dhs.gov) and to the WYOT team member assigned to the case. The WYOT also requires WYO Companies and their Outside Counsel to provide the WYOT with drafts of other dispositive motions at least three days prior to filing with a court. All drafts provided under this provision should be provided in Microsoft Word or other similar computer application. If this requirement presents a difficulty for a WYO Company or Outside Counsel because of a particular circumstance (e.g., an extraordinary number of cases to attend to because of a catastrophic flood event), a waiver may be sought on a case-by-case basis, although it is anticipated that granting of a waiver would be rare since it takes minimal effort to email a document.

## 3.5 Consultations with WYOT

When the WYO Company or Outside Counsel is required to consult with the WYOT about a brief or to discuss the potential for settlement prior to trial, the WYO Company or Outside Counsel must contact the WYOT at least two weeks prior to trial unless this deadline is excused by the WYOT, but in any event no later than three days prior to the due date or trial date. Consultation regarding potential settlements should be ongoing from the inception of a case.

The WYO Company or Outside Counsel must respond to WYOT requests for documents or information within five days unless the WYO Company or Outside Counsel notifies the WYOT in advance of the deadline that additional time to provide responsive material is required.

## 3.6 Appeal Review and Consultation

WYO Companies or Outside Counsel must notify the WYOT of any substantive rulings, including adverse rulings and rulings that may impact other pending NFIP lawsuits, within two business days of notice of the ruling, and include a copy of the order/opinion. This will enable the WYOT to consult with Program officials, develop a Program position, and consult with the WYO Company on future actions.

The WYO Company or Outside Counsel should not provide a detailed summary of the order/opinion or legal research relevant to the decision or charge time analyzing the order/opinion unless

specifically requested by the WYOT. Failure to provide adequate notice may result in denial of a request for SALAE3 expense reimbursement.

The WYO Company must consult with, and obtain concurrence from, the WYOT before filing any appeal or motion for reconsideration or rehearing.

### 3.7 Coordination in Post-Catastrophic Flooding NFIP Litigation

Following a catastrophic flooding event, a number of WYO Companies may be separately named as defendants in a particular jurisdiction. To better manage strategy and costs in high-volume litigation, FEMA may provide additional guidance to address common legal and case management issues. Litigation stemming from catastrophic events tends to present unique administrative issues. To streamline discovery and responses to case management orders and other court requirements and to ensure strategic alignment, the WYOT will coordinate with the United States Department of Justice (DOJ) and local Offices of the United States Attorney and will lead discussions with WYO Companies and their Outside Counsel on cross-cutting issues. As such, no scheduling reports should be submitted to the court without first consulting with the WYOT in these instances. The WYOT will notify WYO Companies and Outside Counsel in writing when any relevant program or litigation requirements are waived or extended.

### 3.8 Joint Defense Meetings, Teleconferences, and Participation in Other Privileged Communication

In furtherance of the Joint Defense Agreement, the WYOT may hold regular meetings or conference calls with WYO Company legal representatives to discuss issues relating to NFIP litigation, including litigation-specific guidance, and to discuss matters of common interest, such as defense strategies. The WYOT will provide teleconference access information via electronic email at least 24 hours prior to the scheduled teleconference. These discussions are considered attorney work product and are protected by the Joint Defense Agreement. A WYO Company and its Outside Counsel are not permitted to disclose information discussed in the meeting without consulting with the WYOT or in compliance with a court order.

### 3.9 Request for *Amicus Curiae* Brief or Statement of Interest

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, FEMA, through the DOJ, may file an *amicus curiae* brief without the consent of the parties or leave of court in litigation involving the NFIP. Further, FEMA may file a statement of interest in a particular litigation pursuant to 28 U.S.C. § 517. A statement of interest will enable the United States to independently make its views on a particular issue known to the court. If a WYO Company identifies a significant issue that may lead to a ruling that could impact an existing NFIP policy, program activity, or practice, the WYO Company may request FEMA to file an *amicus* brief or statement of interest.

To request an *amicus* brief or statement of interest, the WYO Company should submit to the WYOT a written memorandum as soon as possible identifying the issues that will be subject to the court's ruling and explaining how an amicus brief or statement of interest will further the NFIP and the Agency's interests.

A request for an *amicus* brief must be submitted to FEMA at least 60 days prior to the deadline established by FRCP Rule 29(a)(6).

Within five days of receipt of a request for the United States to file an *amicus* brief or statement of interest, the WYOT will acknowledge receipt and coordinate a teleconference with the WYO Company's legal representative to address any questions. All requests for a statement of interest or amicus brief must be approved and filed by the DOJ.

### 3.10 Closure/Disposition of Litigation

All WYO Companies must notify the WYOT of case closure within 30 days. This includes closure through notice of voluntary dismissal, settlement, or by court order. WYO Companies must also provide a copy of any final opinion or settlement documentation to the WYOT.

## 4 Litigation Strategies

### 4.1 Litigation Policy

FEMA expects the WYO Companies to act in a manner consistent with our programmatic litigation objectives: protecting the integrity of the NFIP, respecting our policyholders, and resolving litigation in an expeditious and cost-effective manner. FEMA also expects WYO Companies to evaluate each case in a manner consistent with their treatment of non-NFIP litigation and, unless there is a conflict with NFIP rules and guidance, to litigate NFIP cases in the same manner as their non-NFIP litigation matters. Although FEMA does not expect the parties will be able to settle all litigation, FEMA expects settlement to be assessed early in the litigation and on an ongoing basis throughout the litigation. WYO Companies must make reasonable efforts to resolve cases at the earliest juncture possible. Where appropriate, motions to dismiss, judgment on the pleadings, and summary judgment should be filed early in the case to resolve or refine the issues in dispute.

Additionally, WYO Companies and their Outside Counsel should make best efforts to resolve legal issues without motion practice. For example, rather than using motion practice to strike jury demands and claims for extracontractual damages, Outside Counsel should make a request to the plaintiff's attorney, along with a copy of the relevant case law supporting the request.

Finally, the following two issues arise with some frequency and should be managed as follows to ensure uniformity:

- 1. Policyholder fails to file a proof of loss.** WYO Companies must review the claims in litigation to determine whether the policyholder submitted a compliant proof of loss. If the policyholder failed to submit a proper proof of loss, the WYOT should be consulted immediately to determine whether motion practice is appropriate.
- 2. WYO Company has not issued a denial of a claim.** If the WYO Company has not had sufficient opportunity to render a decision on the initial or supplemental proof of loss prior to the policyholder's filing of the lawsuit, the WYO Company or its Outside Counsel should consult with the WYOT immediately to determine whether the case is ripe for review by the district court and whether a motion to dismiss is the appropriate course of action. Under 44 C.F.R. § 62.22, a full or partial denial by the WYO Company is the act that provides the policyholder with the right to bring an action pursuant to 42 U.S.C. § 4072 and is therefore a prerequisite to the filing of a lawsuit.

#### A. Initial Discovery Protocols

In 2019, the Institute for the Advancement of the American Legal System issued discovery protocols entitled "Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disasters." These protocols are intended to support early case resolution and to facilitate fair and efficient resolution of cases, and the protocols identified catastrophic case management as a priority after Hurricane Harvey. Although the protocol is

intended to be used in State and Federal litigation arising out of all forms of catastrophic disasters where insurance disputes arise, a primary focus of the committee was NFIP flood insurance litigation. FEMA, WYO Companies and their Outside Counsel, and plaintiffs' counsel litigating NFIP cases participated on the committee. The protocols expand on mandatory initial disclosures and identify a number of elements common to NFIP cases where early production can facilitate discussion and settlement.

