U.S. Department of Homeland Security
500 C Street, SW
Washington, DC 20472

FEMA

W-13058

September 26, 2013

ARCHIVED APRIL 2018

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators, WYO Vendors, and NFIP Direct Servicing Agent

FROM: James A. Sadler, CPCU, AIC
Director of Claims
Federal Insurance and Mitigation Administration (FIMA)

SUBJECT: **FEMA's Participation in State-Sponsored Non-Binding Wind versus Flood Disaster Claims Mediation Program**

Purpose: On September 23, 2013, the Federal Emergency Management Agency (FEMA) issued the State-Sponsored Non-Binding Wind versus Flood Disaster Claims Mediation Policy (FP 206-086-1) interpreting and implementing Section 100223 of the Biggert-Waters Flood Insurance Reform Act of 2012 (BW-12), 42 U.S.C. § 4021. Attached is a copy of FP 206-086-1 for your information.

This information is issued as a FEMA policy to facilitate implementation of the provision of BW-12 requiring FEMA to participate in state-sponsored non-binding mediation of wind versus water disputes, when appropriate. A FEMA policy is an appropriate medium to articulate FEMA's interpretation of the BW-12 provision and will enable our state partners, Write Your Own (WYO) companies, and NFIP insureds to understand the role of FEMA, WYO companies, and other stakeholders in wind-versus-water mediation. This policy is necessitated by the importance of the subject, the statutory requirements, limited available Federal resources, and limitation to the Claims and Appeals Branch participation.

FEMA has no privity of contract with WYO company policyholders, and FEMA cannot appear on behalf of WYO companies in the state-sponsored mediation process. FEMA also has statutory obligations on BW-12 Section 100223. Because FEMA is not a party to those SFIPs and does not have possession of necessary claim information, WYO company personnel must be available to participate in mediation, with FEMA personnel available to provide necessary guidance and/or approvals. FEMA also recognizes the need to conserve scarce resources, and FP 206-086-1 requires the flood insurer participating in mediation to exercise sound stewardship of Federal funds. This means that, when feasible and appropriate, FEMA and WYO companies should appear at mediation telephonically or through video conference, and mediation sessions should be scheduled to minimize

costs and time commitments. We expect that state mediators will cooperate in this regard and reduce the costs of mediation while maintaining a commitment to fair and equitable resolution of disputes.

Nonetheless, FEMA will reimburse the WYO companies their reasonable travel expenses and other associated costs when necessary. It should be noted that under the provisions of BW-12 Section 100223, WYO Companies serving as FEMA's fiscal agent are participating at the direction of FEMA and are not be subject to separate direction from a "state" to participate in these state-sponsored mediation programs in their capacity as a WYO company.

WYO companies will not be expected to participate in a state-sponsored mediation unless and until FEMA needs their assistance in resolving a "bona fide dispute." **However, this policy does not affect any request or direction by a state to an insurer to participate in a state-sponsored mediation relative to non-NFIP, privately issued policies of insurance, merely because the insurer also participates in the NFIP as a WYO company**.

Authority: Biggert-Waters Flood Insurance Reform Act of 2012 Section 100223, codified at 42 U.S.C. § 4021, and the related regulations found in 44 C.F.R. § 59, *et seq.*

If you should have any questions, please contact James A. Sadler at James.A.Sadler@fema.dhs.gov.

Attachment

cc: Vendors, IBHS, FIPNC, Government Technical Representative

Required Routing: Claims, Underwriting

ARCHIVED APRIL 2018

FEMA

FP 206-086-1

FEDERAL EMERGENCY MANAGEMENT AGENCY POLICY

ARCHIVED APRIL 2018

I. **TITLE:** Participation by FEMA in State-Sponsored Non-Binding Disaster Claims Mediation Programs

II. **DATE OF ISSUANCE: September 23**, 2013 guided directed

III. **POLICY STATEMENT:** FEMA's participation in non-binding **"State-sponsored mediation"** of disaster-related insurance claims, as required by the Biggert-Waters Flood Insurance Reform Act of 2012, ("BW-12") Section 100223, Pub. Law 112-141 (Jul. 6, 2012), which amended the National Flood Insurance Act of 1968, (the "NFIA" – 42 U.S.C. § 4001, *et seq.*), and created Section 1314 of the NFIA (42 U.S.C. § 4021), will be completed in the most cost effective manner possible. FEMA's participation will respect the "States" regulation or statute regarding Department of Insurance non-binding claims mediation, but must also be directed by the provisions BW-12 Section 100223. FEMA must take advantage of all mechanisms that help to reduce the costs and impacts to program operations.

