

# **ATTACHMENT 10**

Flood Issues from Plaintiff's Perspective (July 30, 2014)

## MEMORANDUM

**TO:** Superstorm Sandy Mediators and Arbitrators  
**FROM:** Christopher W. Gerold, Esq. of Wolff & Samson PC  
**DATE:** July 30, 2014  
**RE:** Plaintiffs' Submission of Training Materials

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### **I. INTRODUCTION**

#### **A. THE FLOOD INSURANCE PROGRAM**

The National Flood Insurance Program (“NFIP”) has two programs: the NFIP direct program and the “Write Your Own” (“WYO”) program. Both programs issue Standard Flood Insurance Policies (“SFIPs”), collect premiums, handle and adjust claims, and issue payments to insured. The same identical SFIPs are issued under both programs. Under the direct program, the issuance, handlings and payment of claims is handled directly by the federal government.

The WYO program was started in 1983. It allows private insurance companies to issue and service federally backed SFIPs under their own names, collect premiums, and pay claims.<sup>1</sup> They are reimbursed by FEMA for these services. The flood policy is backed by the federal government rather than the private insurance company and claims and expenses are paid from U.S. Treasury funds. The WYO program now accounts for approximately ninety-percent (90%) of all flood policies. Most of the well-known property and casualty companies participate in the WYO program.

#### **B. COVERAGE UNDER THE FLOOD INSURANCE PROGRAM**

The SFIPs state that “[w]e will pay for you for direct physical loss by or from flood to your insured property . . . .” Direct physical loss is defined by the SFIPs as “[l]oss or damage to insured property, caused directly by flood. There must be evidence of physical changes to the property.” Unlike a homeowner’s policy, which is often described as a “multi-peril” or “multi-risk” policy, NFIP flood insurance is a “single risk” policy which only insures against “direct physical loss by or from flood.” A flood is defined by the SFIP as “a general and temporary condition of partial or complete inundation of two (2) or more acres of normally dry land area or of two (2) or more properties” caused by an overflow of inland tidal waters; unusual and rapid accumulation or run-off of surface waters from any source; or mudflow. A flood also includes “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

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<sup>1</sup> 44 C.F.R Pt. 62.23.

levels that result in a flood.” There are certain exclusions to coverage, which are discussed further below.

### C. THE THREE SFIP FORMS

There are three SFIPs issued under the NFIP. Unlike wind or homeowner policies, all SFIP’s are exactly the same and are codified federal law.<sup>2</sup> The three types of SFIPs are listed below, along with a brief description of the eligibility of the forms and limitations of liability.

Dwelling Form:<sup>3</sup> The Dwelling Form can be issued to a homeowner, a residential renter or the owner of a residential building containing 2-4 units. Eligible buildings include detached, single-family, non-condominium residences (with incidental occupancy, such as home office, studio or professional services, limited to less than fifty percent of the total floor area); 2-4 family non-condominium building (with incidental occupancy limited to less than twenty-five percent of the total floor area); dwelling unit in a residential condominium building; and, residential townhomes and row houses. The maximum amount of available coverage under the Dwelling Form is \$250,000 for the dwelling or structure coverage and another \$100,000 for contents coverage. Building coverage, as it relates to maximum limits of liability, includes losses payable under Coverage C and Coverage D (*infra.*). In other words, the maximum limit for direct building damages, debris removal, loss avoidance measures and increased cost of compliance is \$250,000.

General Property Form:<sup>4</sup> The General Property Form can be issued to the owner of a residential building with five or more units or an owner or lessee of a non-residential building or unit. Residential buildings include buildings occupied on a long term basis including apartment houses, residential co-operative buildings, dormitories, assisted-living facilities, tourist homes or rooming houses (with five or more lodgers) and a hotel or motel if the normal guest occupancy is six months or more. Nonresidential buildings include commercial buildings and buildings occupied on a short term basis including retail shops, restaurants and other businesses, farm buildings, factories, warehouses, recreational buildings, houses of worship, schools, nursing homes, non-residential condominiums, licensed bed and breakfasts, and hotels and motels with normal guest occupancy of less than six months. The maximum amount of available coverage under the General Property Form is \$500,000 for building coverage and up to \$500,000 for contents coverage.

Residential Condominium Building Association Policy (“RCBAP”) Form:<sup>5</sup> The RCBAP Form is issued to a residential condominium association on behalf of the association and unit owners of a residential condominium building. The maximum amount of available coverage under the RCBAP is the lesser of the replacement cost of the structure or \$250,000 times the number of units in the building. For example, if the condominium building has four units, the

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<sup>2</sup> 44 C.F.R Pt. 61.13.

<sup>3</sup> 44 C.F.R.Pt. 61 App. A(1).

<sup>4</sup> 44 C.F.R Pt. 61 App. A(2).

<sup>5</sup> 44 C.F.R Pt. 61 App. A(3).

maximum limit of liability would be one million dollars or the replacement cost, whichever is less. Separate deductibles are charged for building and contents coverage under all policy forms.<sup>6</sup>

#### **D. SPECIFIC TYPES OF COVERAGE**

Each of the three SFIPs offers four types of coverage. Below is a brief description of each.

Coverage A - Property Coverage: Referred to as dwelling or building coverage. Generally, all three types of policy forms cover the same property under Coverage A-building. Primarily, this includes the building, dwelling, or structure located at the location described on the declarations page of the policy; and, additions and extensions attached to and in contact with the structure by means of a rigid exterior wall, load bearing interior wall, stairway, elevated walkway, or roof.<sup>7</sup> The policies also provide limited coverage for materials and supplies to be used in repairing the structure,<sup>8</sup> a building under construction,<sup>9</sup> and a mobile home or travel trailer.<sup>10</sup>

Coverage B - Personal Property Coverage: Referred to as contents coverage. The three types of policies issued under the NFIP generally cover the same types of personal property under Coverage B but there are important differences. Under the Dwelling Form SFIP, if personal property coverage is purchased, it insures against direct physical loss by flood to personal property located inside a building at the insured location. Coverage applies to property owned by the insured and household family members and, at the insured's option, property owned by guests or servants. If the property is located in a building that is not fully enclosed, it must be secured to prevent floatation out of the building. If the property floats out during a flood, it is conclusively presumed that it was not reasonably secured and there is no coverage.<sup>11</sup>

Coverage C - Other Coverage: Referred to as removal and loss avoidance measures. All three types of SFIPs issued under the NFIP provide for debris removal<sup>12</sup> and loss avoidance measures under Coverage C of the policy.<sup>13</sup> Debris removal includes the expense to remove non-owned debris from the insured property. It also pays for the removal of owned debris anywhere, including the cost to remove portions of the insured structure or contents from adjoining properties. There is no stated limit for this coverage but the coverage does not increase the Coverage A or Coverage B limit of liability. All three types of SFIPs issued under the NFIP

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<sup>6</sup> 44 C.F.R. § 61.6.

<sup>7</sup> 44 C.F.R. Pt. 61 App. (1),(2),(3) III.A.1-2.

<sup>8</sup> *Id.* at A(1),(2),(3) III.A.4.

<sup>9</sup> *Id.* at A(1),(2),(3) III.A.5.

<sup>10</sup> *Id.* at A(1),(2),(3) III.A.6.

<sup>11</sup> *Id.* at A(1) III.B.1.

<sup>12</sup> *Id.* at A(1),(2),(3) III. C.1.

<sup>13</sup> *Id.* at A(1),(2),(3) III. C.2.

provide for debris removal<sup>14</sup> and loss avoidance measures under Coverage C of the policy.<sup>15</sup> Debris removal includes the expense to remove non-owned debris from the insured property. It also pays for the removal of owned debris anywhere, including the cost to remove portions of the insured structure or contents from adjoining properties. There is no stated limit for this coverage but the coverage does not increase the Coverage A or Coverage B limit of liability.

Coverage D - Increased Cost of Compliance Coverage: Referred to as ICC coverage, provides coverage for compliance with state and local flood plain management laws and ordinances. Every building insured under the NFIP has ICC coverage except units insured under a condominium unit owner's policy. The SFIP provides up to \$30,000.00 in coverage. A structure is eligible for ICC coverage if it is a "repetitive loss structure" or if it is a structure that has sustained flood damage in which the cost to repair equals or exceeds fifty-percent (50%) of the market value of the structure at the time of the flood. This latter category of coverage applies to what is commonly referred to "substantial damage" claims. The community is required to have a "substantial damage" provision in its flood plain management law or ordinance and is responsible for making a determination whether a particular building has been substantially damaged after a flood.

Coverage C and D are automatically included with the purchase of Coverage A (the dwelling or structure portion of the policy). Coverage B (contents) is purchased separately. This means that some insured may have coverage on a structure, but not their personal items. Further, the amounts of insurance available differ for each of the three policies. The type of policy and the amount of coverage purchased by each insured is reflected on the insured's declaration page.

## **II. UNDERSTANDING THE SFIP FORMS AND SPECIFIC COVERAGE**

### **A. GENERAL EXCLUSIONS APPLICABLE TO ALL SFIPs**

The SFIPs cover "direct physical loss by or from flood." As with any insurance policy, the easiest way to determine what is covered is to know what is excluded from coverage. Since the SFIP only provides coverage for "direct physical loss by or from flood", it does not cover: loss of revenue or profits; loss of access to the insured property; loss of use; loss from interruption of business or production; additional living expenses incurred while the insured property is being repaired; the cost of complying with any ordinance or law regulating the repair of the property (excluding activities described under Coverage D); and, any other economic loss.

The SFIP also does not cover loss to property caused directly by earth movement, including: earthquake; landslide; land subsidence; sink holes, destabilization or movement of land that results from accumulation of water in subsurface land areas; and, gradual erosion. However, the SFIP covers subsidence if it is a result of erosion specifically covered under the SFIP definition of flood. In most cases, this would include erosion and land subsidence caused by tidal surge and wave action associated with a hurricane.

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<sup>14</sup> *Id.* at A(1),(2),(3) III. C.1.

<sup>15</sup> *Id.* at A(1),(2),(3) III. C.2.

Other notable exclusions from coverage include: theft, fire, explosion, and wind or wind storm. There are also several common types of losses which are excluded unless the loss is directly caused by flooding. These losses include: damages caused by the weight or pressure of water; power heating or cooling failure; and, water or waterborne material that backs up through sewers or drains including discharges or overflows from a sump (or similar) pump; or, seeps or leaks on or through the insured property. Damages from water, moisture, mildew or mold damage is excluded if it results from any condition substantially confined to the structure or within the control of the insured including the failure to inspect and maintain the property after a flood recedes. Otherwise losses resulting from mold and mildew are covered.

## **B. FACTORS AFFECTING COVERAGE IN ALL THREE SFIP POLICIES**

In addition to the exclusions above, there are other factors that affect both the amount of premium charged and the coverage which is available under the SFIPs. Some of the common factors include whether the property is elevated, whether it is considered “pre-FIRM” or “post-FIRM” and whether the dwelling has a “basement”. An elevated building is defined as a non-basement building in which the lowest elevated floor is raised above ground level by foundation walls, shear walls, posts, piers, pilings or columns.<sup>16</sup> A “post-FIRM” building is a building for which construction or substantial improvement occurred after December 31, 1974 or on or after the effective date of an initial FIRM whichever is later.<sup>17</sup> Buildings constructed or substantially improved prior to such time are considered pre-FIRM. Under the SFIP, post-FIRM elevated dwellings in certain SFHAs are subject to coverage restrictions. There are also restrictions in coverage for buildings with basements. A basement is defined as any area of a building, including any sunken room or sunken portion of a room having its floor below ground level (subgrade) on all sides.<sup>18</sup>

## **C. SPECIFIC COVERAGE ISSUES FOR EACH TYPE OF FORM**

### **1. COVERAGE A – BUILDING**

Generally, all three types of policy forms cover the same property under Coverage A-building. Primarily, this includes the building, dwelling, or structure located at the location described on the declarations page of the policy; and, additions and extensions attached to and in contact with the structure by means of a rigid exterior wall, load bearing interior wall, stairway, elevated walkway, or roof.<sup>19</sup> The policies also provide limited coverage for materials and supplies to be used in repairing the structure,<sup>20</sup> a building under construction,<sup>21</sup> and a mobile

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<sup>16</sup> *Id.* at A(1),(2),(3) II.B.14.

<sup>17</sup> *Id.* at A(1),(2),(3) II.B.23.

<sup>18</sup> *Id.* at A(1),(2),(3) II.B.5.

<sup>19</sup> *Id.* at A(1),(2),(3) III.A.1-2.

<sup>20</sup> *Id.* at A(1),(2),(3) III.A.4.

<sup>21</sup> *Id.* at A(1),(2),(3) III.A.5.

home or travel trailer.<sup>22</sup>

The policy specifically describes the items of property covered under Coverage A which includes the following: awnings and canopies, blinds, built-in dishwashers, built-in microwave ovens, carpet permanently installed over unfinished flooring, central air conditioners, elevator equipment, fire sprinkler systems, walk-in freezers, furnaces and radiators, garbage disposal units, hot water heaters including solar water heaters, light fixtures, outdoor antennas and aerials fastened to the building, permanently installed cupboards, bookcases, cabinets, paneling, and wallpaper, plumbing fixtures, pumps and machinery for operating pumps, ranges, cooking stoves and ovens, refrigerators, and wall mirrors permanently installed.<sup>23</sup> However, this list is not meant to be exclusive.

#### **a. Coverage A - Elevated Post-Firm Limitations**

Often, property owners will “build out” the area below the first elevated floor of an elevated structure. Bathrooms and kitchens will be built, interior walls and rooms will be constructed, floor coverings will be installed and the area will, for all practical purposes, serve as a living area. Unfortunately, if the structure is an elevated, post-FIRM building, there is limited coverage for the improvements located on this floor or in a basement. Only the following common items, if installed and connected to any necessary power source are covered: central air conditioners, electrical junction and circuit breaker boxes, electrical outlets and switches, elevators, dumbwaiters and related equipment, fuel tanks and the fuel in them, furnaces and hot water heaters, heat pumps, pumps and tanks used in solar energy systems, stairways and staircases attached to the building not separated by elevated walkways, sump pumps, well water tanks and pumps, required utility connections for any item included in this list and footings, foundations, posts, pilings, piers, and other foundation walls and anchorage systems required to support a building. Also included in regard to basements, are drywall for walls and ceilings but only the cost of labor to nail it unfinished, unfloated and untaped, to the framing; and, non-flammable insulation.<sup>24</sup>

#### **b. Coverage A – Exclusions**

Although many types of property are covered under Coverage A of the SFIP, many common items are not covered. These items include the following: buildings located entirely in, or on, or over water (if constructed or substantially improved after 9/30/82); open structures, including a building used as a boathouse; land, land values, lawns, trees, shrubs, plants, growing crops, or animals; underground structures and equipment including wells, septic tanks and septic systems; walks, walkways, decks, driveways, patios and other surfaces located outside the perimeter exterior walls of the insured building (except for steps and landings not to exceed sixteen square feet); containers or tanks containing gases or liquids; fences, retaining walls, seawalls, bulkheads, wharves, piers, bridges and docks; and, hot tubs and spas (if not bathroom

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<sup>22</sup> *Id.* at A(1),(2),(3) III.A.6.