WYO Companies and Outside Counsel must explore using these protocols in all NFIP litigation where there is a dispute over payment of a claim. WYO Companies should seek an order implementing the initial discovery protocols from the presiding court and use the information provided to evaluate early settlement and to engage in settlement discussions. See Appendix C. Where a plaintiff is not forthcoming with fulsome information about the claim, WYO Companies should seek judicial intervention to require early production. If the court denies the request to implement the protocols requested, the WYO Company must notify the WYOT within three days of the denial to discuss discovery strategy.

In the event a court issues an order requiring a streamlined settlement process and/or a streamlined discovery process, the WYO Company must consult with the WYOT prior to seeking to opt out of any such process.

## **B. Alternate Dispute Resolution/Court Ordered Mediations**

The federal government encourages the use of Alternative Dispute Resolution in appropriate cases. ADR often offers an efficient means of facilitating negotiated settlements. Throughout the course of a lawsuit, the WYO Company and its Outside Counsel should consider whether ADR is appropriate and explore opportunities for utilizing non-judicial dispute resolution approaches. Early use of ADR can reduce litigation expenses and provide a more effective means of facilitating negotiated settlements.

When a court issues an order requiring mediation, the WYO Companies or the Outside Counsel should not file a motion to be excused from mediation without the express consent of the WYOT.

## **C. Settlement Negotiations and Requests for Concurrence**

When appropriate, FEMA encourages reasonable settlements and requires WYO Companies defending NFIP litigation to consider settlement options early in litigation and continually as litigation progresses. A WYO Company is responsible for negotiating and facilitating settlement. In most instances, a WYO Company must obtain the concurrence of the WYOT prior to agreeing to settle a lawsuit. When considering settlement options, the WYO Company should act in a manner consistent with its fiduciary obligations as a fiscal agent of the federal government, as well as the WYO Company's standard business practices for its private lines of business, and the appropriateness of a proposed settlement will be evaluated on that basis. FEMA recognizes that there may be specific cases where FEMA policy or guidance may indicate an approach to settlement that differs from its private lines, and the WYO Company considering settlement should consult with the WYOT.



WYO Companies must notify the WYOT of all demands made by the policyholder's counsel to the WYO Company or its Outside Counsel within three days of the demand and notify the WYOT of its proposed response to allow the WYOT to provide input. In addition, prior to participating in any settlement conference or mediation, whether formal or informal, the WYO Company should consult with the WYOT regarding settlement authority. In order to evaluate the settlement value of a particular case, the WYOT may require WYO Companies to submit additional information.

#### **D. Contact with FEMA After Litigation is Filed and Use of Government Employees as Witnesses**

Once a matter is in litigation, all communications with FEMA must be coordinated with the WYOT. Neither the WYO Company nor its Outside Counsel should make any contact with any FEMA employee or contractor on issues in litigation without the express consent of the WYOT. If the WYO Company, or Outside Counsel on its behalf, seeks to interview a FEMA employee or contractor about any matter directly or indirectly related to the lawsuit (e.g., a specific claim, underwriting, a program issue, etc.), it must be coordinated with the WYOT.

Although generally FEMA does not anticipate that government employees will be witnesses in cases where the WYO Company is the proper party, FEMA may, on rare occasions, agree that a case raises issues of sufficient importance that a FEMA employee may be authorized to appear as a witness. All requests for FEMA witnesses or related information such as declarations by FEMA employees should be coordinated through the WYOT attorney assigned to the particular case. See 6 C.F.R. Part 5; *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

## **4.2 Subrogation**

Per 44 C.F.R. § 62.23(i)(8), FEMA has the right of recovery in the event of any subrogation claim under the NFIP for which the WYO Company forgoes pursuit of recovery. If during the course of a lawsuit the WYO Company or its Outside Counsel believes that there is a subrogation issue related to the pending lawsuit, regardless of whether it intends to pursue recovery, the WYO Company must notify the WYOT within 14 days of the discovery of the potential issue.



## 5 Reimbursement of Litigation Expenses Incurred by WYOs

FEMA reimburses SALAE3 expenses incurred by WYO Companies pursuant to the Arrangement, subject to this Manual and the SALAE3 Billing Requirements (“reimbursement guidance”). Prior to seeking reimbursement, WYO Companies must review Outside Counsel bills to determine whether bills are eligible for reimbursement as SALAE3 expenses utilizing the reimbursement guidance. If not addressed by the reimbursement guidance, the WYO Companies should utilize the same requirements, allowances, and disallowances that apply to the approval and payment of litigation expenses incurred in the WYO Companies’ other lines of business (WYO billing guidance). If there is a conflict between the reimbursement guidance and the WYO billing guidance, the reimbursement guidance will apply. At a minimum, failure to adequately review bills prior to seeking reimbursement will result in delay. Furthermore, when a WYO Company fails to apply the reimbursement guidance and/or the WYO billing guidance, FEMA may exercise its discretion to decline requests for reimbursement, in whole or in part.

FEMA’s SALAE3 Billing Requirements are attached as Appendix B. These requirements set forth the NFIP’s expectations for Outside Counsel performing work on behalf of WYO Companies. All invoices will be reviewed by the WYOT for compliance with the SALAE3 Billing Requirements and the requirements set forth in this Manual. Failure to comply with the requirements in the SALAE3 Billing Requirements and this Manual may result in denial of the request for reimbursement, in whole or in part.

When requesting reimbursement from FEMA, in addition to confirming that it completed a thorough review of each invoice to ensure compliance with the above requirements, the WYO Company must include the contact information of the person who conducted the compliance review of the invoice. Additionally, because this is a reimbursement program, FEMA expects that the WYO Company will generally issue payment directly to the Outside Counsel or the Outside Counsel’s law firm prior to requesting reimbursement from FEMA.

Any questions or concerns regarding requests for information, clarification regarding the SALAE3 Billing Requirements, or reimbursable SALAE3 expenses must be sent to the attention of the WYOT at [FEMA-NFIP-WYO-Litigation@fema.dhs.gov](mailto:FEMA-NFIP-WYO-Litigation@fema.dhs.gov). It is recommended that the WYOT team member assigned to the case also be copied on all communications.

### 5.1 Submission of Type 3 SALAE Expenses

WYO Companies must submit requests for SALAE expense reimbursement through Pivot. The WYO Companies must ensure that all fields are completed or the request for reimbursement will be rejected.

FEMA may ask a WYO Company to submit additional documentation to justify or verify the requested SALAE3 expenses. FEMA may disallow, in whole or in part, SALAE3 expenses that are unsupported, are significantly outside industry standards for attorney rates or hours, or are

significantly outside the scope of FEMA policies and procedures, including this Manual and the SALAE3 Billing Requirements. SALAE3 expenses considered significantly outside the scope of the Arrangement include, but are not limited to:

- Excessive expenses;
- Duplicative work done within one firm or by different firms handling the same case;
- Redundant or unnecessary depositions;
- Claims based on agent error; and
- Time devoted to familiarization with the NFIP, Federal practice, and other general matters with which Outside Counsel should already be familiar.

Outside Counsel representing WYO Companies are encouraged to use paralegal assistance or a more junior attorney when doing so would be appropriate and cost effective.

SALAE3 expenses are subject to the Financial Control Plan's Operational Review for Litigation, including a for cause audit as well as other independent audits determined to be required under the NFIP or the Department of Homeland Security Office of Inspector General. For audit purposes, WYO Companies must retain copies of all NFIP-related invoices and original underlying documentation, including timesheets and expense adjustment records, for at least four years after final payment.

## 5.2 Timing of Submission of Invoices and Requests for Reimbursement

The Arrangement provides that FEMA is not responsible for payment to Outside Counsel representing WYO Companies. The WYO Company is responsible for paying its Outside Counsel without delay and then seeking reimbursement from FEMA for eligible expenses under the Arrangement.