IV. **PURPOSE**: To establish criteria for when and how FEMA will respond to requests from "**States**" to participate in a program of non-binding "**State-sponsored mediation**" in light of budgetary considerations and the staffing requirements of the day-to-day operations of the National Flood Insurance Program ("NFIP").

V. **SCOPE :** This policy applies to NFIP Standard Flood Insurance Policy ("SFIP") Dwelling-form flood insurance claims arising from a **"major disaster"** as defined in the Section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, (42 U.S.C. § 5122 – the "Stafford Act"), where claims for flood related damages to the building and/or contents under Coverage A and Coverage B of the SFIP arise from the same **"major disaster"** involving claims under policies issued by regulated by the **"State."** This Policy pertains to instances where a **"State"** requests FEMA personnel to participate in a non-binding **"State-sponsored mediation"** program along with the insurance company issuing the "**other personal lines residential property insurance coverage"** in the same mediation (*i.e.,* there must be other types of damages in addition to flood for which the requesting party has a separate policy of insurance under which a demand for payment has been made and denied). Additionally, this policy only applies where the Dwelling form is providing the primary coverage, and not when there is also a Residential Condominium Building Association Policy form SFIP responding to the damages.

VI. **AUDIENCE:** This policy informs FEMA Claims and Appeals Branch personnel, WYO program participating insurance companies, insured(s) under SFIPs who qualify for such

"State-sponsored mediation" programs, and each "**State**" that desires to have FEMA personnel participate in such "**State-sponsored mediation"** programs of FEMA's methods of responding and abilities to respond to such requests.

VII. AUTHORITY: BW-12 Section 100223 which created 42 U.S.C. § 4021 by amending the National Flood Insurance Act of 1968, as amended (42 U.S.C. § 4001, *et seq.*) and the related regulations found in 44 C.F.R. § 59, *et seq.*

VIII. OBJECTIVES:

1. To identify when a **"Representative of the Administrator"** and a **"Representative of the National Flood Insurance Program"** are authorized to participate in a non-binding **"State-sponsored mediation"** program for **"major disaster"** related claims.

2. To provide the maximum possible participation of the relevant **"Representative of the Administrator"** and **"Representative of the National Flood Insurance Program"** in such non-binding mediation processes.

3. To maximize the potential to achieve positive results from mediation and to minimize the expenses associated with participating in mediation.

4. To identify FEMA's methodology and procedures to participate in qualifying "**State-sponsored mediation"** programs under BW-12 and the manner in which FEMA (or, if applicable, a WYO participating insurance company) will respond to such requests.

IX. DEFINITIONS, ABBREVIATIONS, AND FORMATTING: For purposes of this Policy, the following definitions will apply, and no special meaning or different meaning will be attributed due to the capitalization or non-capitalization, bolding or non-bolding, of the following terms as they appear in this Policy.

a. **"Bona fide dispute"** – A **"bona fide dispute"** means that the request for mediation must involve a claim for amounts not paid under a SFIP which are supported by a completed, signed and sworn to proof of loss with attached documentation that fully supports the NFIP policyholder's position, as required by General Condition J of the SFIP and other FEMA guidance, including guidance applying to the particular event.