<sup>23</sup> *Id.* at A(1),(2),(3) III.A.7.

<sup>24</sup> *Id.* at A(1),(2),(3) III.8.

fixtures), swimming pools (and equipment) and pool enclosures.<sup>25</sup>

### c. Coverage A - Additional Coverage under the Dwelling Form

Unlike the other two forms, the Dwelling Form SFIP offers additional coverage for a detached garage.<sup>26</sup> However, coverage is limited to no more than ten-percent (10%) of the limit of liability on the dwelling. The use of this coverage is optional and reduces the building limit of liability. A detached garage used for residential (i.e. garage apartment), business or farming purposes is not covered under a dwelling policy. Coverage for improvements and betterments is also available under the Dwelling policy to tenants who have purchased personal property coverage.<sup>27</sup> The maximum amount payable for this coverage, which applies to fixtures, alterations, installations or additions made or acquired solely at the tenant's expense and comprising part of an insured building, is ten-percent (10%) of the personal property limit of liability shown on the declarations page of the SFIP. Use of this coverage reduces the amount of coverage available for personal property. A tenant may purchase higher limits of such coverage if the lease agreement requires the tenant to purchase insurance coverage for the tenant's improvements or states that the tenant is responsible for the repairs of the building or improvements in the event of damage. However, there can be no duplicate coverage and only one SFIP can be issued for building coverage subject to the maximum limit of liability set forth in the National Flood Insurance Act ("NFIA"). Also, the dwelling policy offers additional coverage for condominium owners for walls, floors, and ceilings if personal property coverage was also purchased.<sup>28</sup> In such cases, up to ten-percent (10%) of the personal property limits can be applied to the repair of these building items provided such items are not covered under a policy issued to the condominium association insuring the condominium building. However, this additional coverage does not increase the amount of insurance that applies to insured personal property.

## 2. COVERAGE B – CONTENTS

The three types of policies issued under the NFIP generally cover the same types of personal property under Coverage B but there are important differences. Under the Dwelling Form SFIP, if personal property coverage is purchased, it insures against direct physical loss by flood to personal property located inside a building at the insured location. Coverage applies to property owned by the insured and household family members and, at the insured's option, property owned by guests or servants. If the property is located in a building that is not fully enclosed, it must be secured to prevent floatation out of the building. If the property floats out during a flood, it is conclusively presumed that it was not reasonably secured and there is no coverage.<sup>29</sup>

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<sup>25</sup> See generally, *Id.* at A(1),(2),(3) III.

<sup>26</sup> *Id.* at A(1) III.A.3.

<sup>27</sup> *Id.* at A(1) III.B.4.

<sup>28</sup> *Id.* at A(1) III.B.5.

<sup>29</sup> *Id.* at A(1) III.B.1.



Under the General Property Form, a distinction is made between household personal property and non-household personal property. An individual General Property SFIP can cover only one type of personal property. If the policy covers household personal property, it will insure such property “usual to a living quarters” that belongs to the insured or a member of the household; or, at the insured’s option, a domestic worker, a guest or any other property the insured is legally liable for.<sup>30</sup> If the property covers non-household property, it will insure furniture and fixtures; machinery and equipment; stock; and other personal property owned by the insured and used in the business (subject to items excluded by the policy).<sup>31</sup>

Under the RCBAP, if personal property is purchased, it insures against direct physical loss by flood to property inside a fully enclosed insured building which is either owned by unit owners of the condo association in common or is owned solely by the condominium association and used exclusively in the conduct of the business affairs of the condominium association.<sup>32</sup>

All three policies, subject to these limitations, cover the following specific personal property under Coverage B: air conditioning units installed in the building, carpet, not permanently installed over unfinished flooring, carpets over finished flooring, clothes washers and dryers, “cook-out” grills; food freezers other than walk-in and food in any freezer, and portable microwave ovens and portable dishwashers.<sup>33</sup> The General Property Form and the RCBAP also cover outdoor equipment stored inside the insured building and ovens and the like.<sup>34</sup>

**a. Coverage B – Elevated Post-Firm Limitations**

Similar to the restrictions on coverage for building improvements located in a building enclosure below the lowest elevated floor of an elevated post-FIRM building, or in a basement, there is also limited coverage for personal property in such location. Only the following items are covered, provided they are installed in their functioning locations and connected to any necessary power source: air conditioning units (portable or window types); clothes washers and dryers; and, food freezers (other than walk-in) and food in any freezer. There is no other personal property coverage in such location.<sup>35</sup>

**b. Coverage B – Other Limitations**

Important limitations apply to personal property coverage under all three types of policies. The SFIP will pay no more than \$2,500 for any loss to one or more of the following kinds of personal property: artwork, photographs, collectibles, or memorabilia, including but not limited to porcelain or other figures and sports cards; rare books or autographed items; jewelry,

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<sup>30</sup> *Id.* at A(2) III.B.2.a.

<sup>31</sup> *Id.* at A(2) III.B.2.b.

<sup>32</sup> *Id.* at A(3) III.B.1.

<sup>33</sup> *Id.* at A(1) III.2; *Id.* at A(2) III.3; *Id.* at A(3) III.2.

<sup>34</sup> *Id.* at A(2) III.3.g.h.; *Id.* at A(3) III.2.g.h.

<sup>35</sup> *Id.* at A(1) III.B.3; A(2) III.B.4.; *Id.* at A(3) III.B.3.

watches, precious and semiprecious stones or articles of gold, silver or platinum; and, furs or any article containing fur which represents its principal value.<sup>36</sup> If antiques are damaged or destroyed, the SFIP will only pay the functional value of the antique.<sup>37</sup> If there is a loss to an article which is part of a pair or set, the SFIP provides two alternative options for payment: (1) an amount equal to the cost of replacing the article, less depreciation; or, (2) the proportional value of the damaged article compared to the total value of the pair or set.<sup>38</sup>

### **c. Exclusions**

Obviously, there are certain items which are excluded from coverage under Coverage B. Notable items include automobiles (including dealer's stock), customer goods (including cleaners, shoe repair shops, processors of goods belonging to others and similar risks); contents located in a structure not eligible for building coverage; contents in a building not fully walled or contents not secured against floatation; motorcycles (including dealer's stock); motorized equipment (excluding self-propelled vehicles or machines not licensed for use on public roads and used mainly to service the insured location or to assist handicapped persons while such machines are inside an insured building); accounts, bills, coins, currency, deeds, evidence of debt, metals, money, scrip, stored value cards, postage stamps, securities, bullion, manuscripts or other valuable papers; and, aircraft or watercraft or their furnishings and equipment.

## **3. COVERAGE C – DEBRIS AND LOSS AVOIDANCE**

All three types of SFIPs issued under the NFIP provide for debris removal<sup>39</sup> and loss avoidance measures under Coverage C of the policy.<sup>40</sup> Debris removal includes the expense to remove non-owned debris from the insured property. It also pays for the removal of owned debris anywhere, including the cost to remove portions of the insured structure or contents from adjoining properties. There is no stated limit for this coverage but the coverage does not increase the Coverage A or Coverage B limit of liability. Any expenses incurred for covered debris removal is applied against the Coverage A limits and is not in addition to these limits. If the insured or a member of the household performs the work, the value of the work will be based on the federal minimum wage.

Loss avoidance measures include efforts to protect the insured building from a flood and to move insured property from the insured location to protect it from flood. All three policy forms will pay up to \$1,000 for the cost of sand bags, fill, pumps, and plastic sheeting used to protect the insured building from flood. However, this coverage does not apply unless a flood is imminent and a reasonable person would anticipate flood damage and either flooding occurs in the area of the insured building or an authorized official issues an evacuation order. All three policies will also pay up to \$1,000 for expenses incurred to move insured property from the

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<sup>36</sup> *Id.* at A(1) III.B.6; A(2) III.B.5.; *Id.* at A(3) III.B.4.

<sup>37</sup> *Id.* at A(1) III.B.7; A(2) III.B.6.; *Id.* at A(3) III.B.5.

<sup>38</sup> *Id.* at A(1),(2),(3) VII. A.

<sup>39</sup> *Id.* at A(1),(2),(3) III. C.1.

<sup>40</sup> *Id.* at A(1),(2),(3) III. C.2.

insured location to a safe area outside an SFHA. Any amounts payable for loss avoidance measures will be applied toward Coverage A limits and are not payable in addition to either Coverage A or Coverage B limits. If the work is performed by the insured or a family member, the value of the work, like debris removal, will be based on the federal minimum wage.

**a. Coverage C - Additional Coverage under the Dwelling Form**

The Dwelling Form SFIP also provides additional coverage under Coverage C. The Dwelling Form SFIP, if it insures a condominium unit, will pay up to the Coverage A limit of liability, the insured's share of loss assessments charged against the insured by the condominium association in accordance with its articles and bylaws.<sup>41</sup> However, the assessment must be made as a result of direct physical loss by flood, during the policy term, to the building's common elements. There are important exclusions to this coverage.

If the assessment results from an assessment levied by a governmental body; results from a deductible under the insurance purchased by the condominium association insuring common elements; or results from a loss to personal property, the coverage does not apply. Any such payment is also limited if, in combination with other payments from any other applicable NFIP policies, the payment would exceed the maximum amount of insurance permitted under the NFIA. Perhaps the most common exclusion which applies in regard to this coverage is the failure of the condominium association to be adequately insured. If the assessment results from a loss sustained by the condominium association that was not reimbursed under the condominium flood policy because the building was not insured for eighty-percent (80%) of its replacement cost or the maximum amount of insurance permitted by the NFIA, the coverage does not apply and the loss assessment is not recoverable.

**b. Coverage C – Additional Coverage under the General Property Form**

The additional coverage afforded by the General Property Form SFIP under Coverage C includes damage caused by pollutants.<sup>42</sup> Under Coverage C of the General Property Form only, the SFIP provides for payment of up to \$10,000 for damage caused by pollutants to covered property if the discharge, seepage, migration, release or escape of the pollutants is caused by or results from flood. "Pollutants" are defined by the policy as any solid, liquid, gaseous, or thermal irritant or contaminant. It includes smoke, vapor, soot, fumes, acids, alkalis, chemicals, and materials to be recycled, reconditioned or reclaimed. This coverage does not increase the Coverage A or Coverage B limits of liability and any payment made for this coverage cannot, in combination with any other payment for the same loss, exceed the replacement cost or actual cash value, as appropriate, of the covered property. This coverage does not include any costs incurred for the testing or monitoring of pollutants unless required by law or ordinance.

**4. COVERAGE D – ICC**

In regard to hurricane claims, buildings often sustain damage as a result of both wind and

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<sup>41</sup> *Id.* at A(1) III. C.3.

<sup>42</sup> *Id.* at A(2) III. C.3.

flooding. The building is eligible for ICC payments only if the community determines that the cost of restoring the building to its before damage condition, as a result of flood damage, would equal or exceed fifty-percent (50%) of the market value of the building before the damage occurred. If the fifty-percent (50%) threshold is only exceeded by a combination of wind and flood damage, ICC coverage is not applicable. Obviously, this is a point of contention in some hurricane claims. It is important for the community official making the determination to use accurate information in regard to the market value of the building and to specifically state whether flood damage alone accounts for at least fifty-percent (50%) of the damage.

If the building is eligible for ICC coverage, the SFIP will pay the costs incurred by the insured to comply with state or local flood plain management laws or ordinances including costs for elevation, flood proofing, relocation or demolition (or any combination of these activities).<sup>43</sup> Flood proofing costs are limited to nonresidential structures and residential structures with qualifying basements. The most common recoverable costs are associated with the demolition and elevation of the structure.

Payment for eligible demolition activities include the cost to demolish and clear the site of building debris. Once the building is removed from the site, ICC coverage also pays to clear the site of any remaining materials such as the foundation, remove any utility systems, and stabilize the site in accordance with any state or local regulations. This would necessarily include costs to remove a slab, any septic tank system located on the site, any well water plug (if part of an abandonment of on-site utilities) and, the cost to fill and grade the insured location if required to stabilize the lot.

Generally, the cost to elevate the structure to the minimum base flood elevation (“BFE”) required by the NFIP will be paid under ICC coverage. However, local communities will often provide in their ordinances for elevation above the minimum BFE established by the NFIP which is referred to as “freeboard” requirements. In such cases, the structure must be elevated a certain number of feet or inches above the minimum BFE in order to comply with the local ordinance. The cost to comply with such “freeboard” requirements is payable under the ICC coverage.

#### **a. Coverage D – Limitations**

Several limitations apply to the ICC coverage.<sup>44</sup> Generally, ICC payments will not be made until the demolition, elevation or other mitigation activity is completed. However, partial payments are permitted and may be issued in advance of completion but cannot exceed fifty-percent (50%) of the total estimated reimbursement of the mitigation activity. Also, the insured is required to complete mitigation activities as soon as reasonably possible after the date of the loss, not to exceed four years.<sup>45</sup> Several exclusions apply to issues which frequently arise.<sup>46</sup>

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<sup>43</sup> *Id.* at A(1),(2),(3) III.D.4.

<sup>44</sup> *Id.* at A(1),(2),(3) III.D.5.e.

<sup>45</sup> FEMA Bulletin W-13006, paragraph 2.c.

<sup>46</sup> 44 C.F.R.Pt. 61 App. A (1),(2),(3) III.D.5.c.d.f.

## **b. Coverage D – Exclusions**

Often, there are other building code upgrade requirements, such as plumbing or electrical, when mitigation activities are required. These costs are not covered under coverage A, as previously discussed, and are not covered under ICC coverage unless specifically related to the flood plain ordinance. Similarly, there is no coverage under coverage D for loss in value to the insured building as a result of the requirements of any flood plain ordinance nor is there any coverage for loss in residual value of the undamaged portion of a building demolished as a consequence of the enforcement of a flood plain ordinance.