Outside Counsel must submit invoices to the WYO Company no later than 45 days after the last date of service on the invoice. WYO Companies must submit to FEMA requests for reimbursement within 45 days of receipt of the invoice from its Outside Counsel. If the WYO Company does not submit an invoice within the 90-day period (i.e., the aggregate of the two 45-day periods), the WYO Company must notify FEMA of the existence of an outstanding invoice and its estimated amount and provide an explanation of why it was not timely submitted and an estimate of when the WYO Company will submit the request for reimbursement to FEMA. FEMA retains the discretion to deny reimbursement of any untimely invoices.

Further, FEMA will reject any invoice submitted more than 180 days after the date the invoice was received by the WYO Company unless the WYO Company provides sufficient justification for the delay and that justification is accepted by FEMA, or FEMA expressly and in writing authorizes an extension of the 180-day period.

If a WYO Company disagrees with FEMA's reduction of an invoice, the WYO Company may send an email within 30 days of the reduction(s) to the WYOT member who reviewed the Invoice. The email must explain the precise reason(s) (with any pertinent documentation) the WYO Company does not

believe the reduction was warranted. The WYOT will review the submission and advise the WYO Company of its decision. All such requests for reconsideration should be directly from the WYO Company and not Outside Counsel.

# Appendix A: Sample Case Plan and Budget

This sample Case Plan and Budget (CP&B) has been developed to assist WYO Companies and their Outside Counsel with the submission of the CP&B required by this Manual.

Please provide the CP&B within 30 days of service of the lawsuit through the Litigation and Expense Module via Pivot.

Please note FEMA does not reimburse WYO Companies for the cost of education for their Outside Counsel regarding the NFIP and its policies, related Federal regulations, activities in Federal practice, or related subjects.

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### I. Summary of Complaint and Pleadings

This section should contain a brief summary of the claims raised in the Complaint, the type and dollar amount of damages sought, and a description of any other pleadings filed to date. (Please do not list all of the court filings, instead a copy of the docket can be attached) If there are allegations of agent error, those should be included in the summary of the allegations. This section should also include a brief summary of the allegations made against any codefendants in the case.

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### II. Presiding Court Information

The jurisdiction where the case will be litigated, the identity of the Judge assigned, including the Magistrate Judge, if applicable, and a brief description of the Judge's NFIP experience or notable NFIP cases based on the WYO's experience. \*Research should not be conducted as to the Judge's specific NFIP case experience unless requested by the WYOT.\*

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### III. Defense Theories and Regulatory Defenses

This section should contain a brief summary of the key defenses that will be raised by the WYO Defendant. While regulatory citations may be helpful in certain cases, this section should be a brief statement of how the regulatory provision provides the basis for a defense under the facts of the case (e.g., "Plaintiff failed to submit a timely proof of loss as required by 44 C.F.R. pt. 61, app. A(1), art. VII.J.4). Only defenses applicable to the specific case should be included in the CP&B.

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DISCLAIMER: WYOT's approval of Case Plan and Budgets is one component of the WYOT's continuous oversight of NFIP-related litigation. The WYOT's approval of a CP&B does not preclude future oversight of any lawsuit including the review of legal expenses for compliance with the NFIP Litigation Manual and SALAE3 Billing Requirements, along with any other applicable statutes, regulations, rules, policies, and guidelines. The WYOT's approval of a CP&B does not guarantee reimbursement from FEMA. Upon the submission of an invoice for reimbursement of the legal expenses, the WYOT may require the WYO company to provide additional information prior to the WYOT's approval of any request for reimbursement.

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### IV. Potential Liability/Damages

This section should include the following:

- The amount the plaintiff is seeking in the Complaint;
- The amount of the plaintiff's pre-suit demand or adjuster's report;
- The policy limits;
- Any amounts paid to the plaintiff to date; and
- The total amount believed to be at issue.

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### V. Potential for Settlement/Early Resolution

This section should include an assessment of both the potential for early settlement and the potential for early resolution through a Motion to Dismiss (e.g., for failure to submit a timely proof of loss). If prior to submission of the CP&B there has been any engagement with opposing counsel, the CP&B must include a brief summary of any meetings, exchanges of information and/or correspondence that indicates a likelihood or possibility for settlement. The CP&B should address whether the damages sought justify the amount of estimated fees it will cost to defend the case, as opposed to negotiating a settlement.

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### VI. Discovery Plan

The CP&B should address the appropriateness of asking the court for an enhanced initial disclosure order and if the WYO determines an enhanced initial discovery order is not appropriate, an explanation of why that course of action is in the best interests of the NFIP. This section should include the discovery to be conducted and the timing of the discovery as well as the anticipated discovery by the Plaintiff.

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### VII. Litigation Risks/Strategy

This section should highlight the strengths and weaknesses of the case, estimate the likelihood of success, and describe any issue(s) that could potentially impact the NFIP. It should recommend a proper course of action for the case, e.g., resolve it early through negotiation or motion practice or needs to be tried. It should also include the reason(s) for the recommended course of action, e.g., plaintiff friendly jurisdiction, existing precedent in the jurisdiction. If agent error has been alleged, there should be a discussion of that claim and an explanation as to why the WYO believes that the defense of this claim is not outside the scope of the Arrangement. This section should include any relevant information that indicates the case arises from a catastrophic flooding event, is related to other cases, or otherwise raises unique issues.

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### VIII. Anticipated Exceptional/Extraordinary Legal Expense

This section should indicate whether the case may involve the deposition of subject matter experts, federal employees or “agent error”-based witnesses and must also include any extraordinary issues that may significantly increase the cost of litigation. If local counsel has been or will be hired, please provide a summary that clearly outlays the delineation of roles/responsibilities (including court appearances), and, with as much as exactness as possible, describes the action items to be performed separately and distinctively by local counsel, as well as those itemizations that will be performed jointly by local and national counsel.

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### IX. Experience with Plaintiff’s Counsel

A brief description of WYO’s experience, if any, with counsel representing the Plaintiff. *\*Research should not be conducted as to Plaintiff’s Counsel unless requested by the WYOT.*

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### Budget for NFIP-Related Legal Activities

#### Preliminary Information and Fees:

1. Total amount of expenses to date: \$ \_\_\_\_\_
2. Primary Billing Attorney:  
Name: \_\_\_\_\_  
Hourly Rate: \$ \_\_\_\_\_ per hour
3. Additional timekeeper:  
Name: \_\_\_\_\_  
Hourly Rate: \$ \_\_\_\_\_ per hour
4. Initial handling hours: # \_\_\_\_\_ hours
5. Initial handling costs: \$ \_\_\_\_\_

#### Pre-Trial Fees:

6. Pretrial Contractor/Vendor Costs: \$ \_\_\_\_\_  
(e.g., appraisers, engineers, deposition transcripts, etc.)
7. Pleadings/Motions Preparation hours: # \_\_\_\_\_ Primary Billing Attorney  
# \_\_\_\_\_ Additional Timekeeper
8. Pleadings/Motions Fees: \$ \_\_\_\_\_ (rate × hours) Primary Billing Attorney  
\$ \_\_\_\_\_ (rate × hours) Additional Timekeeper
9. Discovery Preparation Hours: # \_\_\_\_\_ Primary Billing Attorney  
# \_\_\_\_\_ Additional Timekeeper
10. Discovery Fees: \$ \_\_\_\_\_ (rate × hours) Primary Billing Attorney  
\$ \_\_\_\_\_ (rate × hours) Additional Timekeeper
11. Settlement/Mediation Hours: # \_\_\_\_\_ Primary Billing Attorney  
# \_\_\_\_\_ Additional Timekeeper
12. Settlement/Mediation Fees: \$ \_\_\_\_\_ (rate × hours) Primary Billing Attorney  
\$ \_\_\_\_\_ (rate × hours) Additional Timekeeper

#### TOTAL EXPECTED PRETRIAL HOURS AND COSTS:

Total Pretrial Hours: \_\_\_\_\_ Total Pretrial Costs: \$ \_\_\_\_\_

DISCLAIMER: WYOT's approval of Case Plan and Budgets is one component of the WYOT's continuous oversight of NFIP-related litigation. The WYOT's approval of a CP&B does not preclude future oversight of any lawsuit including the review of legal expenses for compliance with the NFIP Litigation Manual and SALAE3 Billing Requirements, along with any other applicable statutes, regulations, rules, policies, and guidelines. The WYOT's approval of a CP&B does not guarantee reimbursement from FEMA. Upon the submission of an invoice for reimbursement of the legal expenses, the WYOT may require the WYO company to provide additional information prior to the WYOT's approval of any request for reimbursement.