ARCHIVED APRIL 2018

b. **"Designated area"** – a **"designated area"** means any emergency or major disaster-affected portion of a "**State**" which has been determined eligible for Federal Individual and Household Assistance.

c. **"Major Disaster"** – a "major disaster" for purposes of this Policy is the same definition as used in Section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. § 5122), for which Individual and Household Assistance is made available pursuant to the Stafford Act in a **"designated area."** For purposes of this Policy, in addition to the foregoing, to qualify for FEMA to participate in a "**State-sponsored mediation**" process, the **"major disaster"** must be one which resulted in **"flood"** damage covered by a Standard Flood Insurance Policy as well as damage covered under one or more policies of **"other personal lines residential property insurance coverage."** The damages covered by the SFIP and the other insurance company's policy must result from that same single Major Disaster and must involve an additional type of damage other than **"flood,"** If multiple events occur over a time period, each of which causes separate types of damage (*e.g.* – fire damages occur in the first event and sometime later **"flood"** damages in a second event), the separate events cannot be combined to qualify as a **"major disaster"** so as to require FEMA to participate in a "**State-sponsored mediation"** program.

ARCHIVED APRIL 2018

d. **"United States"** means the fifty "**States,"** the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

e. **"State" or "States"** means any of the fifty "**States"** comprising the **"United States"**, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

f. **"Other personal lines residential property insurance coverage"** means any other policy of insurance providing coverage against a peril other than flood, or any combination of perils of which flood related damages are included, but does not mean a non-NFIP policy of insurance which insures only against flood or a non-NFIP policy of insurance which provides coverage for flood related damages for amounts in excess of the coverage limits purchased under a SFIP. If only **"flood"** related damages are presented under the SFIP and other policies of insurance, the "Other Insurance" clause of the Standard Flood Insurance Policy would control, and FEMA will not mediate such claims.

g. **"Representative of the Administrator"** means one or more employees of the Federal Emergency Management Agency employed in the Claims and Appeals branch of the Federal Insurance and Mitigation Administration who has been delegated authority to **"finalize the settlement"** of claims.

h. **"Representative of the National Flood Insurance Program"** – means one or more employees of the Federal Emergency Management Agency employed in the Claims and Appeals branch of the Federal Insurance and Mitigation Administration, and when needed by FEMA personnel, representative(s) of a Write Your Own Program participating insurance company when such company is the issuer of the SFIP at issue.

i. **"Direct physical loss by or from flood"** - As defined by the Standard Flood Insurance Policy forms promulgated by FEMA this means for a SFIP policyholder: "Loss or damage to insured property, directly caused by a flood. There must be evidence of physical changes to the property." See, 44 C.F.R. § 61, App. A(1)-(3), Section II (Definitions).

j. **"Flood"** - As defined by the Standard Flood Insurance Policy forms promulgated by FEMA in 44 C.F.R. § 61, Appl. A(1)-(3), this means:

> "1. A general and temporary condition of partial or complete inundation of normally dry land areas or of two or more properties (one of which is your property) from:
>
> a. Overflow of inland or tidal waters,
> b. Unusual and rapid accumulation or runoff of surface waters from any source,
> c. Mudflow.
>
> 2. Collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood as defined in A.1.a. above."

k. **"State-sponsored mediation"** – means a mediation program set up by a **"State Department of Insurance" or its equivalent** which affords a named insured the opportunity to mediate claims under multiple policies of insurance on a non-binding

ARCHIVED APRIL 2018

basis, using a **"qualified mediator"** for purposes of trying to reach a voluntary agreement and resolution between all parties as to some or all of the damages to their insured property.

l. **"Qualified mediator"** – means, for purposes of Section 1314(d) of the NFIA as created by BW-12 Section 100223, a mediator selected and appointed by the "**State**" which is sponsoring the mediation program, and who is:

1. a member in good standing of the "**State**" bar in the "**State**" in which the mediation is to occur with at least 2 years of **"practical experience;"** and is an active member of such bar for at least 1 year prior to the year in which such mediator's participation is sought; or

2. is a retired trial judge from any **"United States"** jurisdiction who was a member in good standing of the bar in the "**State**" in which the judge presided for at least 5 years prior to the year in which such mediator's participation is sought.