In many cases, where a structure is substantially damaged, it is either condemned as a result of ordinance enforcement or it is necessary to demolish the structure and rebuild because it is either impossible to elevate the existing structure to comply with flood plain requirements or the cost to repair the existing structure and comply with applicable codes and ordinances would exceed the cost to demolish and rebuild. This situation is commonly referred to as a “constructive total loss”. Unlike homeowners and wind policies, the SFIP does not provide payment for a constructive total loss under coverage A or coverage D or any other provision of the SFIP. The only coverage available if the flood damaged building is less than a total loss is for a direct physical loss by flood under coverage A and the demolition, elevation or other mitigation activity as described under coverage D.

## **III. REQUIREMENTS AFTER A LOSS**

In the event of a flood loss to an insured property the insured is required under all three SFIPs to comply with certain conditions and requirements,<sup>47</sup> including: giving prompt notice to the flood carrier, separating damaged and undamaged property for examination; and, preparing an inventory of damaged property which includes the quantity, description, actual cash value, and amount of the loss. Once notification of a flood loss is given to the insurance carrier, the insurance carrier will assign an adjuster to investigate the claim as courtesy to the insured. In the event of a non-catastrophic flood situation, within sixty (60) days after the loss, the insured is required to submit a Proof of Loss. The Proof of Loss is the insured’s official claim for damages.<sup>48</sup>

The Proof of Loss must be signed and sworn to, which includes the following information: the date and time of loss; a brief explanation of how the loss happened; the interests of all parties in the damaged property; details of any other insurance covering the property; changes in title or occupancy during the term of the policy; specifications of damaged buildings and detailed repair estimates, names or mortgagees or anyone else having a claim against the property; details about the occupancy of the structure at the time of the loss; and, an inventory of damaged personal property.

The insurance adjuster that the carrier hires to investigate the flood loss may furnish the insured with a Proof of Loss form, and may help the insured complete it. However, this is a

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<sup>47</sup> *Id.* at A(1),(2),(3) VII. J.

<sup>48</sup> NFIP Flood Insurance Claims Handbook, FEMA F-687 / February 2009, page 6.

matter of courtesy only, and the insured must still send the carrier within sixty (60) days after the loss even if the adjuster does not furnish the form or help the insured to complete it.

Because of the widespread catastrophic nature of Hurricane Sandy, FEMA waived the Proof of Loss requirement on initial payments to insured and carriers were authorized to base initial payments to insured on the insurance adjuster's initial estimate. This however was not a blanket waiver. Proofs of Loss are still required on any supplemental payments to insured. FEMA also extended the Proof of Loss deadline on three occasions from 60 days to 2 years. The deadline to file a Proof of Loss is now October 29, 2014.

#### **IV. SPECIFIC ISSUES FOR MEDIATORS AND ARBITRATORS**

##### **A. STATUTE OF LIMITATIONS, TIMING OF THE LAWSUIT, AND THE PROOF OF LOSS**

Federal law determines the accrual date of a federal claim and when a federal statute of limitations is triggered. Under federal common law, there is no accrual of a cause of action until all facts exist so that Plaintiff can allege a complete cause of action. *Entergy Arkansas, Inc. v State of Nebraska*, 358 F.3d 528, 551, n.18 (8<sup>th</sup> Cir. 2004). A cause of action accrues for purposes of the statute of limitations when it is sufficiently ripe that one can maintain suit on it. *Whittle v Local 641, Int'l Bhd of Teamsters*, 56 F.3d 487, 489 (3<sup>rd</sup> Cir. 1995); *Franks v Ross*, 313 F.3d 184, 194 (4<sup>th</sup> Cir. 2002). Stated differently, a cause of action accrues when the Plaintiff could first have successfully maintained a suit based on that cause of action. *Bell v Aerodex*, 473 F.2d 869 (5<sup>th</sup> Cir. 1973); *Skyberg v United Food & Commercial Workers Int'l Union*, 5 F.3d 297,301 (8<sup>th</sup> Cir. 1993); *Gharty v St. John's Queens Hosp.*, 869 F.2d 160, 163 (2<sup>nd</sup> Cir. 1989). The well settled rule is that the limitations period commences when the Plaintiff has a complete and present cause of action. *Ladd v United States*, 630 F.3d 1015, 1024 (Fed. Cir. 2010) *citing Bay Area Laundry and Dry Cleaning Pension Trust Fund v Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997). A cause of action does not become "complete and present" for limitations purposes until the Plaintiff can file suit and obtain relief. *Id.*

FEMA maintains that any "denial" is sufficient to trigger the limitation period whether made in response to a Proof of Loss or not. In many cases, such denial takes place before the Plaintiff has filed a Proof of Loss. If FEMA's interpretation is correct, the limitation period can be triggered before the Plaintiff's cause of action accrues. In Sandy cases, any "denials" to date have been received before the Proof of Loss deadline has expired and in many cases, before the Plaintiff has filed a Proof of Loss, which the policyholder is required to do as a condition precedent to filing suit. If FEMA's position is accepted, it creates a situation where the limitation period could be triggered and expire before the Plaintiff has the right to file suit.<sup>49</sup> "While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any indication in

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<sup>49</sup> The Proof of Loss deadline for Sandy claims has been extended to October 29, 2014. The extension of the deadline serves no useful purpose if a Plaintiff is barred from filing suit even though he timely files a valid Proof of Loss which he must do before filing suit.

the statute.” *Reiter v Cooper*, 507 U.S. 258,267 (1993). There is no indication that the limitation period set forth in 42 U.S.C. § 4072 and/or the SFIP intends to create such an odd situation. On the contrary, the clear intention is to require the insured to submit a Proof of Loss, which is his “claim,” before filing suit and allowing the insured one year from the disallowance of his “claim” to file suit. This insures that the Plaintiff will receive the benefit of any Proof of Loss extension which may be granted and also receive the full one year period to file suit if all or part of his “claim” is disallowed.

Pursuant to the NFIA a lawsuit must be filed within one year after the disallowance or partial disallowance of a “claim” for “proved and approved losses.”<sup>50</sup>

In the event the program is carried out as provided in section 4071 of this title, the Director shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance<sup>51</sup>, and upon the disallowance by the Director of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Director, may institute an action against the Director on such claim... (emphasis added)

42 U.S.C. § 4072.

In order to make a “claim” under an SFIP, an insured is required to notify the insurer of the loss and is also required to file a Proof of Loss. Giving notice of a loss and providing a sworn Proof of Loss are separate and distinct requirements of the policy. *Gowland v Aetna*, 143 F.3d 951, 954 (5<sup>th</sup> Cir. 1998). Simply giving notice of a loss is not sufficient to make a claim under the policy. *Id.* See also *Suopys v Omaha Property and Casualty*, 404 F.3d 805, 810 (3<sup>rd</sup> Cir. 2005). A “claim” is evidenced by a Proof of Loss which must normally be filed within sixty (60) days after the loss.<sup>52</sup> The Proof of Loss, by definition, is the insured’s “statement of the amount you are claiming under the policy” SFIP, Art. VII.J.4; see also *Flood Insurance Claims Handbook*<sup>53</sup>, p. 6 (“...Your official claim for damages is called a Proof of Loss...”). The failure of the insured to provide a complete, sworn Proof of Loss as required by the SFIP, relieves the insurer’s obligation to pay what otherwise might be a valid claim. *Gowland*, 143 F.3d 951; *Suopys*, 404 F.3d 805; see also *Marseilles Homeowners Condominium Association v Fidelity National Insurance Company*, 542 F.3d 1053, 1056 (5<sup>th</sup> Cir. 2008). Therefore, the insurer has no

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<sup>50</sup> *C.E.R 1988, Inc. v Aetna Casualty and Surety Co.*, 386 F.3d 263, 267 (3<sup>rd</sup> Cir. 2004)

<sup>51</sup> See also 42 U.S.C § 4019 authorizing FEMA to “prescribe regulations establishing the general method or methods by which *proved and approved claims for losses* may be adjusted and paid for any damage to or loss of property which is covered by flood insurance.” (emphasis added)

<sup>52</sup> In regard to Hurricane Sandy claims, the deadline was extended until October 29, 2014.

<sup>53</sup> Section 204 of the Flood Insurance Reform Act of 2004 required that a flood insurance claims handbook be developed and distributed to each purchaser of flood insurance in order to help the insured with the claims process. It is clear from the handbook, which was required by statute, that FEMA defines the insured’s “claim” to be his Proof of Loss.

obligation to pay a claim until the Proof of Loss is provided. The filing of a Proof of Loss is a strict requirement and condition precedent to waiver of sovereign immunity and as such, is a procedural requirement before suit can be filed.<sup>54</sup> All requirements of the policy must be met before suit can be filed. This is clearly set forth in SFIP, Art. VII(R):

...You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within one year after the date of the written denial of all or part of the claim... (emphasis added)

After the Proof of Loss is submitted, the WYO or FEMA must make a decision on the claim.<sup>55</sup> If the insurer decides to disallow the claim, either in whole or in part, then, and only then, does the insured have the right to exercise his right under the SFIP to file a lawsuit.<sup>56</sup> As a practical and legal matter, the insured has no need or right to file suit prior to submission of the Proof of Loss to the insurer.

A “loss” becomes a “claim for proved and approved losses” only after the timely submission of a Proof of Loss with supporting documentation. Until such time, there is no “claim” which can be disallowed by the insurer. This is re-iterated in 42 U.S.C. § 4072 which permits a claimant to sue within one year “upon the disallowance by the Director of any “such claim.”” It is clear that “such claim” refers back to “any claims for proved and approved losses.”, i.e. losses supported by a proper and timely filed Proof of Loss. See *Qader v FEMA*, 543 F. Supp.2d 558, 561-562 (E.D. La 2008). Consequently, the one-year filing period only begins to run when FEMA denies a claim that is accompanied by a Proof of Loss. *Id.*; see also *Willis v State Farm Fire and Casualty Company*, 2008 WL 793514 (E.D. La. 2008), slip opinion, pp. 1-2.

In *Qader*, the Court rejected FEMA’s contention that the one year time bar begins when it denies a claim based on an adjuster’s report and specifically held that under 42 U.S.C. § 4072, only the denial of a claim accompanied by a Proof of Loss triggers the one year limitation period. *Id.*, at 561-562. Shortly thereafter, Judge Barbier, who sits in the same District was presented with the same issue in *Willis v State Farm Fire and Casualty Company*, 2008 WL 793514 (E.D.La. 2008). Judge Barbier agreed with Judge Feldman’s decision, holding that:

...In *Qader*, Judge Feldman was faced with the identical issues before the Court in the instant case, and ultimately determined that the one year filing period begins to run when FEMA denies a claim that is accompanied by a Proof of Loss, not when FEMA denies a claim based on an adjuster's report. *Id.*... (slip opinion, page 1)

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<sup>54</sup> SFIP, Art. VII.J.4

<sup>55</sup> SFIP Art.VII.M.1.

<sup>56</sup> SFIP Art.VII.M.2.b.



Recently, the District Court in the Southern District of Texas agreed with Judge Feldman and Judge Barbier holding that "... the one-year filing period begins to run when FEMA denies a claim that is based upon the insured's sworn Proof of Loss, not from the date FEMA denies a claim based upon an adjuster's report..." see "Opinion and Order" (doc. 20) in *Altman v Napolitano*, Case No. 3:10-mc-3004 (S.D. Tex. March 1, 2013) and "Opinion and Order" (doc. 31), *Wolfe v American Bankers Insurance Company of Florida*, Case No. 3:10-cv-0578 (S.D. Tex. March 1, 2012).

## **B. THE PROOF OF LOSS AND ESTIMATES**

The requirement that a Proof of Loss be submitted for payment from flood insurance is the single most litigated issue when it comes to flood insurance cases. The timeliness of the Proof of Loss as discussed above is only the first technical defense that will be raised.

Pursuant to SFIP Art. VII(J), as stated above, a Proof of Loss should be submitted with supporting documentation. Case law however only requires that documentation submitted with the Proof of Loss as its support need only be sufficient for the carrier to evaluate the merits of the claim. See e.g. *Copeland v FEMA*, 2004 WL 325577 (E.D. La. 2004); *Portnoy v Federal Emergency Management Agency*, 2003 WL 21294980 (E.D. Pa. 2003); *Courteaux v Federal Emergency Management Agency*, 2014 WL 273146 (E.D. La. January 24, 2014); and *Reichert v Fidelity National Property et al*, 2007 WL 763706 (E.D. La. 2007).

Albeit a contractor's estimate, a public adjuster's estimate, or the policyholder's own judgment of the value of the loss, the determination will turn on the fact of whether the supporting documentation that was submitted as part of the Proof of Loss gave the carrier sufficient information to evaluate the merits of the claim. The Court in *Reichert*, made the following two statements regarding the Proof of Loss requirement, which fully support that notion.

Neither the case law nor the regulations suggest that the formal POL requirement was put in place to serve *solely* as a technical defense to a timely filed lawsuit when deficiencies in the POL played no role whatsoever in the denial of the claim. Rather, the formal POL serves its purpose when its provisions are strictly enforced *prior to disbursing flood claim proceeds*.

The Court does find, however, that in this lawsuit [the WYO] is attempting to use the formal POL requirements in a hyper-technical way that the law does not envision or require.

*Reichert v Fidelity National Property et al*, 2007 WL 763706 (E.D. La. 2007).