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## National Flood Insurance Program Case Plan and Budget for NFIP-Related Litigation

### Budget for NFIP-Related Legal Activities

**Note:** This section should *not* be completed at the outset of the litigation.  
Section 3.3(F) of the NFIP Litigation Manual provides the timeline for submitting the trial budget.

#### Trial Fees:

12. Trial Preparation Hours: # \_\_\_\_\_ Primary Billing Attorney  
# \_\_\_\_\_ Additional Timekeeper
13. Trial Preparation Fees : \$ \_\_\_\_\_ (rate × hours) Primary Billing Attorney  
\$ \_\_\_\_\_ (rate × hours) Additional Timekeeper

#### TOTAL EXPECTED TRIAL HOURS AND COSTS:

Total Trial Hours: \_\_\_\_\_ Total Trial Costs: \$ \_\_\_\_\_

DISCLAIMER: WYOT's approval of Case Plan and Budgets is one component of the WYOT's continuous oversight of NFIP-related litigation. The WYOT's approval of a CP&B does not preclude future oversight of any lawsuit including the review of legal expenses for compliance with the NFIP Litigation Manual and SALAE3 Billing Requirements, along with any other applicable statutes, regulations, rules, policies, and guidelines. The WYOT's approval of a CP&B does not guarantee reimbursement from FEMA. Upon the submission of an invoice for reimbursement of the legal expenses, the WYOT may require the WYO company to provide additional information prior to the WYOT's approval of any request for reimbursement.

# Appendix B: Outside Counsel Requirements

## Write Your Own Company SALAE3 Billing Requirements

The National Flood Insurance Program (NFIP) expects Outside Counsel and their staff performing work on behalf of participating Write Your Own (WYO) Companies to comply with these billing requirements and will hold WYO Companies responsible if their counsel do not comply. “Outside Counsel” is defined as the legal counsel hired by a WYO Company to defend a lawsuit against the WYO Company that is not significantly outside the scope of the Financial Assistance/Subsidy Arrangement between the Federal Emergency Management Agency (FEMA) and the WYO Company. FEMA will review all invoices submitted by a WYO Company for compliance with these requirements and will not reimburse WYO Companies for items that do not comply. Each WYO Company must review these requirements, sign the acknowledgment, and return it to the FEMA Write Your Own Team (WYOT). A copy of this document must be provided to Outside Counsel, including local counsel, who must also sign the acknowledgment and return it to the WYO Company. The WYO Company must provide any signed acknowledgment(s) from Outside Counsel to the WYOT upon request.

If any questions arise about whether an expense is reimbursable, or a unique issue arises that appears to be outside the scope of these guidelines, please consult with the WYOT.

### 1. Pre-Litigation Fees and Non-Party Litigation Fees Are Not Compensable

Only legal fees incurred defending an NFIP lawsuit are reimbursable. Prior to the filing of a lawsuit, the matter is considered claims handling, and legal fees and costs incurred by the WYO Company are ineligible for reimbursement as SALAE3 expenses.

Absent prior approval, FEMA will not pay any fees that a WYO Company may incur by hiring Outside Counsel to assist in litigation activities in a case in which the WYO Company is not a party (e.g., defending a deposition of a witness who is an agent of the WYO Company, assisting the WYO Company in responding to a subpoena, etc.). Each instance will be assessed on its own merits, but it is anticipated that such prior approval will rarely be given.

### 2. Legal Fees Incurred in Preparing the Case Plan and Budget That Are Reimbursable

FEMA will reimburse up to two hours for the preparation of a Case Plan and Budget (CP&B) that meets the requirements set out in the NFIP Litigation Manual. FEMA will also reimburse up to one hour for the preparation of any Supplemental CP&B. The amount of time spent preparing the CP&B

or Supplemental CP&B should be commensurate with the level of complexity of the case. If a budget exceeds 50 percent of the amount in controversy for a case, the WYO Company should provide a detailed explanation in the CP&B explaining why the projected amount is disproportionate to litigation exposure and why early resolution is not the best course of action.

Active representation of a WYO Company in litigation must not be initiated by Outside Counsel before CP&Bs are approved by the WYOT except to the extent necessary to preserve the substantive rights of the WYO Company in the litigation. When circumstances warrant, waiver of this requirement must be sought from the WYOT. In the event the CP&B has been submitted by the WYO Company, but has not yet approved by the WYOT, and Outside Counsel considers it necessary to take additional actions in the litigation beyond the actions necessary to preserve the substantive rights of the WYOT Company, Outside Counsel must contact the WYOT member assigned to the case to determine the status of approval of the CP&B, and provide a brief explanation of the additional work that must be done.

### 3. Legal Billing Practices, and Legal Fees and Expenses That Are Not Reimbursable

The Outside Counsel invoice for legal fees and costs incurred in defending NFIP litigation (Invoice) submitted by the WYO Company on behalf of Outside Counsel, including local counsel, should sufficiently describe the legal work performed. The Invoice should not contain multiple time entries for several smaller tasks within an overall task. For example, multiple emails on the same topic by a timekeeper should be grouped together, there should be one daily entry for work on a brief unless there are entries by different timekeepers on the same day, etc. Any billing for communications between Outside Counsel, Outside Counsel and the WYO Company, any member of the WYOT, any adjuster, or any expert should specify not just the entity (e.g., “ABC Insurance” or “client” or “WYOT” or “expert” or “adjuster”), but should also specify the person at the entity with whom the communication occurred (e.g., “Mary Smith of client,” or “John Jones of WYOT,” or “Jane Johnson of XYZ Engineering,” etc.).

FEMA will **not** reimburse:

- Time spent on conflict of interest checks;
- Time spent on, and expenses related to, pro hac vice admission, except expenses incurred by pre-approved local counsel to file for pro hac vice admission of Outside Counsel;
- Time spent on the substitution of attorneys;
- Time spent to review a file to determine the status of the case;
- For more than 1.5 hours collectively for deposition summaries;
- For more than 1.0 hour collectively from all timekeepers involved in drafting a request for a FEMA concurrence to a settlement;
- Time spent attempting to recoup fees and costs from the opposing party (e.g., motion for costs, motion for sanctions, etc.) to the extent that the attorney’s fees and costs incurred by Outside Counsel to recoup said fees and costs might exceed the amount being sought from the opposing party;