m. "**Practical experience**" – for purposes of defining a **"qualified mediator"** means someone having primarily litigated structure and contents-related insurance coverage claims either as a plaintiff's lawyer or as a defense attorney for 2 years. Experience litigating other types of insurance (e.g. – auto-insurance, health insurance, domestic law, family law, etc.) will not constitute **"practical experience".**

n. **"Certified for purposes of the National Flood Insurance Program to settle claims"** – means that the **"Representative of the Administrator"** or the **"Representative of the National Flood Insurance Program"** participating in the "**State-sponsored mediation**", having the position of Supervisory Insurance Examiner, Senior Insurance Examiner, Insurance Program Specialist, Insurance Examiners, or Program Analysts in the Claims and Appeals Branch of the Federal Insurance and Mitigation Administration who participate in the appeal process established under Section 205 of the Flood Insurance Reform Act of 2004 (42 U.S.C. 4011 note) and certified by the Chief of the Claims and Appeals Branch to **"finalize the settlement"** of claims in mediation.

o. "**Finalize the settlement**" – means that the individual(s) described in definition (m) above will have the authority and experience to determine coverage related issues and appropriate dollar amounts payable for a covered loss. Generally, this person

ARCHIVED APRIL 2018

will possess the necessary authority to resolve a claim. However, because of other limitations in the SFIP, federal regulations and federal laws, these individuals may still have to actively seek waivers of certain provisions or requirements from the Federal Insurance Administrator by and through the Chief of the Claims and Appeals Branch, as waiver authority is granted only to the Administrator and such waivers must be expressly stated in writing pursuant to 44 C.F.R. §61.13(d) and General Condition (D) of the SFIP. **It is also possible that if the matter being mediated is in litigation, authority from the assigned defense counsel from the U.S. Department of Justice will be needed to settle the claim. There is no guarantee that a request for a waiver of any federal regulation or term of the SFIP will be granted.**

p. "**Branch Chief of Claims and Appeals**" – means Mr. James A. Sadler, or anyone who may be acting temporarily on his behalf, or who may replace Mr. Sadler in that position, in the Federal Insurance and Mitigation Administration within FEMA.

X. **POLICY DETAILS:** Generally, FEMA will participate in such "**State-sponsored mediation**" programs when requested. However, there are certain times when FEMA will not able to participate. For example:

a. If a request for mediation is made when the insured has been paid all amounts under the Proof of Loss that they submitted, there is no **"bona fide dispute"** as to either the scope of damages or the pricing which could be mediated.

b. If the only cause of loss to the property is **"flood"** damages (as defined in the SFIP), then pursuant to the exception in BW-12, Section 100223(i), only FEMA's appeal process set forth in 44 C.F.R. § 62.20 is available to that insured (outside of initiating a lawsuit pursuant to 42 U.S.C. § 4072, 44 C.F.R. § 62.22 and General Condition (R) of each form of the SFIP).

c. FEMA may suspend participation in "**State-sponsored mediation**" in the event its mission-critical duties exhaust staff availability.

d. FEMA will not mediate if there are only multiple policies of flood insurance in play (e.g. – a private lines flood insurance policy which provides either primary coverage or excess coverage and a SFIP are only at issue).

e. FEMA will not mediate if the policy limits of the SFIP for the coverage at issue have already been paid.

ARCHIVED APRIL 2018

The foregoing examples are illustrative, as there may be other reasons or events which would delay or prevent FEMA from being able to participate

To be eligible for mediation under BW12 Section 100223, there must be a **"bona fide dispute"** between the parties at the time mediation is requested. The requirements for presenting a Proof of Loss in support of a claim for SFIP benefits are found in 44 C.F.R. § 61, Appendix A(1) (the Dwelling Form).