## **C. USE OF STATE LAW IN INTERPRETING ABIGUITY IN THE SFIP**

If an insured cannot resolve a flood loss with the insurance carrier, the insured has the

right to seek appraisal of the claim, appeal the decision to FEMA, or file a lawsuit in federal court. The NFIA was enacted by Congress to achieve national goals and policies, which is part of the reason that NFIP flood cases must be filed in Federal District Court. As a result, there is a compelling interest in assuring uniformity of decision in cases involving the NFIP which mandates the application of Federal Law.<sup>57</sup> Accordingly, neither the statutory nor decisional law of any particular state is applicable to disputes concerning coverage of an SFIP.<sup>58</sup> The law is clear that, as contracts, SFIPs issued under the NFIP are governed by Federal Law applying “standard insurance law principles”.<sup>59</sup> Under these principles, the SFIP is interpreted in accordance with its plain, unambiguous meaning with the intent that its interpretation should be uniform throughout the country and that coverage should not vary from state to state.<sup>60</sup>

Important “standard insurance principles” which have been utilized by Federal Courts in interpreting the SFIP include the following: (1) “if the language of a policy is clear and unambiguous it should be accorded its natural meaning;” (2) “if the meaning of a policy provision is doubtful and the language used is susceptible of different constructions, the one most favorable to the insured is adopted;” (3) “the rule favoring the insured where ambiguity exists should not be applied automatically insurance contracts are to be reasonably construed consonant with the apparent object and intent of the parties;” (4) “in deciding what a reasonable construction of the contested provisions are, the material we may draw from consists of those provisions, the policy as a whole, and the apparent objectives of the parties in establishing this kind of contractual relationship;” (5) “if the meaning of the policy terms remain unclear, the policy is generally construed in favor of the insured in order to promote the policy's objective of providing coverage;” (6) “under ordinary rules of contract construction, a court must first examine the natural and plain meaning of a policy's language and an ambiguity does not exist simply because a contract requires interpretation or fails to define a term;” and, (7) “while ambiguous contracts are construed against their authors, meaning should not be added to clear and unambiguous language.”<sup>61</sup>

## V. LOSS SETTLEMENT

New York Plaintiffs’ Liaison Counsel’s Memorandum on the Loss Settlement Clause of the SFIP (doc. 401) filed in Case No. 1:14-mc-00041-CLP-GRB-RER, E.D.N.Y. is attached hereto as Exhibit A and incorporated as a part hereof.

## VI. SPECIFIC COVERAGE ISSUES

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<sup>57</sup> See *West v. Harris*, 573 F. 2d 873, 881-882 (5<sup>th</sup> Cir. 1978).

<sup>58</sup> *Linder and Associates, Inc. v. Aetna Casualty and Surety Company*, 166 F. 3d 547, 550 (3<sup>rd</sup> Cir. 1999).

<sup>59</sup> *Flick v. Liberty Mutual Fire Insurance Company*, 205 F. 3d 386, 390 (9<sup>th</sup> Cir. 2000).

<sup>60</sup> *Linder and Associates, Inc.*, 166 F. 3d at 550.

<sup>61</sup> See *Hanover Building Materials, Inc. v. Guifrida*, 748 F. 2d. 1011, 1013 (5<sup>th</sup> Cir. 1984); *Caneiro Da Cuna v. Standard Fire Insurance Company*, 129 F. 3d 581, 584 (11<sup>th</sup> Cir. 1997) and cases cited therein.

In order to address certain issues that may arise during litigation, and that are ripe for arbitration and / or mediation, below are some specific examples of specific coverage issues. Immediately below is cheat sheet from *National Flood Insurance Program Adjuster Claims Manual*, June 2010. The chart has been pasted into this document without modification, except for formatting. Immediately below the chart is a list of issues that are likely to arise. Again, each of the issues and scenarios below are taken directly **without modification** from the *National Flood Insurance Program Adjuster Claims Manual*, June 2010. While they have not been modified, the order is not as they appear in the manual. A copy of the manual has been included with these materials.

<b>ITEM</b>	<b>DWELLING FORM</b>	<b>GEN. PROP. FORM</b>	<b>RCBAP</b>
Additional Living	NO	NO	NO
Appurtenant Structures	YES; 10% of Building limit of liability can be applied to a qualifying	NO	NO
Awnings	ACV, if attached to	ACV, if attached to	ACV, if attached to
Building Fixtures	Listed	Listed	Listed
Carpeting	ACV; no overhead and	ACV; no overhead and	ACV; no overhead and
Construction Before Walled & Roofed	YES; two times the deductible	YES; two times the deductible	YES; two times the deductible
Debris Removal	YES	YES	YES
Decks	NO; limit of 16 sq. feet	NO; limit of 16 sq. feet	NO; limit of 16 sq. feet
Deductible	Applied separately to building and contents	Applied separately to building and contents	Applied separately to building and contents
Loss Avoidance Measures (Mitigation), Pre-Flood	Limited coverage, \$1,000	Limited coverage, \$1,000	Limited coverage, \$1,000
Exterior Paint	YES	YES	YES
Fences	NO	NO	NO
Hot Tubs & Spas	YES, if they are bathroom fixtures	YES, if they are bathroom fixtures or stock	YES, if they are bathroom fixtures
Hurricane Shutters	YES	YES	YES
ICC	YES, except Emergency Program and Group Policy	YES, except Emergency Program	YES, except Emergency Program

<b>ITEM</b>	<b>DWELLING</b>	<b>GEN. PROP.</b>	<b>RCBAP</b>
Improvements & Betterments	YES; if tenant has personal property coverage, we cover cooking stove, range, and refrigerator. 10% of personal property coverage will cover other tenant-installed improvements.	10% of personal property coverage	Yes
Loss Assessments	YES	NO	NO
Loss of Rents	NO	NO	NO
Ordinance or Law	ICC only see Exclusion	ICC only see Exclusion	ICC only see Exclusion
Pollutants	YES	YES, up to \$10,000	YES
Power Failure	YES, if caused by flood on the described location	YES, if caused by flood on the described location	YES, if caused by flood on the described location
Replacement Cost, Building	YES, if insured to 80% of RC and insured lived at risk 80% of previous 365 days	NO	YES, with coinsurance provision
Replacement Cost, Personal Property	NO	NO	NO
Screened Porches	YES, unless below elevated floor (Post-FIRM)	YES	YES
Storage Sheds	NO	NO	NO
Stove & Refrigerator	Building ACV, if tenant's contents	Building ACV, if tenant's contents	Building ACV
Swimming Pools/Hot	NO	NO	NO
Temporary Repairs	NO	NO	NO
Trees	NO	NO	NO
Venetian Blinds	Building ACV	Building ACV	Building ACV
Walkways	NO	NO	NO

## **1. BASEMENTS**

Exterior Windows and Doors – In “daylight” basements or basements with exterior windows and/or doors, the windows and doors that are installed in exterior foundation walls are covered. However, they can be painted or otherwise finished on the exterior surfaces only.

Baseboard Heaters – Baseboard heaters installed in basements are not covered. Only building items listed in SFIP Section III.A.8.a. (1)- (17) are covered.

## **2. DEPRECIATION**

To accurately determine the ACV of an item, the adjuster must consider the replacement cost along with the depreciation, as well as the average useful life of the item. The condition of the item prior to loss must also be considered. The NFIP will not accept lump-sum depreciation figures. Replacement costs on contents items need to be validated with a reliable source when they appear to be inaccurate.

### **1. Building Physical Depreciation**

If an adjuster is removing and replacing a building item that is not new, appropriate depreciation must be applied.

### **2. Contents Physical Depreciation**

Contents depreciation must be line by line and item by item. Each item is considered on its own merit. Things to consider include replacement cost of the item, age of the item, and condition of the item prior to the flood, and anticipated useful life.

## **3. OVERHEAD AND PROFIT**

The overhead and profit percentage must be applied to the depreciation total and reflected in the ACV loss figure. Overhead and profit is not applied to the following items:

1. Carpeting
2. Insured’s own labor
3. Outside service charges such as plumber, electrician, or appliance service calls
4. Repairs made by the insured (However, an allowance can be made for the insured’s time and expense in purchasing materials, not to exceed 10 percent.)

Overhead and profit is warranted only if a general contractor has been hired to make repairs. The adjuster must document the general contractor’s involvement. The NFIP Servicing Agent or the WYO Company has the option of withholding the overhead and profit until the repairs are completed or until a contract is signed.

In the event the policyholder functions as general contractor, a reasonable allowance may be added for the policyholder’s time and effort in coordinating subcontracted repairs.

#### **4. POLLUTION DAMAGE**

The SFIP covers direct physical loss by or from flood. Therefore, when flood waters contain pollutants or cause release of pollutants that damage insured property, the cleanup, repair, and mitigation costs associated with such pollutants are covered under the General Property Form up to \$10,000.

If vinyl tile containing asbestos is damaged by flood (the asbestos does not damage insured property), the claim for removal and replacement of the flood-damaged tile is limited only by the Building Property policy limit less the deductible.

See FEMA Bulletin W-10065a, June 7, 2010 regarding basic claims procedures with handling claims involving oil in water.

#### **5. REMEDIATION, DRYING, EMERGENCY SERVICE CONTRACTORS**

Water remediation, drying charges, emergency service charges should be reviewed to limit their scope to repairing only direct loss from flooding. This would include charges to properly dry the salvageable building materials. Particular care should be taken to exclude charges to dry material that is non-salvageable. Charges not considered a direct loss from flood should not be allowed.

Additionally, the effort put forth by the restoration company to salvage the flood-damaged items should preclude the need to replace those salvageable items. If repair or restoration cost is incurred for an item, an additional claim for replacement of that item will not be considered.

The SFIP provides up to three loss settlement methods, depending on the policy form under which the risk is insured. See Dwelling Form and General Property Form VII.V. Loss Settlement and RCBAP VIII.V. Loss Settlement.

#### **6. REPLACEMENT COST COVERAGE (RCC) AND HOLD BACK**

For single-family residences, including doublewide manufactured (mobile) homes, RCC is applicable only to building coverage. Under the Residential Condominium Building Association Policy, a coinsurance clause requires the condominium association to insure its building to at least 80 percent of the replacement cost value, in order to avoid suffering uninsured losses and charging assessments to members.

When insured property is eligible for replacement cost loss settlement, it is no longer required to hold back the recoverable depreciation (see FEMA Bulletin W-04020, May 7, 2004). Any amounts that would have currently been held back should be paid as part of the claim. The Bulletin, however, does not preclude the need to support the allowable depreciation. While RCC is paid up front, adjusters should continue to indicate line-by-line depreciation. While RCC is paid up front, adjusters should continue to indicate line-by-line depreciation on all estimates, and the ACV amount should continue to be referenced in reports

and included in the Proof of Loss. The allowable depreciation amount may continue to be reflected in the signed Statement as to full cost of repair or replacement under the replacement cost coverage and the signed Final Report; however, if you do not choose to utilize these methods, you may include the allowable depreciation amount in the signed ACV Proof of Loss.

## **7. AIR CONDITIONING CONDENSERS AND SOLAR HEATING ELEMENTS**

Building coverage extends to the insured building and additions and extensions attached to and in contact with it by means of a common wall. Air conditioning condensers and solar heating panels are considered building property even if they are located apart from the structure and are not attached in accordance with the policy definition. Condensers are eligible for replacement cost coverage if the structures they service are eligible for it.

Coverage does not apply to other equipment, such as generators, air compressors, and substation transformers owned by the policyholder that may service the building, but are located apart from the structure and are not attached. If a generator or other such equipment is attached in accordance with the policy definition or are in a fully-enclosed structure, coverage would apply. If generators and other such equipment not listed in the coverage are in a basement, they are not covered.

## **8. CARPETING AND DRAPES**

Carpeting is considered building property if it is installed over an unfinished floor surface. Carpeting over finished floors is considered personal property (contents), even if it is wall to wall or affixed to the floor. All carpet losses, whether building property coverage or personal property coverage, are adjusted on an ACV basis. When a carpet loss is paid, overhead and profit is not allowed, unless a general contractor is responsible for installation and such responsibility is documented for the claim file.

Drapes are always treated as contents items, even if they are custom-made and fit only a specific window. However, window blinds of all kinds are considered building property (See Dwelling Form III.A.7.b.).

## **9. DECKS**

Since 1994, the SFIP has specifically excluded coverage for decks. However, stairways and staircases are still covered, if they are attached directly to the insured building. We also cover stairways or staircases attached to decks or walkways for the purpose of ingress and egress. If there are two staircases attached to the same deck or walkway, then there is coverage for only one of the staircases. The SFIP allows for payment of steps and a landing. The maximum allowable area is 16 square feet.

## **10. ELEVATED BUILDINGS (Coverage Restrictions)**

An “elevated building” is defined as a non-basement building in which the lowest elevated floor is raised above ground level by foundation walls, shear walls, posts, piers, pilings, or columns. post-FIRM elevated buildings in certain SFHAs are subject to coverage restrictions specified in the Standard Flood Insurance Policy. A manufactured (mobile) home may be an elevated building.

Determination of the Lowest Elevated Floor – Full coverage for post-FIRM elevated buildings begins at the lowest elevated floor. This is the lowest floor raised above the ground, even if the pilings extend above it (see FEMA Bulletin W-04020, May 7, 2004, page 2 included in Appendix 2).

Some confusion has been reported about the applicability of the elevated building coverage restrictions to a non-elevated post-FIRM building located in an SFHA and constructed with its lowest floor below the Base Flood Elevation. Such a building is not subject to the elevated building coverage restrictions. The rating of any structure must be based on the correct elevation difference between the lowest floor and the Base Flood Elevation. Structures that are misrated should be reported to the company’s underwriting department as soon as possible after the potential error is discovered.

The restrictions apply only to post-FIRM, Regular Program, elevated buildings in Zones A1-A30, AE, AH, AR, AR/A, AR/AE, AR/AH, AR/A1-A30, V1-V30, or VE. “post-FIRM” means that a building was constructed or substantially improved on or after the community’s initial FIRM date or after December 31, 1974, whichever is later. The coverage restrictions apply to any area of an elevated building that is lower than the lowest elevated floor.

Coverage will respond for the building and personal property items listed in the policy, provided that these items are connected to a power source and installed in their functioning locations and that the insured has purchased appropriate coverage.

Floor insulation and the underpinning material used to hold it in place against the underside of the lowest elevated floor of a post-FIRM elevated building is covered. No finish of the underpinning material is allowed.

## **11. COVERAGE FOR GARAGES AND CONTENTS**

### **a. Attached Garage**

If a post-FIRM elevated building located in zones A1-A30, AE, AH, AR, AR/A, AR/AE, AR/AH, AR/A1-A30, V1-V30, or VE has an attached garage with a floor lower than the lowest elevated floor, the coverage restrictions apply to that area. Any contents located above the level of the lowest elevated floor (such as hanging from the ceiling or on the garage walls) are covered.

### **b. Detached Garage**

If a dwelling is post-FIRM elevated and there is a detached garage present with a floor lower than the lowest elevated floor of the insured dwelling, the garage is fully covered. Also,



contents inside the garage are covered, subject to all other policy provisions (such as the requirement that they be secured against flotation if the structure is not fully enclosed).