- If an attorney attends one hearing on multiple cases at the same time, or attends multiple hearings on multiple cases at the same time, the billing for the attendance must be allocated equally between the cases as reasonably as possible;
- Multiple billing for any other legal work (e.g., research, memoranda, reports, or communications from experts, etc.) that involves more than a single case, except that the billing must be allocated equally between the cases as reasonably as possible;
- Administrative activities and case management activities, such as preparing case charts, calendaring dates, confirming deadlines, scheduling and arranging meetings, depositions, examinations, site inspections, etc.;
- Supervisory time, case monitoring time, office conferences, consultations, and the like within the Outside Counsel law firm, or between Outside Counsel and local counsel;
- Site inspection attendance by a timekeeper without pre-authorization from the WYOT;
- Secretarial time, docketing time, document management, and administrative services;
- Directions to prepare the closure of a file, closure of a file, checking for completeness of a file, acquiring documents to complete the file, and organizing material for storage;
- Time spent to bill or to prepare invoices or respond to inquiries concerning services, billing statements, case files, or audit letters;
- Fees incurred for “learning time.” This would include, but not be limited to, learning the area of law pertinent to NFIP litigation, and learning the local rules and customs of practice of the jurisdiction(s);
- Time spent on data entry, document scanning, conversion of documents to other electronic formats, photocopying, collating, emailing, or faxing documents;
- Time spent arranging travel;
- Time spent Bates stamping documents, date stamping documents, or the like;
- Time spent managing personnel;
- Rent for office space, equipment, or software licenses;
- Utilities, including, but not limited to, telephone service or usage, internet service, conference lines, Zoom or equivalent service, gas, or electric;
- Local car services, Uber, Lyft, taxi cabs, meals, or any other locally incurred travel expenses. FEMA will reimburse reasonable expenses when the attorney is traveling outside the metropolitan area in which they are located for a purpose that is otherwise reimbursable under these guidelines (e.g., an approved deposition, a court hearing where there is not local counsel, etc.);
- Services for delivery of documents to a court or other location, or for retrieval of documents from same. This exclusion does not include overnight services (e.g., FedEx) for delivery of settlement checks;
- Costs for meeting rooms located in Outside Counsel’s office or local counsel’s office for depositions, conferences, etc.;
- Catering;

- Postage or express mail delivery other than for settlement checks;
- Meals or refreshments for anyone other than the attorney(s) assigned to the case while attending court hearings and conferences, trial, mediation, and depositions;
- Support staff salaries;
- Bar dues, membership fees, court admission fees, or the like;
- Technology costs;
- Internet or telephone fees from hotels or airlines;
- The use of an outside vendor for copy services, unless pre-approved by FEMA;
- Scanning charges;
- In-house photocopy charges, whether black and white or color, that exceed ten cents per page; and
- All other items associated with overhead or profit.

## 4. Research

FEMA will not reimburse costs associated with electronic search services such as Lexis/Westlaw/PACER, but attorney time spent conducting necessary legal research is reimbursable. Time spent on research must be reasonable and describe the exact nature of the legal research. An entry simply stating legal research will not be reimbursed.

## 5. Staffing

### A. General

Cases should be staffed with no more than two attorneys, and one paralegal. If there is a change in any person in any of these categories working on a file, FEMA should be notified prior to the new person(s) billing on the file. FEMA may, in its discretion, deny reimbursement of invoices, in whole or in part, for work that reflects inefficiencies, duplicative efforts, and/or a failure to delegate tasks to less costly timekeepers. If there is a transfer of responsibility for a file within Outside Counsel's office, FEMA will not reimburse for the time the new attorney spends learning the file.

### B. Local Counsel

WYO Companies must generally hire Outside Counsel admitted to practice in the jurisdiction in which the litigation has been filed or in the jurisdiction to which the case will be removed. If the WYO Company intends to hire Outside Counsel in that jurisdiction for which local counsel will be required, it must consult with the WYOT in advance and justify that decision. If the WYO Company hires Outside Counsel that requires local counsel and the WYOT does not agree with that course of action, FEMA will not reimburse any legal expenses incurred for the use of local counsel. If the WYOT concurs with the use of local counsel, the CP&B should include an analysis of the cost efficiency of hiring

local counsel to minimize litigation travel expenses and to avoid duplicative legal expenses. The CP&B should include specific line-item budget entries related to local counsel work so that FEMA can ascertain the amounts attributable to work performed by local counsel. In any event, consistent with Paragraphs 5(C) and 5(D) below, FEMA will not reimburse for more than one attorney to attend depositions, mediations, hearings and trial or similar activities, and FEMA will not reimburse the WYO Company for duplicative work performed by Outside Counsel and local counsel.

### **C. Attendance at Depositions, Mediations, Hearings and Trial**

FEMA will generally only reimburse for one attorney to attend depositions, mediations, hearings, and trial. If the WYO Company or Outside Counsel believe an additional timekeeper's presence is required, it must obtain prior written approval from the WYOT. If prior written approval is not obtained, FEMA will not reimburse the fees and expenses for the presence of an additional timekeeper. The request for approval of an additional timekeeper to attend a trial, mediation, deposition, or hearing should be submitted at least 14 days before the event is scheduled to occur.

### **D. Duplication of Effort in Strategizing, Conferencing and Briefing**

Unless agreed upon in advance, FEMA will not reimburse for more than one timekeeper participating in conference/strategy calls with FEMA, WYO Company in-house counsel, or intra-office conferencing between the Outside Counsel defending the particular NFIP litigation. Additionally, FEMA will not reimburse for review of the same correspondence, documents, or memoranda by more than one timekeeper unless justified to and approved by the WYOT.

### **E. Hourly Rates**

Hourly rates for attorneys and paralegals must not exceed the lowest rate that the retained Outside Counsel charges the WYO Company for other comparable lines of litigation that Outside Counsel handles for the WYO Company. In establishing a reimbursable hourly billing rate for timekeepers handling NFIP litigation, WYO Companies should consider factors such as years of experience and geographic market rates. If the WYO Company is given a discount for a certain volume of matters with a particular Outside Counsel, that discount must be reflected in the invoices submitted for reimbursement in NFIP cases. Regardless of the rate established for any particular timekeeper handling a specific case, FEMA will not reimburse the WYO Company utilizing senior-level attorney rates for tasks that do not require senior-level attorney attention. Hourly rates should not be increased without preapproval by the WYO Company and the WYOT. The WYO Company should utilize the same criteria it uses for its other lines of business when determining whether to approve a request for a rate increase. Under no circumstances will a rate increase be approved more than once per year.



## 6. Submission of Invoices

Under the Arrangement, the WYO Company is responsible for paying its Outside Counsel without delay and then seeking reimbursement from FEMA for eligible SALAE3 expenses. Invoices should be submitted to FEMA by the WYO Company through PIVOT on a monthly basis, and **no more than 45 days** after receipt of the Invoice from Outside Counsel. Outside Counsel, including local counsel, must submit invoices to the WYO Company no later than 45 days after the last date of service on the invoice. Each invoice must contain time entries for only one calendar month. In addition:

- Each Invoice should include the amount billed for that month, the amount paid to the Outside Counsel since the last invoice, any amount outstanding from previous billings, and the cumulative total of fees and costs billed on the case since the inception of the case;
- Each Invoice should include a list of the name of each timekeeper billing on each Invoice, include the title (i.e., partner, associate, of counsel, paralegal, etc.), the billing rate for each timekeeper, the total hours and amount billed on that Invoice by each timekeeper, and the total hours and amount collectively billed on that Invoice. If this information is not included, a member of the WYOT will contact the WYO Company for an updated Invoice before approving an invoice for reimbursement; and
- Invoices for approved local counsel should be submitted within the same time frame, and for the same monthly billing period, as Outside Counsel's submission, and they are subject to the same rules and format as those of Outside Counsel. The invoice should identify any overlapping expenses.

**Timing of Invoice Submission:** If the WYO Company is not able to submit an Invoice within 90 days of the last date of service on the Invoice, the WYO Company must notify FEMA before the expiration of that 90 days that the Invoice will not be submitted on time, explain why it is untimely, estimate when Counsel will submit the Invoice to the WYO Company (if it has not already been submitted to the WYO Company by Counsel), and estimate when the WYO Company will submit the request for reimbursement to FEMA. FEMA may, in its discretion, deny in whole or part the reimbursement sought for the untimely Invoice. If FEMA determines the delay is reasonable, it will grant an extension to submit the Invoice. Acceptable reasons for late invoices may include circumstances outside the control of the WYO Company or its Outside Counsel, such as a technical error on FEMA's part, an event (e.g., a large hurricane) that affects the WYO Company's or Outside Counsel's infrastructure and/or technology and impedes normal business operations, or where FEMA gives an express written authorization granting an extension at least five days prior to the 90-day deadline.