Because of the operative system of the NFIP (which is presently Part B of the NFIA), over eighty percent (80%) of the SFIPs in force are issued by and through Write-Your-Own ("WYO") Program-participating insurance companies, who act as FEMA's fiduciary and fiscal agents per 44 C.F.R. § 62.23(f) and (g). For those WYO company issued policies, FEMA is not a party to those contracts (see 44 C.F.R. § 62.23(g)), even though FEMA and the National Flood Insurance Fund pay the claims and expenses associated with those claims, and legal proceedings cannot be instituted against FEMA directly for such SFIPs. *Id.* Instead, the WYO Company is sued in FEMA's place pursuant to 42 U.S.C. §§ 4071 and 4072. As FEMA is not a party to those SFIPs, it is necessary to have the WYO company personnel available to participate in those mediations, with FEMA personnel available to provide necessary guidance and/or approvals for such mediations. FEMA will reimburse the WYO companies their reasonable travel expenses and other associated costs when necessary. However, under the provisions of BW-12, Section 100223, WYO Companies serving as FEMA's fiscal agents will not be subject to separate directions from a **"State"** to participate in these **"State-sponsored mediation"** programs in their capacity as a WYO Company. WYO Companies will not be expected to participate in a **"State-sponsored mediation"** unless and until FEMA needs their assistance in resolving a **"bona fide dispute." However, this policy does not affect any request or direction by a state to an insurer that happens to be a WYO Company to participate in a "State-sponsored mediation"** with regard to one of their privately-issued policies of insurance that is regulated by the **"State"** and is not a SFIP.

ARCHIVED APRIL 2018

FEMA will draft and enter into individual Memorandums of Agreement ("MOA") with any **"State"** that requests FEMA participation in a qualifying **"State-sponsored mediation"** program. The MOA's will be based on and include the terms and conditions in the preceding parts of this document, and will, at a minimum, also include the following terms:

A. FEMA and other relevant party personnel will participate in these mediation programs by teleconference or videoconference to the maximum extent possible.

B. **"State-sponsored mediation"** only apply to those flood insurance claims arising from a **"major disaster"** as defined in the Section 102 of the Stafford Act, where "**other personal lines residential property insurance coverage"** regulated by the **"State"** covers contributing damage in the loss and are explicitly included in the Stafford Act **"major disaster"** declaration and are included in the same mediation.

C. The only damage FEMA (or where applicable, WYO) personnel will consider will be those which are a **"direct physical loss by or from flood"** to the NFIP policyholder's insured property" and a "flood" as defined by the SFIP. Further:

1. The mediation must involve only personal lines, residential (1-4 family) claims involving only the Dwelling Form of the SFIP, per the requirements of BW-12, Section 100223(a)'s mandate that other personal lines residential property insurance coverage in addition to the SFIP must be at issue;

2. The insurer writing the policy including coverage for the other non-flood damage made part of the **"major disaster"** declaration at issue in the mediation must be an insurer regulated by the **"State"** per the requirements of BW-12, Section 100223(a);

3. Only the named insured(s) on both the NFIP flood insurance policy and the "**other personal lines residential property insurance coverage"** policy at the time of loss may make the mediation request;

4. The named insured must attend the mediation (by teleconference or video conference if available), along with any other representative that they desire to accompany them and participate in the proceedings; and

5. A complete copy of the documents the insured is relying upon in mediation, including, but not limited to their timely, signed and sworn proof of loss with supporting documentation as required by the SFIP, as well as the "**other personal lines residential property insurance coverage"** company's insurance policy, estimate of damages and payments must be submitted to FEMA or the WYO Company (and FEMA or a WYO Company will provide a copy of its claims file) at least two weeks in advance of the scheduled mediation date in order to allow the parties enough time to review causation, coverage issues and payments based upon causation and coverage.

D. Mediations involving FEMA (and/or WYO insurance company personnel) where its personnel will physically attend must all occur at a single, agreed location to minimize

ARCHIVED APRIL 2018

the costs and travel times for the parties, and to the extent possible, the mediation processes for that day should be limited to a single WYO insurance company and as many claims as possible for as many insureds as possible should be scheduled for mediation in that time frame. All parties will agree to minimize unnecessary costs that would result from scheduling mediations with multiple WYO insurance companies on the same day.