No coverage will apply to any detached garage used or held for use for residential (i.e., dwelling), business, or farming purposes. The ordinary dictionary meanings of the words “residential” (e.g. suitable for or used as a residence or dwelling) and “dwelling” (e.g., a place to live in, abode) when applying coverage to detached garages. These words should no longer be broadly applied to limit coverage. However, for the purpose of this limitation, kitchen facilities are not required for the space to qualify as residential use or a place to live in. If any space is rented or held for rental, the contents owned by the policyholder and related to the rental would be limited to the \$2,500 contents used in any business. Otherwise covered contents in such detached garages are covered.

The General Property Form and RCBAP do not provide coverage for appurtenant private structures. Coverage for a detached garage responds only in the case of 1-4 family residential buildings insured under the Dwelling Form. The insured may elect to apply up to 10 percent of the building coverage limit for a detached garage. This is not an additional amount of insurance.

As indicated in the “Exclusions” section of the ICC coverage (Coverage D), ICC coverage does not apply to a garage. To obtain ICC coverage on an appurtenant structure, a separate flood insurance policy must be written. For example, a detached garage that has been converted for residential purposes, receives no ICC coverage unless it is insured under a separate policy.

## **12. COVERAGE FOR BUILDING PROPERTY IN A BUILDING ENCLOSURE BELOW THE LOWEST ELEVATED FLOOR OR IN A BASEMENT**

Paragraph III.A.8. of the SFIP provides coverage for certain items of building property (and related clean-up) in an enclosure below the lowest elevated floor of an elevated post-FIRM building in any of Zones A1-A30, AE, AH, AR, AR/A, AR/AE, AR/AH, AR/A1-A30, V1-V30, or VE, or in a basement regardless of zone. Coverage is limited to:

- a. Clean-up expenses
- b. Any of the following items, if installed in their functioning locations and, if necessary for operation, connected to a power source:
  - Central air conditioners
  - Cisterns and the water in them
  - Drywall for walls and ceilings in a basement and the cost of labor to nail it, unfinished and unfloated and not taped, to the framing
  - Electrical junction and circuit breaker boxes
  - Electrical outlets and switches

- Elevators, dumbwaiters, and related equipment, except for related equipment installed below the Base Flood Elevation after September 30, 1987
- Fuel tanks and the fuel in them
- Furnaces and hot water heaters
- Heat pumps
- Nonflammable insulation in a basement
- Pumps and tanks used in solar energy systems
- Stairways and staircases attached to the building, not separated from it by elevated walkways
- Sump pumps
- Water softeners and the chemicals in them, water filters, and faucets installed as an integral part of the plumbing system
- Well water tanks and pumps
- Required utility connections for any item in this list
- Footings, foundations, posts, pilings, piers, or other foundation walls and anchorage systems required to support a building

If an area below grade on all sides is within a room, such as a living room, then coverage is not provided for the “finished walls” of the area below grade. When the area extends above grade, or if there are contents located in the sunken area, coverage limitations will apply. When the entire room is below grade, even if the walls extend above grade, as in a daylight basement, there is no coverage for contents on the floor or coverage for the walls except those listed in the policy. The coverage limitations apply to the whole area, including the “finished walls.”

If an elevated building, subject to the coverage limitations, has an attached garage with a floor lower than the lowest elevated floor of the building, the coverage restrictions apply to that area. Any contents located above the level of the lowest elevated floor (such as hanging from the ceiling or on garage walls) are covered.

### **13. ELEVATORS**

The SFIP provides coverage for elevators, dumbwaiters, and related equipment. When these items are located in a basement or the enclosed area below an elevated building, there is no coverage for the related equipment below the Base Flood Elevation unless it was installed on or before September 30, 1987. Elevators and chairlifts installed outside of the perimeter of the insured building are not covered.

### **14. EROSION AND WAVE WASH**

The SFIP states that loss and damage from wave action along a lake or other body of water is considered direct physical loss by flood. Loss and damage from spray consequent to wash-over, whether wind driven or not, is not covered. Loss and damage to structures arising from ongoing erosion is not covered under the SFIP. However, collapse or subsidence of land along the shore of

a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding cyclical levels which result in flooding is included in the definition of “flood” (SFIP II.A.2.) and, thus, is covered.

Replacement of soil lost through erosion is covered only when the erosion results from an overflow of inland or tidal waters and not from the unusual and rapid accumulation or runoff of surface waters from any source. Soil replacement must be confined to within the perimeter of, and related to the support of, the building. Soil replacement beyond this perimeter is not payable under the SFIP. Rip-rap, armoring, and retaining walls are not covered.

## **15. FIBERBOARD SHEATHING/BLACKBOARD**

When the flooding of buildings consisting of wood frame construction and brick veneer occurs, complete demolition is not always required. There are alternative methods of repair or replacement of fiberboard sheathing.

## **16. FOOD IN FREEZERS**

When food is located in a post-FIRM building enclosure below the lowest elevated floor or in a basement and subject to restrictive coverage outlined in Section III.B.3. of the SFIP, coverage is only provided for food located in food freezers. Damage to food in refrigerator/freezers is excluded from coverage.

## **17. FOUNDATIONS**

Floods can cause significant foundation damage, but so can settlement, improper construction, earth movement, tree roots, and sinkholes. Many times an insured will claim normal settlement cracks in slabs and foundations as flood related. The insured will indicate that he or she never noticed the foundation and slab damage until after the flood. This neither proves nor disproves that the damage resulted from flood.

Most slab and foundation damage occurs because of a lack of moisture in the ground. The soil shrinks away from the foundation, allowing the grade beams to settle downward under the supported weight. This results in a bowing effect and cracks. Excess water in the ground exerts upward pressure on the slab floor and inward pressure on the subgrade foundation walls. This also results in cracks and displacement. Damage of this kind is considered the result of hydrostatic pressure and is not covered under the SFIP, unless there is a general condition of flooding in the area.

Flooding with sufficient water movement to carry the subsoil away (scouring) from the slab or foundation walls generally leaves visible signs. Claims for foundation damage without any visible indication of scouring or land subsidence bear close scrutiny. Most foundation and slab damage that occurs without any visible signs of soil displacement may have resulted from causes other than flooding and is not covered by the SFIP. The adjuster must carefully check the perimeter and underneath the building for soil washout from velocity water flow. When finding no indication, the adjuster must resist a claim for foundation damage. The insured then has the responsibility to prove that the damage was caused by flood. Use

of structural engineers must be limited to losses with visible indications of flood damage or of floodwaters' having exacerbated preexisting damage.

There is limited coverage for slabs under post-FIRM elevated buildings. Coverage provided at SFIP III. A.8.a. (17) is limited to "footings, foundations, posts, pilings, piers, or other foundation walls and anchorage systems required to support the building." These slabs are covered only if they are part of the foundation. To be part of the foundation, a slab must be at least 6" thick containing rebar and tied into the posts, pilings, piers, or other foundation walls and anchorage systems required to support the building (see FEMA Bulletin W-04091, November 19, 2004).

#### **18. FREEZERS**

Walk-in freezers attached to the building are considered part of the building.

#### **19. GARAGES**

If a garage is in contact with the insured dwelling (elevated or not) by means of rigid exterior wall, a solid load-bearing interior wall, a stairway, an elevated walkway, or a roof, the policyholder has the option of insuring the garage separately. However, if connected by a common interior wall that is not a solid load-bearing wall; the addition is always considered part of the building and cannot be separately insured. (See SFIP Dwelling Form III.A.2 and 3.) Otherwise, the garage will be considered detached and subject to the 10% of Coverage A (Dwelling) limit. The General Property Form and RCBAP do not cover detached garages or other appurtenant structures, but do provide coverage for qualifying additions and extensions. *See, also, "M. Elevated Buildings" above.*

#### **20. HYDROSTATIC PRESSURE**

The SFIP excludes damages resulting from hydrostatic pressure unless there is surface flooding in the area and the flood is the proximate cause of the damage from the pressure of water against the insured structure.

#### **21. PROPERTY REMOVED TO SAFETY**

If coverage has been purchased both for personal property (contents) and for the building, the SFIP covers direct physical loss by flood to each while the property is located at the property address shown on the application or endorsement. Coverage is available for 45 days at another place above ground or outside of a Special Flood Hazard Area to which any insured property (including a moveable building) is removed in order to protect and preserve it from a flood or from the imminent danger of flood. Personal property that has been removed must be placed in a fully enclosed building or otherwise reasonably protected from the elements to be insured against loss. The reasonable expense incurred by the insured, including the value of the insured's own labor at prevailing federal minimum wage in moving the insured property away from the peril of flood and storing the property at the temporary location, will be reimbursed to the insured, up to \$1,000.

## **22. SEEPAGE AND HIGH WATER TABLE**

The SFIP does not provide coverage for losses related to high water tables or seepage unless there was a general condition of flooding in the area.

## **23. SWIMMING POOLS, HOT TUBS, AND SPAS**

Coverage for swimming pools, hot tubs, spas, and their equipment is excluded, except that spas and hot tubs are covered if they are bathroom fixtures. Spas and hot tubs are covered under the General Property Form if they are bathroom fixtures or stock and inventory held for sale.

## **24. BLINDS**

The SFIP covers all types of window blinds. Blinds are covered under SFIP Coverage A. only.

## **25. WATER, MOISTURE, MILDEW, OR MOLD DAMAGE**

The SFIP covers reasonable costs for remediation of mold damage except when the damage results from a condition “confined to the insured building” or “within [the insured’s] control,” such as “failure to inspect and maintain the property after a flood recedes.” Four examples of SFIP coverage are provided below. If such damage is caused by “wicking,” it is covered.

1. If a building was inundated but not evacuated, the SFIP will pay reasonable expenses for water extraction, dehumidifier and fan rental, and mildicide and anti-microbial application.
2. If, after the insured has taken the mitigation measures in example 1 above, mold reappears and causes damage to the upper portions of walls, ceilings, etc., the NFIP will honor such claims if the insured can show that mitigation attempts were made.
3. If a local official requires testing for mold, and has legal authority to do so, the SFIP will pay reasonable costs for the test. No other testing is necessary because the SFIP pays for reasonable remediation of mold damage (except as noted above). Therefore, the cost of other testing, except as described here and in example 4 below, will not be covered.
4. If, during inspection of a claim for mold damage, the adjuster believes that such damage is not the result of the recent flood but is a long-term, recurring problem, it may be necessary to obtain a testing report from a Certified or Licensed Hygienist or Microbiologist. The report must be specific as to whether the mold is a recent problem or a long-term, recurring problem.

Obviously, there can be other scenarios: situations where waist-deep water has inundated the building and remained for several days or situations where the insured was not allowed to return to the building for an extended period of time. In such cases, apply common sense and good adjusting principles. Use these examples as a guide in the handling of the more complex cases.

**26. WATER SOFTENERS**

If the water softener is installed at the described location and connected to a power source, coverage is provided for the water softener and the chemicals in it.

**27. WELL WATER PUMPS**

The Dwelling Form provides coverage for well pumps located below the lowest elevated floor of an elevated building and in basements. Well pumps are described as building items and therefore cannot be construed as content items. If the well pump is located in an unattached shed or building, then there is no coverage.

# EXHIBIT A

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

-----X  
**IN RE HURRICANE SANDY CASES**

**PLAINTIFFS' LIAISON  
COUNSEL'S MEMORANDUM  
ON THE LOSS SETTLEMENT  
CLAUSE OF THE NFIP**

-----X

**14 MC 41**

**THIS DOCUMENT APPLIES TO:  
ALL RELATED CASES**

-----X

The undersigned Plaintiffs' Liaison Counsel, Tracey Rannals Bryan of Gauthier, Houghtaling & Williams and Javier Delgado of Merlin Law Group, P.A. hereby submit this memorandum which discusses the Loss Settlement Clause of the NFIP.

**MAY IT PLEASE THE COURT:**

The defendants in these cases have argued that plaintiffs are limited to recovering the *least* of three amounts specified in a certain portion of the Standard Flood Insurance Policy ("SFIP"): (1) the building limit of liability shown on the Declarations Page; (2) the replacement cost of that part of the dwelling damaged, with materials of like kind and quality and for like use; or (3) The necessary amount "actually spent to repair or replace the damaged part of the dwelling for like use."<sup>1</sup> Based on these provisions, some defendants have asserted that they will not mediate or otherwise seek to resolve the subject claims until they have been provided receipts for the amount actually spent to repair or replace the damaged part of the dwelling for like use, and that recovery will be limited to the total of the receipts provided. There is no sound legal basis for this argument.

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<sup>1</sup> 44 C.F.R. Art. 61 App. A(1) VII (V)(2)(a)



On May 22, 2014, this Court held a conference with liaison counsel where this issue was raised in the context of discovery deficiencies and the need for further discovery procedures. This brief will address the loss settlement provisions described above and elsewhere in the SFIP. It will discuss the various methods of loss valuation and the level of documentation necessary to resolve flood claims under the SFIP.

**Issues Presented:**

- What are the loss settlement provisions of the SFIP?
- Are plaintiffs limited in their recovery to the amount actually spent to repair or replace the damaged part of the dwelling for like use and, if so, under what circumstances?
- How is the value of the loss determined under the SFIP?
- Can claims for damages covered by SFIP policies be resolved when the amount actually spent to repair or replace the damaged part of the dwelling is unknown?

**Discussion:**

The loss settlement provisions of the SFIP dwelling form policy are codified in Title 44 of the Code of Federal Regulations, Article 61 Appendix A(1) Article VII “General Conditions” Section V “Loss Settlement.” (See Exhibit “A”-full text of the statute) In pertinent part, four conditions applicable to Replacement Cost Loss Settlement for single family dwellings are set forth:

“a. We will pay to repair or replace the damaged dwelling after application of the deductible and without deduction for depreciation, but not more than the least of the following amounts:

- (1) The building limit of liability shown on your Declarations Page;
- (2) The replacement cost of that part of the dwelling damaged, with materials of like kind and quality and for like use; or
- (3) The necessary amount actually spent to repair or replace the damaged part of the dwelling for like use.

b. If the dwelling is rebuilt at a new location, the cost described above is limited to the cost that would have been incurred if the dwelling had been rebuilt at its former location.

c. When the full cost of repair or replacement is more than \$1,000, or more than 5% of the whole amount of insurance that applies to the dwelling, we will not be liable for any loss under V.2.a. above or V.4.a.(2) below unless and until actual repair or replacement is completed.