## 7. Travel

When feasible, depositions, settlement conferences, mediations and hearings should be conducted remotely to reduce travel expenses. When travel is required, the following limitations apply:

- FEMA will not reimburse the WYO Company for any travel costs that exceed the amounts prescribed in the Federal Travel Regulations, or for any costs prohibited under U.S. Federal Regulations. Costs for transportation may be based on mileage rates, or actual costs incurred, provided the method used results in a reasonable charge. Costs for lodging,



meals, and incidental expenses may be based on per diem or actual expenses provided the method used results in a reasonable charge. Costs incurred for lodging, meals, and incidental expenses will be considered reasonable and allowable only to the extent that they do not exceed, on a daily basis, the maximum per diem rates in effect at the time of travel as set forth in the Federal Travel Regulations, prescribed by the General Services Administration available at the following website:

<https://www.gsa.gov/policy-regulations/regulations/federal-travel-regulation-ftr>.

The following websites are provided for reference as the Government's determination for price reasonableness for airfare and per diem:

<https://cpsearch.fas.gsa.gov/cpsearch/search.do>

<https://www.gsa.gov/travel/plan-book/per-diem-rates>

<https://www.gsa.gov/travel/plan-book/per-diem-rates/meals-and-incidental-expenses-mie-breakdown>

- FEMA generally will not reimburse attorney or paralegal fees for travel time. FEMA will, however, pay for time reasonably spent working on matters (e.g., reviewing or drafting documents, communicating about matters, or preparing for meetings or hearings) during the course of business travel.

## 8. Expert Witnesses

An expert witness must not be consulted, retained, or designated without first obtaining prior approval from the WYO Company. If any questions arise as to whether such engagement is advisable, the WYOT should be consulted.

## 9. Depositions

Preapproval by the WYO Company and the WYOT are required prior to taking or attending any depositions. The amount at issue and the unique issues presented by the case should be considered. The WYO Company must ensure the deposition is necessary, is not duplicative, and is relevant to the claims against, or the defenses of, the WYO Company. If there is another defendant, and the claims against that other defendant do not involve a claim against the WYO Company under the SFIP, permission will likely not be given for Outside Counsel to attend the deposition. The WYO Company should apply its current business practices as applied with respect to its other lines of business when deciding whether Outside Counsel should attend such depositions.

## 10. Settlement

Efforts at early resolution of cases and avoidance of litigation expenses are encouraged, as explained in the NFIP Litigation Manual.

## 11. Signature

I have read, and I concur with, the requirements contained in the National Flood Insurance Program's Participating Write Your Own Company SALAE3 Billing Requirements. I will communicate the contents of these billing requirements to all Outside Counsel retained by this Company and ensure that they are also communicated to local counsel. I understand that failure to comply with all these requirements may result in the denial of reimbursement for part, or all, of the legal fees and expenses billed.

WYO Company Name: \_\_\_\_\_

WYO Company Representative: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name and Title

Date: \_\_\_\_\_

**Please return signed this form to:**

Write Your Own Oversight Team, [FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov](mailto:FEMA-NFIP-WYO-Litigation@FEMA.DHS.gov)

### Outside Counsel Representing WYO Company

I, as lead counsel for \_\_\_\_\_ have read and concur with the requirements contained in the National Flood Insurance Program's Participating Write Your Own Company SALAE3 Billing Requirements. I understand that this assent applies to all cases in which my firm represents any Write Your Own Company SALAE3 Write Your Own Company. If my firm enlists local counsel, my firm will communicate these Billing Requirements to local counsel and obtain its signature on this document. I understand that failure to comply with all these requirements may result in the denial of reimbursement for part or all of the legal fees and expenses billed.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name

Date: \_\_\_\_\_

# Appendix C: Sample Proposed Initial Discovery Order

IN THE UNITED STATES DISTRICT COURT FOR  
THE \_\_\_\_\_ DISTRICT OF  
\_\_\_\_\_

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Plaintiff[s],

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vs.

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Defendant[s].

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## Initial Discovery Protocols Order for Cases Under the National Flood Insurance Act

This Court is implementing these **Initial Discovery Protocols for Cases Arising Under the National Flood Insurance Act**. These Initial Discovery Protocols (“Discovery Protocols”) apply to claims under the National Flood Insurance Act under insurance policies issued under the National Flood Insurance Program (NFIP).

Parties and counsel must comply with the Discovery Protocols attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 45 days after the defendant's filing of a response to a complaint, the parties must provide to one another the documents and information described in the Discovery Protocols attached as \_\_\_\_\_ to this Order for the relevant time period. This exchange supersedes the parties' obligations to provide initial disclosures under F.R.C.P. 26(a)(1). The parties must use the documents and information exchanged to prepare the F.R.C.P. 26(f) discovery plan.

The parties' responses to the Discovery Protocols must comply with F.R.C.P. 26(e) on supplementation and with F.R.C.P. 26(g) on certification of responses. As stated in the Protocols, this Initial Discovery is not subject to objections, except on the grounds of attorney-client privilege, work-product protection (including a joint defense agreement), or other applicable privilege (Collectively "Privilege"). Any party that withholds documents or information based on Privilege must provide a Privilege Log under F.R.C.P. 26(b)(5).

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[Name and Signature of Judge]

## Initial Discovery Protocols for NFIP Cases

### Part 1: Introduction and Definitions.

#### (1) Statement of purpose.

- a. These Initial Discovery Protocols (“Discovery Protocols”) apply to any cases arising under the NFIP in which the Court determines such Discovery Protocols are appropriate to make it easier and faster for the parties and their counsel to:
  - (1) exchange important information and documents early in the case;
  - (2) frame the issues to be resolved;
  - (3) value the claims for possible early resolution; and
  - (4) plan for more efficient and targeted subsequent formal discovery, if needed.
- b. Participating courts may implement the Discovery Protocols by local rule or by standing, general, or individual-case orders. Although the Discovery Protocols are designed for the full range of case size and complexity, if any party believes that there is good cause why a case should be exempted, in whole or in part, from the Discovery Protocols, that party may raise the issue with the Court no later than 14 days after issuance of an Order adopting these protocols.
- c. The Discovery Protocols are intended to supersede the parties’ obligations to provide initial disclosures under F.R.C.P. 26(a)(1). The Discovery Protocols, unless specifically stated in any given case or Case Management Order (CMO), are not intended to preclude or modify any party’s rights to formal discovery as provided by the Federal Rules of Civil Procedure or the Local Rules.

The Discovery Protocols require parties to exchange information and documents routinely requested (“Initial Discovery”). This Initial Discovery is unlike initial disclosures under F.R.C.P. 26(a)(1) because it includes favorable as well as unfavorable information and documents, is limited to information and documents that are not subject to objection, and is limited to the information and documents most likely to be important and useful in facilitating early settlement discussion and resolving or narrowing the issues requiring further litigation.

#### (2) Definitions. The following definitions apply to cases under the Discovery Protocols.

- a. **Claimed Loss.** “Claimed Loss” means the loss or damage that the Insured seeks to recover under the Standard Flood Insurance Policy (SFIP) at issue in the lawsuit.
- b. **Document.** “Document” and “documents” are defined to be synonymous in meaning and equal in scope to the phrase “documents or electronically stored information” in F.R.C.P. 34(a)(1)(A). A draft of a document or a nonidentical copy is a separate document.
- c. **Event.** “Event” means the event alleged to have caused the Insured’s Claimed Loss.