E. The **"State-sponsored mediation"** program is nonbinding. BW-12, Section 100223(a);

F. Proceedings and Documents are Privileged. Pursuant to the BW-12, Section 100223 (e) as a condition of FEMA (or a WYO insurance company serving as FEMA's fiscal agent) participation, all statements made and documents produced pursuant to "**State-sponsored mediation**" shall be deemed privileged and confidential settlement negotiations made in anticipation of litigation, and will be inadmissible in court proceedings;

G. Liability, Rights, or Obligations Not Affected. "**State**" law and "**State**" law-based standards will not be used or applied in such mediations, as such are preempted and barred by the "What Law Governs" section of each form of the Standard Flood Insurance Policy. Furthermore, pursuant to BW-12, Section 100223(f), participation in such "**State-sponsored mediation**" does not:

(1) affect or expand the liability of any party in contract or in tort; or
(2) affect the rights or obligations of the parties, as established:
  (A) in any regulation issued by the Administrator, including any regulation relating to a Standard Flood Insurance Policy;
  (B) under the NFIA (42 U.S.C. §4001, *et seq.,* as amended);
  (C) under any other provision of Federal Law.

H. Participation in "**State-sponsored mediation"** shall not alter, change, or modify the original exclusive jurisdiction of **"United States"** federal courts over any SFIP dispute, regardless of the dollar amount at issue, as set forth in 42 U.S.C. § 4072; General Condition, Section (R) of the Standard Flood Insurance Policy, and 44 C.F.R. § 62.22(a);

I. Participation in the "**State-sponsored mediation"** with a WYO program-participating insurance company will not make FEMA a party to any litigation that may follow any effort to mediate a claim under a WYO-carrier issued policy. See 44 C.F.R. § 62.23(g).

ARCHIVED APRIL 2018

J. FEMA (and a WYO program insurance company) shall not pay mediation fees relating to flood insurance claims associated with a "**State-sponsored mediation**" program in which a **"Representative of the Administrator"** (or a **"Representative of the National Flood Insurance Program"**) participates;

K. FEMA (and WYO program insurance companies) will not participate in any mediation if:

(1) The Appraisal provision of the SFIP has been properly invoked and the parties agree to go to mediation, or there has been a final Appraisal award granted pursuant to the provisions of the SFIP (the final award will be provided to FEMA if a WYO company is involved); or

(2) The NFIP flood insurance policyholder has filed an NFIP claim appeal under the terms of the NFIP flood Insurance Claims Appeals Process pursuant to 44 C.F.R. § 62.20, as FEMA does not have the personnel or resources available to engage in duplicative efforts (the insured must make an election of the process they wish to utilize – the "**State-sponsored mediation**" or the FEMA appeal process); or

(3) The other relevant insurer(s) who is/are handling the non-flood caused damage claim(s) do not participate in the mediation for any reason.

(4) The policy limits or the amount of the **"bona fide dispute"** described above that are the subject of the mediation of the NFIP SFIP have been exhausted and paid respectively prior to the mediation occurring.

(5) The issue to be mediated concerns problems with the procurement of the SFIP or with the administration of the policy (*i.e.* – non-claims related activities).

ARCHIVED APRIL 2018

XI. ROLES & RESPONSIBILITIES: Pursuant to BW-12, Section 100223(j), the personnel from FEMA responsible for participating and implementing the mediation requirements (**"Representative of the Administrator"**) are those personnel employed within the Claims and Appeal Branch of FIMA. This policy and participation in a "**State-sponsored mediation**" program is overseen by the Branch Chief of Claims and Appeals of FIMA. For those instances where WYO program insurance company personnel are needed (**"Representative of the National Flood Insurance Program"**), those individuals will have to be designated by the company, and "**Representative of the Administrator**" will also be available and participate. A **"Representative of the National Flood Insurance Program"** who participate will be **"certified for purposes of the National Flood Insurance Program to settle claims"** as required by Section 1314(b) of the NFIA. However, only a "**Representative of the Administrator**" working with the "**Branch Chief of Claims and Appeals**" within FEMA, will have the ability to seek a waiver from the Administrator in

accordance with 44 C.F.R. § 1314 and General Condition (D) of the SFIP as may be needed.

XII. RESPONSIBLE OFFICE: Federal Insurance and Mitigation Administration Claims and Appeals Branch.

XIII. REVIEW DATE: This policy will expire on August 1, 2014.

Edward L. Connor
Deputy Associate Administrator for Federal Insurance
Federal Insurance and Mitigation Administration

ARCHIVED APRIL 2018