**d. You may disregard the replacement cost conditions above and make claim under this policy for loss to dwellings on an actual cash value basis. You may then make claim for any additional liability according to V.2.a., b., and c. above, provided you notify us of your intent to do so within 180 days after the date of loss.”<sup>2</sup> (emphasis added)**

The policy clearly states in (d) that an insured may make a claim on an *actual cash value* basis without consideration of the limitations in parts (a), (b), or (c). It is also clear from reading the section as a whole that the provisions of part (a) do not become relevant until the actual repair or replacement of the “damaged part of the dwelling” has been completed. The limitation, of course, would only apply to that “damaged part.” Plaintiffs are entitled to the actual cash value of their loss under sub-part (d) regardless of any amounts already spent on repairs. The limitation of sub-section (a)(3) applies only when complete repairs or replacements of like kind and quality for like use have actually been made.

**Valuing Repairs Generally:**

The regulations governing the NFIP establish standards and guidelines for adjusters investigating flood losses.<sup>3</sup> In general, the adjuster is required to prepare a repair estimate on a room-by-room and unit cost basis that clearly indicates room dimensions. The unit costs reflect the opinion of the estimator of the cost to repair or replace the damaged parts of the insured’s

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<sup>2</sup> 44 C.F.R. Art. 61 App. A(1) VII (V)(2)

<sup>3</sup> NFIP Adjuster Claims Manual (2008 edition), pp. II-1-II-6 (44C.F.R § 62.23(i)(1) requires WYO companies to adjust claims guided by NFIP manuals).

dwelling with materials of like kind and quality for like use. When the adjuster finishes his building and contents estimates and worksheets, he must provide these to the insured.

After the insured receives the undisputed portion of his or her claim, the insured will typically begin the re-construction process. It must be noted, however, that there is no provision in the SFIP which requires the insured to repair his or her property in order to receive payment, or after the insured has received the payment. In some cases, the insured will choose to sell the property rather than undertake the onerous task of reconstruction. In other cases, the dwelling has been so severely damaged that it must be demolished. Some insureds receive payment, quickly realize that the payment is insufficient to repair the property, and begin the equally onerous task of attempting to recover the full cost of reconstruction from their insurance carrier prior to attempting repairs or while completing partial repairs with the insufficient funds. Many insureds cannot commence construction and pay costs out of pocket until reimbursed by their insurance carrier.

The SFIP provides for repair or replacement with like kind and quality, for like use, but it is mostly silent regarding what construction methods and standards are to be utilized in reconstructing the dwelling.<sup>4</sup> In fact, there is no clear articulated standard set forth within the SFIP for determining when a damaged item should be replaced or when it should simply be repaired.<sup>5</sup> The proper method of repair and unit pricing is often disputed. Two different estimates may reflect different pricing and different repair methodology creating a *bona fide* dispute concerning the proper measure of actual loss. The true amount of loss in any case is usually best determined by the two estimators, who will work together to reconcile their competing estimates and reach an

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<sup>4</sup> See *De La Cruz v Bankers Ins. Co.*, 237 F.Supp.2d 1370,1374 (S.D.Fla. 2002).

<sup>5</sup> *Id.*

agreement as to the true replacement cost for the flood damaged components of an insured's dwelling. The amount owed by the insurer can be determined on the basis of these estimates whether there have been no repairs, partial repairs, or inadequate repairs.

**Partial Repairs and Inadequate Repairs**

The critical issue is the replacement cost of the structure at the time of the loss. "Replacement cost coverage" is generally defined as reimbursing the insured for the full cost of repairs.<sup>6</sup> The necessary repairs include those for placing the building in as nearly as possible the same condition that it was before the loss, without allowing for depreciation.<sup>7</sup> Where the insurer expressly contracts to pay what it would cost to repair or replace the insured property "with materials of like kind and quality," such estimated costs are a sound measure of the damages.<sup>8</sup> Estimates are the time honored means of proving what the repair costs will be and estimates may vary considerably.<sup>9</sup> Per the terms of the policy, an insured is owed for the cost to repair or replace with like kind and quality for like use. When repairs are not yet begun the estimates are the only proof available. When the repairs are not of like kind and quality for like use (for example, when an insured makes "stop-gap" repairs, or when an insured makes repairs with lesser quality materials) then they are not an accurate measure of the insured's damages. The actual amount spent should only be considered when it was spent to complete repairs of like kind and quality for like use.

In these Sandy cases, plaintiffs contend in every situation that their homes have not been fully repaired with materials of like kind and quality, for like use. They have submitted

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<sup>6</sup> 6 *Appleman on Insurance Law & Practice*, § 3861

<sup>7</sup> *Id.*; 12 *Couch on Insurance 3<sup>rd</sup>*, § 177.28.

<sup>8</sup> *Couch, id.* at §175.45

<sup>9</sup> *Couch, id.* at § 175.51

documentation of their loss as required under the policy in the form of a detailed line item estimate generated by an NFIP-certified flood adjuster. That documentation is sufficient for evaluating and proving the amount of the plaintiff's loss in each and every case.

**Receipts and Invoices**

The SFIP does not require the insured to submit receipts, invoices or other proof of completed repairs in order to receive additional payment. Nowhere in the policy does it state that an insured must supply invoices, cancelled checks, or other documentation proving that repairs were actually completed on the insured property or their cost.<sup>10</sup> While the defendants may seek evidence that repairs were done, there is nothing in the policy that requires this as a predicate to recovery.<sup>11</sup> Article VII.K.2 requires, if specifically requested, “a complete inventory of the destroyed, damaged and undamaged property,” and “any written plans and specifications for repair,” not documentation of repairs actually completed. Article VII.2.c states that when the full cost of repairs exceeds a certain amount, the insurer is not liable until they are complete, but it does not require the insured to submit any documentation proving the repairs are complete or what they cost.

In fact, pursuant to FEMA Guidance Bulletin W-04020, effective May 7, 2004, there is no longer any requirement to wait for completion and withhold the recoverable depreciation until repairs are made when the insured dwelling is eligible for replacement cost loss settlement. Article VII.J.4 requires documentation of “the loss,” not the repairs performed.

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<sup>10</sup> See *Mahood v Omaha Property and Casualty Co.*, 174 F.Supp 2d 284, 291 (E.D. Pa. 2001). *Mahood* was decided before the provisions of the SFIP were changed requiring submission of loss documents with the Proof of Loss. However, the Court's observations about the lack of a requirement for proof of completion of repairs are still applicable.

<sup>11</sup> *Id.* at FN7, p.292

This was exemplified in a recent Eastern District of Louisiana case decided against Allstate involving a claim by Diane and Bobby Stevens, who had suffered damage to their home in Hurricane Isaac.<sup>12</sup> Allstate, (which was represented by the Nielsen firm) moved for summary judgment arguing that “the amount the Stevens spent on repairs is less than the amount it paid them and that its liability should not be determined by an estimate when the actual amount [spent on repairs actually made] is known.” *Id.* at \*1. Allstate further argued in *Stevens* that “the Stevens bear the burden of proving that the actual amount of damage was greater than the amount paid and that the Stevens are unable to meet this burden.” *Id.* The *Stevens* court soundly rejected Allstate’s argument:

Specifically, Allstate suggests that the insureds should be required to establish—presumably through receipts and similar documentation—that the damage to their houses exceeded what they were paid by the insurer. It asks whether allowing the insureds to simply testify as to what they have spent or will need to spend is “a proper foundation for more than 100 NFIP trials.” (*Id.* at 4). The import of its argument is that it would be onerous to require that the repair cost, which is a material fact, be established at trial.

The Court is disinclined to increase the Stevens' burden on summary judgment simply because it would be more convenient for Allstate—or, for that matter, the Court. The fact that there are more than 100 similar cases pending does nothing to alter the significance of each. The Stevens seek only to recover that which they are owed under their contract with Allstate. They have been placed in the unenviable position of having to repair their own house after a catastrophic event and, if their allegations are sound, they have painstakingly worked to repair that house with less than the necessary resources. This is not to say that there may be instances in which an insured is incapable of meeting its burden on summary judgment, only that the Stevens' burden should not be—nor could be—increased merely because they are two among many others.<sup>13</sup>

The plaintiffs in *Stevens* prevailed because they had written estimates for the total cost of their damages. That total was significantly in excess of what Allstate paid. The court noted that

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<sup>12</sup> *Stevens v. Allstate Ins. Co.*, 2014 WL 1779478 (E.D. La. May 5, 2014), slip op.

<sup>13</sup> *Id.* at \*7.

although the Stevens “do not have documentation for everything they have spent so far, they have supplied testimony and evidence that demonstrates there is—at least—an issue of fact as to whether Allstate underpaid them for the actual cash value of the damaged part of their house.”<sup>14</sup>

In fact, in many cases, invoices and receipts are the least reliable evidence of loss – if they even exist or are available.<sup>15</sup> Invoices and receipts from general contractors in particular are not itemized in the same way as an adjuster’s estimate. The availability of invoices and receipts together with the lack of itemization is problematic if such documents are being relied on to determine the loss. If receipts were used to determine the loss they would need to be painstakingly reviewed, if that were even possible, to determine whether the repairs and replacements were of like kind and quality for like use, whether they were for full or partial repair or replacement, whether the item repaired or replaced was covered by the policy, whether the invoice reflected appropriate sales tax and contractor overhead and profit (if applicable) and a multitude of other considerations too numerous to list. For these reasons, invoices, receipts and cancelled checks, which are often demanded by the carrier, are usually irrelevant because they are of no benefit to the trier of fact in determining the proper amount due under the SFIP which is fixed and determined at the time of the loss. In reality, it does not matter how much the insured spends on repairs because in most cases, the amount spent does not have any probative value in proving how much the insured is entitled to receive under the SFIP. Finally, if receipts were used to determine the loss, the plaintiffs would be required to expend not only the entirety of the inadequate funds they received from their insurer but also expend their savings or borrow the funds in order to completely repair

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<sup>14</sup> *Id.* at \*5.

<sup>15</sup> Although plaintiffs do not think that the repair documentation is relevant in most cases, plaintiffs have agreed to produce any documentation of repairs that is in their client’s possession, in order to encourage resolution of these cases.

the dwelling and then hope for reimbursement from their insurer. Neither policy nor the law place such an impractical, and in many cases impossible, burden on the plaintiff.

### **Valuing the Loss**

Both parties have had an opportunity to inspect the subject property. What is at issue in these suits is the difference between two estimates written by equally qualified NFIP estimators. The amounts spent by insureds to make the dwelling livable, if it even has been made livable, do not determine the amount of the insureds damages. The amount of damages is “(1) The building limit of liability shown on your Declarations Page; (2) The replacement cost of that part of the dwelling damaged, with materials of like kind and quality and for like use; or (3) The necessary amount actually spent to repair or replace the damaged part of the dwelling for like use.”<sup>16</sup> When the repairs are not yet complete the only way to determine the proper value is to use the replacement cost as estimated by an NFIP adjuster. Alternatively, it is always proper to award the actual cash value without regard to amount actually spent. By analyzing the two estimates both generated by NFIP certified adjusters the insurer can properly value the claimant’s loss.

### **Burden of Proof**

The insured has the burden of proving his loss.<sup>17</sup> But where it is claimed that a limitation is effective to reduce the recovery of the insured, the burden is upon the insurer to establish that the limitation clause is applicable. Any ambiguities are to be resolved in favor of the insured.<sup>18</sup> Paragraph V.2.a.(3) limits the insured’s recovery to “necessary” amounts actually spent to repair or replace the damaged part of the dwelling for like use. The term “necessary” is not defined by

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<sup>16</sup> 44 C.F.R. Art. 61 App. A(1) VII (V)(2)

<sup>17</sup> *Couch, id.* at § 175.92.

<sup>18</sup> See *Ebrahimian v. Nationwide Mut. Fire Ins. Co.* 960 F. Supp. 2d 405;



the SFIP and there appears to be no case law interpreting the term as it is used in this section of the SFIP. The clause “necessary amount actually spent” lends itself to several constructions. One reasonable construction of this clause is that if the repair or replacement was not completed of like kind and quality for like use, such repairs being the “necessary” repairs contemplated by the replacement cost loss settlement provisions of the SFIP, this limitation should not apply. In other words, if the insured does not complete the repairs, or, if completed, the repairs are not of like kind and quality for like use, the limitation should not be applied. Otherwise, the insurer will receive a windfall since the insured paid a premium for replacement cost coverage. In *Stevens v. Allstate Ins. Co.*, 2014 WL 1779478 (E.D. La. May 5, 2014), slip op, the Eastern District of Louisiana district court discussed the law which governs interpretation of provisions in SFIPs by citing to the Fifth Circuit in *Worthen v. Fid. Nat’l Prop. & Cas. Ins. Co.*, 463 F. App’x 422, 426 (5<sup>th</sup> Cir. 2012) as follows:

Although federal law governs SFIPs, “general principles of state insurance law may be useful” in interpreting them. *Id.* at 425. Those general principles include:

(1) if the language of a policy is clear and unambiguous, it is accorded its natural meaning; (2) if the meaning of a policy provision is susceptible to different constructions, the one most favorable to the insured prevails; (3) insurance contracts are to be reasonably construed in accordance with the objective and intent of the parties; (4) in determining the most reasonable construction of contested provisions, the court may draw from the provisions, the policy as a whole, and the apparent objectives of the parties in entering the contract; and (5) in the end, if the meaning of the policy terms remains unclear, the policy is generally construed in the insured's favor to promote the policy's objective of providing coverage. *Id.* at 425–26.

*Stevens* at 3.

Defendants have asserted in several cases before this Court that because the insureds have returned to their dwellings, the repairs must necessarily be complete. This sweeping generalization, which is based on the mere assumptions of counsel, is completely untrue. The fact that some plaintiffs have chosen to reoccupy their homes does not mean that all damaged items,

as contained in the estimates of their experts, have been fully repaired. The burden to prove that all repairs have been completed satisfactorily falls on the defendants since the defendants seek to limit the plaintiffs' recovery to these allegedly "complete" repairs.