- d. **Identify (Documents).** When referring to documents, to “identify” means to describe, to the extent known: (i) the type of document; (ii) the general subject matter; (iii) the date; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document (or a copy) was to have been sent. Alternatively, to “identify” a document means to produce a copy.
- e. **Identify (Natural Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) email address; (iv) present or last known place of employment; (v) present or last known job title; and (vi) relationship, if any, to the parties. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent requests to identify that person.
- f. **Identify (Non-Natural Persons or Entities).** When referring to a corporate entity, partnership, or other unincorporated association, to “identify” means to give the: (i) corporate or entity name and, if known, the trade or other names under which it has done business during the relevant time period; (ii) state of incorporation or registration; (iii) address of its principal place of business; (iv) primary phone number; and (v) internet address. Once a corporate or other business entity has been identified in accordance with this subparagraph, only the name of that entity needs to be listed in response to subsequent requests to identify that entity.
- g. **Insurer.** “Insurer” means the entity alleged to have issued the SFIP that is the subject of the lawsuit.
- h. **Insured.** “Insured” means any named individual(s), corporate entity(ies), partnership(s), or other unincorporated association(s) seeking to recover under the SFIP at issue as an Insured in the litigation.
- i. **NFIP Claim.** “NFIP Claim” means a claim the Insured asserted under the SFIP at issue in the lawsuit.
- j. **Other Insurance.** “Other Insurance” means any insurance policy, other than the SFIP that is subject of the lawsuit, that covers or potentially covers the Property or the Claimed Loss.
- k. **Policy or SFIP.** The “Policy” or “SFIP” means the insurance policy at issue in this lawsuit.
- l. **Property.** “Property” means the property (building or contents) that the Insured claims is covered under the SFIP at issue in the lawsuit.
- m. **Relating to.** As used herein, “relating to” is to be construed broadly. This means that if information or document(s), directly or indirectly, concern, refer to, describe, evidence, constitute, or otherwise have bearing on this litigation, they “relate to” the required disclosure under these Discovery Protocols.

### (3) Instructions.

- a. The relevant time period for this Initial Discovery begins on the date immediately before the Event and ends on the date the lawsuit is filed for the Claimed Loss, unless a different time period is indicated with respect to a specific production obligation as set out in Part 2 or Part 3 below.

- b. This Initial Discovery is presumptively not subject to any objections except for Privilege. Documents withheld based on Privilege are subject to F.R.C.P. 26(b)(5). Withholding documents on this basis does not alleviate any obligation to produce the withheld documents or additional information about them at a later date if the Court orders or the applicable rules require.
- c. If a partial or incomplete or “unknown at this time” answer or production is given to any disclosure requirement in these Discovery Protocols, the responding party must state the reason that the answer or production is partial, incomplete, or unknown and when supplemental information or documents providing a complete response will be produced.
- d. For this Initial Discovery, a party must disclose information and documents that the disclosing party has in its possession, custody, or control and that are reasonably available. This Initial Discovery is subject to F.R.C.P. 26(e) on supplementation, to F.R.C.P. 26(g) on certification of responses. This Initial Discovery does not preclude either party from seeking additional discovery under the rules at a later date.
- e. This Initial Discovery is subject to F.R.C.P. 34(b)(2)(E) on the form of production.
- f. This Initial Discovery is subject to the attached Interim Protective Order unless the parties agree or the Court orders otherwise. The Interim Protective Order will remain in place until and unless the parties agree on, or the Court orders, a different protective order. Absent party agreement or Court order, the Interim Protective Order does not apply to subsequent discovery.
- g. Within 14 days after the entry of this Order, the Parties will meet and confer on the format (e.g., TIFF/text, searchable pdf, or Excel) in which to produce documents under these Discovery Protocols. This will not delay the timeframes for Initial Discovery, absent Court order. Nor will production in one format preclude requesting production in another format, if applicable rules of discovery allow.

## **Part 2: Information and Documents To Be Produced By the Insured.**

### **(1) Timing.**

The Insured’s Initial Discovery responses must be provided within 45 days after the Insurer has filed a response to the complaint unless the Court orders otherwise.

### **(2) Information to be provided by the Insured:**

- a. A description of the Insured’s ownership or other interest in the Property.
- b. The address of the Property (or location of movable Property) on the date of the Event.
- c. The name of each Insurer and all policy numbers for each Policy or SFIP or Other Insurance held by or potentially benefitting the Insured or the Property on the date of the Claimed Loss, including relevant policy and claim numbers for any claims.
- d. Identify any current mortgagee or other known lien holder.

- e. A computation of each item or type of Claimed Loss, including content claims if in dispute. The computation must reasonably identify or itemize price and quantity of materials.
- f. Identify any payments received under the Policy relating to the Event.
- g. Identify the source and amount of any payments received after the Event from Other Insurance, or any other source, for all or any part of the Claimed Loss.
- h. Identify any grant or other similar program that the Insured applied for after the Event, including a Small Business Administration loan, seeking payment for all or any part of the Claimed Loss.
- i. Identify the public or other adjusters, estimators, inspectors, contractors, engineers, or other persons engaged by or on behalf of the Insured relating to the Claimed Loss.
- j. With respect to any Other Insurance, all policy numbers, the name of each insurer, and claim numbers for any claims made for coverage by the Insured on the same Property at issue in this litigation.
- k. A general description, including the court and docket number, of any other lawsuits to which the Insured is a party seeking coverage from the Event relating to the Property.
- l. A general description of any known preexisting damage to the Property that is the subject of the Claimed Loss.
- m. A general description of any claims for property damage or lawsuits resulting from property damage in the past ten years relating to the Property, including, any insurers, policy numbers, claim numbers, and court and docket numbers for any lawsuits.
- n. Identify any sale, transfer, or foreclosure of any interest in the Property after the Event.

**(3) Documents to be produced by the Insured:**

- a. Documents relating to the Claimed Loss, including: loss estimates; adjuster's reports; engineering reports; contractor's reports; estimates, bids, plans, or specifications regarding repair work (whether planned, in progress, or completed); photographs; videos; or other materials relating to the Claimed Loss, along with any receipts, invoices, and other records of actual costs to repair or replace the Claimed Loss.
- b. Any signed proofs of loss the Insured contends were submitted to the Insurer for the Claimed Loss, and any documentation demonstrating that the signed proof(s) of loss were submitted.
- c. Any other proofs of loss for the Claimed Loss the Insured contends were submitted to the Insurer for the Claimed Loss, and any documentation demonstrating that the signed proof(s) of loss were submitted.
- d. Documents relied on by the Insured in generating any proof of loss required or provided under the Policy.



- e. Written communications exchanged between the Insured and Insurer that refer or relate to Insured's Claimed Loss, the Property, or damages, or otherwise relating to the Insured's claim.
- f. Any denial letters received by the Insured from the Insurer or its agent(s) upon which the lawsuit was brought.
- g. Any other document that the Insured contends was a denial and upon which the lawsuit was brought.
- h. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property, including photographs and videos of the Claimed Loss.
- i. Written communications, photographs, or estimates of damages sought from or paid by any other insurer related to the Event.
- j. The insurance policy with respect to any Other Insurance, and the claim numbers for claims made to recover loss to the Property relating to the Event.
- k. Appraisals or surveys of the Property condition within five years before, or any time after, the Event.
- l. If there has been an appraisal under the Policy, documents relating to the appraisal process.
- m. Communications to and from FEMA, the Insurer, and the Insured relating to the Claimed Loss or the Property before the litigation was filed.
- n. Documents relating to an administrative appeal under 44 C.F.R. § 62.20.
- o. Any other document(s) on which the Insured relies to support the Claimed Loss.
- p. For any claims or lawsuits related to claims for property damage to the Property in the past ten years, any proofs of loss submitted to any insurer, any engineering reports, any contractor's reports, estimates, bids, plans, specifications, or invoices regarding repair work (whether planned, in progress, or completed), any evidence of any repairs made after said claims or lawsuits, any photographs, any videos or any or other materials you have or reasonably can obtain relating to each such claim or lawsuit.

### **Part 3: Information and Documents To Be Produced By the Insurer.**

#### **(1) Timing.**

The Insurer's Initial Discovery responses must be provided within 45 days after the Insurer has filed a response to the complaint unless the Court rules otherwise.

#### **(2) Information to be provided by the Insurer:**

- a. **If there is a dispute over coverage**, in whole or in part, an explanation of the Insurer's reason for the denial of coverage, including:
  - i. Any exclusions or exceptions, or other coverage or legal defenses;
  - ii. The factual basis for any exclusion, limitation, exception, or condition-based dispute or defense;
  - iii. Whether there is also a dispute as to the value or amount of the Claimed Loss; and

- iv. Any other basis on which coverage was denied.
- b. **If there is a dispute over all or part of the valuation**, an explanation of the Insurer's basis for disputing the value or amount of the Claimed Loss, including:
  - i. The Insurer's understanding of the nature of the dispute;
  - ii. The amount the Insurer disputes and the basis for that dispute, including any applicable Policy provisions that the Insurer alleges or believes are relevant to the dispute; and
  - iii. The amount the Insurer agrees to pay, if any, with respect to any undisputed part of the Claimed Loss.
- c. Any Policy terms or conditions that the Insurer alleges the Insured failed to comply with, including conditions precedent or other terms.
- d. Any payments previously made under the Policy relating to the Event.
- e. A general description of any other basis for nonpayment of the Claimed Loss, in whole or in part.
- f. Any other Event-related lawsuits filed for the Property.
- g. Identify the adjuster(s) who handled the claim.
- h. Identify the individual(s) who recommended, made, approved, or rejected the claim decision.
- i. Identify the estimators, inspectors, contractors, engineers, or other persons who participated in the claims process or on whom the Insurer relied in making its claim decision.
- j. If preexisting damage is at issue in the litigation, a general description of any prior claims in the past ten years for the Property.

**(3) Documents to be produced by the Insurer:**

- a. The claim file maintained by the Insurer.
- b. The complete Policy in effect at the time of the Event.
- c. Assessments of the Claimed Loss in existence at the time the disclosure is due, including loss reports, expert reports that contain any description or analysis of the scope of loss or any defenses under the Policy, damage assessments, adjuster's reports, engineering reports, contractor's reports, and estimates of repair or replacement.
- d. Photographs and videos of the Property taken for the purpose of documenting the condition of the Property, including photographs and videos of the Claimed Loss.
- e. Any other evaluations of the Claimed Loss.
- f. Documents containing recordings, transcripts, or notes of statements, conversations, or communications by or between the Insurer and the Insured relating to the Event.
- g. Any claim log, journal, or diary maintained by the Insurer relating to the Claimed Loss.

- h. Any proofs of loss received for the Claimed Loss.
- i. If there has been an appraisal under the Policy documents relating to the appraisal process.
- j. For NFIP Write Your Own Claims, communications to and from FEMA, the Insurer, and the Insured relating to the Claimed Loss or the Property before the litigation was filed.
- k. For NFIP Direct Claims, written communications exchanged between the Insured and FEMA claims-handling personnel referring to the Insured's Claimed Loss, Property, or damages, or otherwise relating to the Insured's claim.
- l. Documents relating to the administrative appeal under 44 C.F.R. § 62.20.
- m. Any other document(s) on which the Insurer intends to rely to support its defenses.

## IN THE UNITED STATES DISTRICT COURT

[ ]	§	
	§	
	§	
Plaintiff[s],	§	
	§	
vs.	§	CIVIL ACTION NO. H-[ ]-[ ]
	§	
[ ]	§	
[ ]	§	
	§	
Defendant[s].	§	

### Interim Protective Order

The Initial Discovery Protocols are designed to achieve more efficient and targeted discovery. Prompt entry of a protective order will allow the parties to begin exchanging documents and information without delay. This Interim Protective Order will remain in place until the parties agree to, or the Court orders, a different protective order, but absent agreement or Court order, the Interim Protective Order will not apply to subsequent discovery. The parties may agree to use the Interim Protective Order throughout litigation.

Recognizing that whether to enter a protective order and its terms are within the Court's discretion and are subject to local practice, courts might use an approach along the following lines:

The Court orders that the following restrictions and procedures apply to certain information, documents, and excerpts from documents and information the parties exchange in response to the Discovery Protocols (those with checked boxes are measures applicable to this case):

1. ☐ Any party may designate as “Confidential” any document, or information contained in or revealed in a document, provided in response to these Protocols or, if applicable, in subsequent discovery, if the party determines, in good faith, that the designation is necessary to protect the party. Information and documents that a party designates as confidential will be stamped “CONFIDENTIAL.” Confidential information or documents are collectively referred to as “Confidential Information.”
2. ☐ Unless the Court orders otherwise, the Confidential Information disclosed will be held and may be used by any person receiving the information solely in this litigation.
3. ☐ If a party challenges another party’s Confidential Information designation, counsel must make a good-faith effort to resolve the dispute. If that is unsuccessful, the challenging party may seek resolution by the Court. Nothing in this Interim Protective Order is an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and court rules.
4. ☐ Information or documents designated as “Confidential” must not be disclosed to any person, except:
  - a. ☐ the requesting party and counsel, including in-house or agency counsel;
  - b. ☐ employees of counsel assigned to and necessary to assist in the litigation;
  - c. ☐ consultants or experts assisting in the prosecution or defense of the litigation, to the extent deemed necessary by counsel;
  - d. ☐ any person from whom testimony is taken or is to be taken in this litigation, but that person may be shown the Confidential Information only in preparation for, and during, the testimony and may not retain the Confidential Information; and
  - e. ☐ The judge, the court staff, including the clerk, case manager, court reporter, or other person with access to Confidential Information by virtue of his or her position with the court, or the jury.
5. ☐ Before disclosing or displaying Confidential Information to any person, a party must:
  - a. ☐ inform the person of the confidential nature of the information and documents; and
  - b. ☐ inform the person that the Court has enjoined the use of the information or documents for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
6. ☐ The Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that before any such display or discussion, each person must be asked to sign an agreement to be bound by this Order in the form attached as Exhibit A. If the person refuses to sign an agreement in the form attached, the party seeking to disclose the Confidential Information may seek relief from the Court.

7. ☐ The disclosure of a document or information without designating it as “Confidential Information” does not waive the right to designate the document or information as Confidential Information if the document or information is designated under this Order.
8. ☐ Documents or information filed with the Court that are subject to confidential treatment under this Order, and any pleadings, motions, or other papers filed with the Court disclosing any Confidential Information, must be filed under seal to the extent permitted by the law, rules, or Court orders, and must be kept under seal until the court orders otherwise. To the extent the Court requires any further act by the parties as a precondition to filing the documents or information under seal, the party filing the document or information is responsible for satisfying the requirements. If possible, only the confidential parts of documents of information filed with the Court will be filed under seal.
9. ☐ At the conclusion of this litigation, the Confidential Information and any copies must be promptly (and in no event later than 60 days after entry of final judgment no longer subject to appeal) returned to the producing party or certified as destroyed, except that the parties’ counsel may retain their working files on the condition that those files will remain confidential. Materials filed in the Court will remain in the file unless the Court orders their return.
10. ☐ Producing documents or information, including Confidential Information, in this litigation does not waive attorney-client privilege or work-product protection for the documents or information, under FRE 502(d).

This Order does not diminish the right of any party to apply to the Court for a different or additional Protective Order relating to Confidential Information, to object to the production of documents or information, to apply to the Court for an order compelling production of documents or information, or to modify this Order. Any party may seek enforcement of this Order and the Court may sanction violations.

Date Signed: \_\_\_\_\_

## EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled \_\_\_\_\_ have been designated as confidential. I have been informed that any of the documents or information labeled “CONFIDENTIAL” are confidential by Order of the Court.

I agree that I will not disclose any information contained in the documents to any other person. I further agree not to use this information for any purpose other than this litigation.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

Signed in the presence of: \_\_\_\_\_  
(Attorney)