**CONCLUSION:**

The loss provision cited by the defendants applies only where it can be shown affirmatively that an item was "actually spent to repair or replace the damaged part of the dwelling for like use." The limitation would apply to the amount actually paid for that item. *This limitation has no application at all where payment is sought under the policy on an "actual cash value" basis.* A claimant is not limited to the amounts actually spent unless the defendant can prove that the amounts actually spent *fully* repaired all items of damage caused by the flood. As defined by the policy, fully repaired means repairs or replacement of like kind and material for like use. A claimant is within his or her rights under the policy to seek the actual cash value of his or her loss without any regard for repairs already made, thereby making all evidence of actual repair costs irrelevant. There is nothing preventing the defendants from evaluating and mediating these claims on the basis of comparing a plaintiff's estimate with his or her carrier's estimate. Indeed, that is the precise method that has resulted in the settlement of tens of thousands of Sandy flood cases.

Respectfully submitted,

**MERLIN LAW GROUP**

/s/ Javier Delgado  
Javier Delgado (NY #527998)  
100 Park Avenue, 16<sup>th</sup> Floor  
New York, NY 10017  
Telephone: 212-351-5017  
Facsimile: 212-880-6499  
Plaintiffs' Liaison Counsel

**GAUTHIER, HOUGHTALING &  
WILLIAMS, L.L.P.**

/s/ Tracey Rannals Bryan  
Tracey Rannals Bryan (LA #22560)  
3500 N. Hullen Street  
Metairie, LA 70002  
Telephone: 504-456-8600  
Facsimile: 504-456-8624  
Plaintiffs' Liaison Counsel

# **ATTACHMENT 11**

Flood Issues from Defense Perspective (July 30, 2014)

## MEMORANDUM

TO: DNJ Mediators and Arbitrators

FROM: William Treas  
Nielsen, Carter & Treas, LLC

DATE: July 23, 2014

RE: **JULY 30, 2014 CLE TRAINING OF MEDIATORS AND ARBITRATORS**

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The following submission is a brief introduction to the key issues involved in mediating National Flood Insurance Program (NFIP) claims disputes. As a first and foundational point, these claims are not governed in any sense by New Jersey State insurance law. They are not governed by the doctrine of reasonable expectations, or by the rules of notice prejudice, or the rules of substantial compliance. None of those principles have any materiality to NFIP litigation. Nor do any claims of reasonable detrimental reliance, or estoppel. See *Federal Crop Ins. Co. v. Merrill*, 332 U.S. 380 (1947), and *Heckler v. Community Health Services*, 467 U.S. 51 (1984). These cases are purely objective exercises governed by federal law, along with standard (meaning nationally uniform) principles of insurance law.

The maxim penned by Justice Oliver Wendell Holmes that, “Men must turn square corners when they deal with their government,” is the foundation upon which these cases are handled. See *Rock Island A.&L.R. Co. v. United States*, 254 U.S. 141 (1920). Critically, much of what might pass for appropriate behavior (in some person’s eyes) in private insurance, constitutes a violation of the U.S. False Claims Act, as well as various U.S. Supreme Court precedents, in a context of federal insurance programs. These are important points, because unfortunately, it does appear that there are significant issues of misrepresentation involved in a very large percentage of the NFIP cases currently pending in the EDNY.

This paper's focus will be a brief recitation of the key issues that must be addressed along the path of getting an NFIP lawsuit resolved. Within the strictures of this important and 40+ year old federal program, such is indeed the defendant WYO Program carriers' objective.

**ISSUES FOR THE PREPARATION OF MEDIATORS AS TO THE  
NATURE OF RISK FOR A WYO CARRIER**

An effective mediator looks for what makes a party feel at risk. Once understood, the effective mediator uses this information to persuade the parties to lessen that risk by settling the dispute. The DNJ is no doubt serious about wanting its mediators to be well prepared, and certainly, to be effective. For this to happen in the NFIP cases, those mediators need to know how an NFIP-WYO carrier gains risk, or lessens risk.

A WYO carrier lessens its risk by settling NFIP cases within FEMA's views of FEMA's regulations.<sup>1</sup> Plaintiffs and their counsel in the NFIP cases may make all the arguments *they* wish concerning how *they* construe or interpret FEMA's rules. They can pull out a lone FEMA Manual provision and grab a snippet here, or a partial phrase there, or claim that some WYO carrier in some other case somewhere, did settle with them as to this or that point. They can even cite some district court case from somewhere that disagrees with FEMA's views. They can tell long stories about how wind cases are settled. That is all fine. However, these types of arguments rarely lead to settlements against experienced NFIP defense counsel, and they certainly do not lead to settlements at volume. They lead to trials, which then often lead to appeals. Most often, on an NFIP appeal, the insured loses out.<sup>2</sup>

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<sup>1</sup> An agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation it interprets." *Stinson v. United States*, 508 US 36, 45 (1993).

<sup>2</sup> This is precisely what happened recently to the insured in *Decosta v. Allstate Ins. Co.*, 730 F.3d 76 (1st Cir. 2013), wherein the district judge refused to allow the WYO carrier to conduct discovery, and refused to abide any of FEMA's rules governing that case. It is the hope of this submission to be candid, so as to avoid such occurrences wherever possible.

If the Court's mediators push settlements that are not in accord with FEMA's rules, few settlements will happen. This is because WYO carriers entering into such settlements risk a FEMA audit wherein FEMA rejects the carrier's decisions, and requires the carrier to reimburse FEMA for the entirety of any improper payments made. It is safer for a WYO carrier to simply let the Court rule at a trial upon the merits, and then to pursue an appeal if warranted, than to agree to a settlement not in accord with FEMA's views of FEMA's rules.

The substantive laws predicated all of this should be examined thoroughly by the mediators. Two different sets of laws are in play:

First, the mediator must examine the regulations that govern the NFIP-WYO Program. These make clear that a WYO carrier is the Government's "fiduciary," and that its duty is to "assure that any taxpayer funds are accounted for and appropriately expended." 44 C.F.R. Pt. 62.23(f). *See also* 44 C.F.R. Pt. 62.23(i)(2), which states in part, "It is important that the company's Claims Department verifies the correctness of the coverage interpretations and reasonableness of the payments recommended by the adjusters." Please consider also that within the Arrangement between FEMA and all WYO carriers, which is itself a federal law, the Arrangement provides at 44 C.F.R. Pt. 62, App. A, Art. II(G), that, "The company shall comply with written standards, procedures, and guidance issued by FEMA or FIA relating to the NFIP and applicable to the company." These are non-discretionary legal duties governing disbursements of federal funds. At bottom, WYO carriers facing NFIP litigation cannot settle those cases without first "verifying" all damages being claimed. A WYO carrier cannot just take a public adjuster's word for it.

Second, the mediator must give due consideration to the Improper Payments Information Act of 2002, and the Improper Payments Elimination and Recovery Act of 2010. ("IPIA" and

“IPERA”). These federal laws contain nondiscretionary Congressional mandates that apply to FEMA, which require it to require WYO carriers to reimburse to FEMA, any payments made that are not properly documented in accordance with agency rules and regulations. For example, if a WYO carrier were to engage in traditional “split the baby” type settlements as might occur routinely in private insurance litigation, this would constitute a direct violation of both the IPIA and the IPERA.

An effective NFIP mediator will also have to understand this: Pursuant to FEMA’s rules, and without litigation, 99% of the NFIP claims arising from Hurricane Sandy have already been successfully resolved. This Court is only reviewing the claims of 1% of the total claims that arose within the counties that comprise the EDNY. Wholly apart from whether the individuals within that 1% are right or wrong, it would be inappropriate, wrong and obviously contrary to the underlying substantive laws, to afford to the 1% a different or better deal under this Program beyond what was received by the 99%. The SFIP is just that – a standard federal insurance policy that is the same exact policy for everyone.

The mediator should also understand that WYO carriers view the word “settlement” in this context as a misnomer. An NFIP insured’s lawsuit is more properly described as a continuation of the NFIP claims process. If all conditions to the lawsuit were met, and if more is actually owed under the Program’s rules, then it should be paid. But, “splitting the baby” just to make cases go away is not a part of this federal program. Candidly, it’s illegal.

In the same vein, nothing in this submission should be construed as conveying a belief that “it’s FEMA’s way or the highway.” Congress adopted 42 U.S.C. §4072, which gives the courts exclusive jurisdiction over disputes of this type. Wherever an NFIP insured/plaintiff disagrees with FEMA’s view, the courts are authorized by Congress to resolve that dispute. The

sole point being made is that a WYO carrier is not a court. It is not empowered by ANYTHING in either the statutory or regulatory scheme to take a position contrary to FEMA's, or to disburse federal funds in a manner not approved by FEMA.

### **SPECIFIC COMMON LEGAL ISSUES AND DEFENSES**

Presented in no particular order, the following are commonly occurring legal issues and defenses in NFIP cases. To avoid repetition, issues that are a fixture of standard principles of insurance law (such as that no one may profit from an insurance claim) are addressed in the separate submission of the wind carriers.

1. Is the suit time barred? FEMA did extend its regulatory deadline for the filing of a proof of loss from 60 days to 24 months for Hurricane Sandy claims. 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(4). However, this extension of a regulatory rule has no impact upon, or relation to, the statutory deadline for filing NFIP lawsuits established by Congress at 42 U.S.C. §4072, and incorporated into both FEMA's regulations and each plaintiffs' SFIP. *See* 44 C.F.R. Pt. 61, App. A(1) Art. VII(R), and 62.22(a). FEMA Bulletin W-13069 explaining this exact topic is attached hereto as Exhibit A.
2. Were all damages from prior flood events, for which an NFIP claim was paid, completely repaired? A currently unknown number of the Sandy litigants may have also had NFIP claims from Hurricanes Irene or Lee. NFIP rules concerning paying for the same damage twice require the WYO carrier to determine whether prior repairs were in fact completed in these situations.
3. Did the plaintiff comply with all conditions precedent to the filing of the lawsuit, before filing that lawsuit? *See* 44 C.F.R. Pt. 61, App. A(1), Art. VII(R). The most notable of these requirements is FEMA's proof of loss rule. *Id.*, at SFIP Article



VII(J)(4). An explanation of the strictness with which this rule is enforced by the appellate courts is to be found in the following recent cases: *DeCosta v. Allstate Ins. Co.*, 730 F.3d 76, 81-86 (1st Cir. 2013); *Jacobsen v. Metropolitan Prop. & Cas. Ins. Co.*, 672 F.3d 171, 175 (2nd Cir. 2012); *Suopys v. Omaha Prop. & Cas.*, 404 F.3d 805 (3rd Cir. 2005); *Dickson v. American Bankers Ins. Co. of Florida*, 739 F.3d 397 (8th Cir. 2014).

4. Coupled with the proof of loss requirement is FEMA's supporting documentation requirement found at 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(3) and 4(f) and (i). As numerous courts have held, the pre-suit documentation submitted with the proof of loss as its support, must be sufficiently detailed that it genuinely allows the WYO carrier to perform its job as the Government's fiduciary, to determine the underlying basis of the claim, before a lawsuit is filed. See e.g., *Sun Ray Village Owners Association v. Old Dominion Ins. Co.*, 546 F.Supp. 2d 1283 (N.D.Fla. 2008); *Trosclair v. State Farm*, 2008 WL 5157715, \*3 (E.D.La., Dec. 9, 2008); *Treme Cottages, Inc. v. Fidelity*, 2008 WL 4974660, \*1 (E.D.La., Nov. 19, 2008); and *Wells v. Fidelity*, 2008 WL 2781539, \*3-4 (E.D. La., July 14, 2008). One obvious purpose of this rule is to avoid the cost of unnecessary lawsuits. It does not work to submit the proof of loss and supporting documentation post-lawsuit.
5. Limited Scope of Coverage. The NFIP/SFIP is a "single risk" insurance policy. *Wagner v. Dir., FEMA*, 847 F.2d 515, 521 (9th Cir. 1988). It only covers "direct physical loss by or from flood." 44 C.F.R. Pt. 61, App. A(1), Art. II(B)(12). This provision further states that, "there must be evidence of physical changes to the property." And, because of numerous restrictions, conditions and exclusions

contained throughout the SFIP, many of which are designed to facilitate and bolster FEMA's mitigation and flood plain management initiatives, there are many instances where damages that can indeed be traceable to a "but for" causal relationship to the flood, are nevertheless not covered by this federal program. *See e.g.*, the earth movement exclusion of the SFIP. *West v. Harris*, 573 F.2d 873 (5th Cir. 1978), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1424 (1979). Simply put, just because the flood did cause it, does not necessarily mean it is covered.

6. The Loss Settlement Clause. 44 C.F.R. Pt. 61, App. A(1), Art. VII(V). Recognizing the standard insurance law doctrine that no one should "profit" from insurance, FEMA's loss settlement clause provides that a claimant may only receive the lesser of (1) policy limits, (2) the actual cost of repairs, or (3) the estimated cost of repairs. *See e.g.*, *Mathews v. State Farm Fire and Cas. Co.*, 2007 WL 2127581, \*2 (E.D.La., July 24, 2007). In many instances, given the amount of time that has passed since Hurricane Sandy, repairs will have already been completed. In those situations, the cost of repairs is a far more relevant indicator of the proper value of the claim than are professional estimators' estimates. *LaCroix v. State Farm Fire and Cas. Co.*, 2010 WL 226557, \*4 (E.D.La., June 2, 2010).<sup>3</sup> In similar fashion, wherever a claim was also made for wind damage, no insured may recover from both their wind and flood policies, an amount that exceeds the value of their structure. *Bradley v. Allstate Ins. Co.*, 620 F.3d 509, 523 (5th Cir. 2010).
7. Mass produced estimates. Early settlements will not happen in NFIP cases predicated on mass produced estimates and proofs of loss where policy limits are claimed in every single claim, and inflated costs are included for repair items on every single

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<sup>3</sup> Indeed, once the work is done, estimates are irrelevant.

claim, regardless of need, and without any individual consideration of whether or not that repair would actually occur in that particular home. These efforts are dubious at best, and do not reflect the individualized judgment required by the SFIP at 44 C.F.R. Pt. 61, App. A(1), Art. VII(J)(5). In some cases, these mass produced repair estimates are almost double the entire value of the building. Examples of this type of problem resulting in the dismissal of the insured's lawsuit, include *Donovan v. Fidelity Nat'l Property & Casualty Co.*, 2014 WL 50811 (S.D.Tex, Jan. 7, 2014.); *Charnock v. Fidelity*, Docket #3:10-mc-07015 (S.D.Tex., Jan. 7, 2014); and *Pye v. Fidelity*, 2014 WL 496520 (S.D. Tex., Feb. 6, 2014).<sup>4</sup>

8. Appraisal. 44 C.F.R. Pt. 61, App. A(1), Art. VII(P). Via the appraisal clause, FEMA has adopted by regulation its own form of Alternative Dispute Resolution (“ADR”). *Id.* The process works well when its standards are respected. *See* however, *Decosta, supra*. Prior to appraisal, the parties must achieve agreement on all issues of claims presentment, coverage and scope. *De La Cruz v. Bankers*, 237 F.Supp.2d 1370, 1374 (S.D.Fla. 2002). Only pricing disputes may be presented on appraisal. Further, the parties must actually submit “qualified” and “disinterested” appraisers. Where the process is used appropriately, it is very effective at moving files. FEMA Bulletin W-13029, which explains the process in detail, is attached as Exhibit B.
9. FEMA Waivers. The defendant WYO Program carriers have no more power to waive or not enforce a rule of this Program than do the courts.<sup>5</sup> The sole power of waiver of the regulations rests with FEMA. 44 C.F.R. Pt. 61, App. A(1), Art. VII(D). FEMA is

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<sup>4</sup> The *de minimus* judgment in *Pye* for \$2,500.00 for car parts has been appealed to the Fifth Circuit. Car parts are not covered under the NFIP as per Article IV(5) of the SFIP.

<sup>5</sup> *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (limitations on judicial power to issue judgments payable in federal funds).

known to grant additional individual waivers of the timeframe for compliance with its proof of loss requirement in certain circumstances, provided all parties have at all times acted in good faith, provided that the parties achieve a complete agreement as to all matters in litigation such that after the waiver is granted, the lawsuit is promptly dismissed, and provided, the waiver request comes early, before FEMA is put to the expense of having to pay both a large litigation bill, and the claim itself. In the past, FEMA officials have expressed their disdain for being asked to pay for both a large litigation bill, and then the claim. Understandably, they would rather just pay one or the other.

10. Exclusion for Post-FIRM elevated buildings. Given that coastal areas were impacted, FEMA's exclusion in the SFIP for damage to the lower area of post-FIRM elevated buildings (44 C.F.R. Pt. 61, App. A(1), Art. II(23) and Art. III(a)(8) and (b)(3) will be an issue. There are various ways that a building might be elevated; thus, no single across the board ruling is possible. For an example of a court applying FEMA's rules to a particular structure, see *Ayers Realty Co., LLC v. Selective Ins. Co. of Southeast*, 2014 WL 807509 (M.D.Pa., Feb. 28, 2014).
11. Basements. Examples of cases applying FEMA's rules concerning basements are as follows: *McGair v. American Bankers Ins. Co.*, 693 F.3d 94 (1st Cir. 2012); *Benbenek v. Fidelity Nat. Prop. and Cas. Ins. Co.*, 2013 WL 5366395 (S.D. Ind., Sept. 24, 2013); and *Oaks v. Allstate Ins. Co.*, 2006 WL 3328179 (E.D.Ky., Nov. 14, 2006). In the SFIP, a basement is defined as, "Any area of the building, including any sunken room or portion of a room, having its floor below ground level (subgrade)

on all sides.” 44 C.F.R., Pt. 61, App. (A)(1), Art. II(B)(5). As a simplistic rule of thumb, if it holds water, it’s a basement.

12. Earth Movement. There are times when a flood is indeed the “but for” cause of differential settlement which leads to significant and expensive damage to an insured structure. Many times, however, damages of this type are actually pre-existing. In either situation, the damage is not covered under this Program, even where the flood is indeed the “but for” cause of substantial structural damage. For cases applying this exclusion, see *West v. Harris, supra*; *Sadowski v. NFIP*, 834 F.2d 653 (7th Cir. 1987) and *Wagner v. Director, FEMA*, 847 F.2d 515 (9th Cir. 1988).
13. Misrepresentation. As per SFIP Article VII(B), misrepresentation voids the policy. If there is a misrepresentation or a false statement by the insured, or by anyone acting for the insured as his or her “agent,” then the policy is void. Even if the misrepresentation or false statement occurs on just the building claim or the contents claim, no aspect of a claim upon the SFIP may be paid once this article has been triggered. Currently, FEMA’s Office of Central Counsel and the U.S. Attorney’s Office for the Eastern District of New York and the District of New Jersey are examining how the Government will respond to the questions of misrepresentation that are arising in a large number of currently pending cases in New York and some in New Jersey.
14. Direct Physical Loss from Flood. As per SFIP Article III, the flood policy sets forth the list of items of property that are covered “against direct physical loss by or from flood.” The SFIP defines this term as “Loss or damage to insured property, directly caused by flood. There must be evidence of physical changes to the property.” as per

SFIP Article II(B)(12). The two key terms are “directly caused by flood” and “evidence of physical changes.” The Courts have held that in order to be covered under the SFIP, the item of property must have been damaged directly by flood waters. Just because something gets wet from flood waters does not mean that it is automatically covered under the SFIP. There must be damage evidenced by physical changes to the property, i.e. claims for gutters, plumbing, toilets, brick, etc.

15. Increased Costs of Compliance (ICC)/Substantial Damage. As per SFIP Article V(A)(6), the flood policy excludes from coverage the cost of complying with any ordinance or law requiring or regulating the construction, demolition, remodeling, renovation, or repair of the property. The SFIP does however offer assistance up to \$30,000 for the insured if their property was substantially damaged (the most common situation). SFIP Article III(D) sets forth all of the eligibility requirements and prerequisite conditions.

For purposes of this memo and the most common occurrence, if a particular building has been deemed by the local township or county, in conjunction with the local flood plain manager, that is substantially damaged and issues a substantial damage letter or determination, an insured may be eligible for an ICC claim. This may include elevating, demolishing, or relocating the building. This is a separate claim under the SFIP but cannot exceed the maximum allowed under law, i.e. \$250,000 for residential dwellings.

16. Constructive Total Loss. The SFIP is not a valued policy as per Article II(B)(28). As such, any expert opinion that the building is a constructive total loss or it would be more economical to tear down the home and rebuild a new one does not afford policy

limits or any consequential remedies under the SFIP. As stated above and in the SFIP, the policy only pays for items covered under the SFIP and that were damaged from direct physical loss by or from flood.

### CONCLUSION

Two different dynamics are involved stemming from the two different branches of the Federal Government that are involved here, depending upon whether the NFIP cases end in mediation, or in trial and eventual appeal. In all things relating to the mediations, it is FEMA's view which is absolutely controlling. The Court's opinion, and certainly that of any mediator, must defer to FEMA's view of FEMA's regulations if a case is to be voluntarily resolved at mediation. Conversely, if these cases are to proceed to trial, then it is the Court's opinion that will control, subject to any ensuing appeal.

The defense counsel for the WYO carriers, in the context of mediation, have literally no choice but to advocate and abide FEMA's view of FEMA's rules, and to decline all overtures for settlements that are not accord with FEMA's rules.

In closing, defense counsel would respectfully remind all involved in the NFIP cases that the judiciary is not empowered to grant a monetary remedy against the Federal Treasury that the Congress has not itself sanctioned. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). Congress, at 42 U.S.C. §4013, delegated exclusive rulemaking authority to FEMA to decide the scope of coverage. At 42 U.S.C. §4019, Congress delegated to FEMA exclusive authority to decide all rules governing the presentment of claims. Based upon these two statutes, it is only FEMA's rules that provide the necessary predicate for a judicial award of United States Treasury funds. Either the rules have been followed and an award may be made, or the rules have not been followed, and an award may not be made.

Respectfully submitted,

NIELSEN, CARTER & TREAS, LLC

/s/ William T. Treas

William T. Treas, LASB No. 26537  
3838 N. Causeway Boulevard, Suite 2850  
Metairie, Louisiana 70002

(T): (504) 837-2500

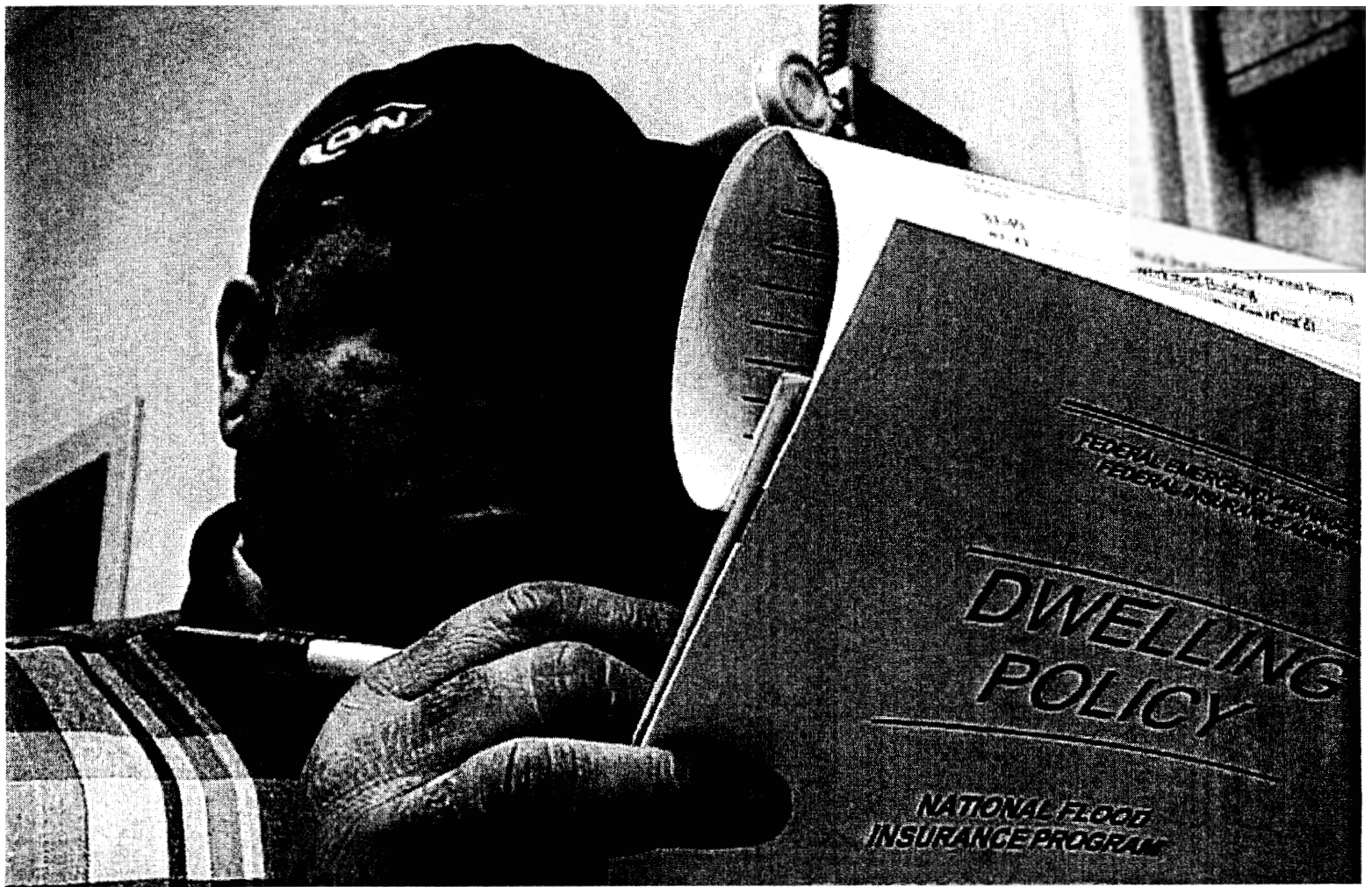
(F): (504) 832-9165

Email: [wtreas@nct-law.com](mailto:wtreas@nct-law.com)



# **ATTACHMENT 12**

NFIP Adjuster Claims Manual: Table of Contents (Revised June 2010)



National Flood Insurance Program

# Adjuster Claims Manual

December 2000

Revised January 2002

Revised January 2004

Revised June 2010



**FEMA**

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## FEMA Claims Guidance

- a. Interplay Between the Extension of the Proof of Loss Deadline for NFIP – Insureds Damaged By Sandy and the 1-Year Statute of Limitations (November 21, 2013)
- b. Claim Guidance - Sandy Supplemental Claims (May 16, 2013)
- c. Proper Invocation and Usage of the Appraisal Clause Provisions in the Standard Flood Insurance Policy (May 15, 2013)
- d. Water, Moisture, Mildew, or Mold Damage (February 15, 2013)
- e. Conditional and Partial Waiver of Loss Requirement in SFIP and One Year Extension (November 9, 2012)
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- g. Flood Insurance Claims Guidance (September 25, 2008)
- h. Flood Damage-Resistant Materials Requirements-Technical Bulletin 2 (August 2008)
- i. Wind/Water Investigative Tips (February 25, 2008)



**FEMA**

W-13069

November 21, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the  
National Flood Insurance Program (NFIP) Direct Servicing Agent

A handwritten signature in cursive script, appearing to read "James A. Sadler".

FROM: James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program

SUBJECT: **Interplay Between the Extension of the Proof of Loss Deadline  
for NFIP-Insureds Damaged By Meteorological Event Sandy  
and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R,  
Suit Against Us)**

Questions have been presented to FEMA concerning how the granting of the extension of the Proof of Loss deadline for National Flood Insurance Program (NFIP) policyholders damaged by Meteorological Event Sandy (ME Sandy) established by FEMA by regulation in the Standard Flood Insurance Policy (SFIP) interplays with the 1-year statute of limitations for an insured to bring a lawsuit established by Congress in 42 U.S.C. § 4072. FEMA is providing this Bulletin as an explanation to insurers of how the extended Proof of Loss deadline interacts with the 1-year statute of limitations established by statute. A brief review of the factual background is provided to put FEMA's guidance in context.

The SFIP is itself a Federal regulation promulgated by FEMA, which has three forms. The Dwelling form is found at 44 C.F.R. § 61, Appendix A(1); the General Property form is found in Appendix A(2); and the Residential Condominium Building Association Policy (RCBAP) form is found in Appendix A(3). In these regulations, FEMA established the 60-day Proof of Loss deadline. See Section VII(J) of the Dwelling and General Property forms and Section VIII(J) of the RCBAP form. The Associate Administrator of the Federal Insurance and Mitigation Administration (FIMA, a division of FEMA) has the authority to grant waivers of and extend the Proof of Loss deadline pursuant to 44 C.F.R. § 61.13(d). See also 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(D), and Appendix A(3), Section VIII(D).

Congress, in enacting the National Flood Insurance Act of 1968, as amended, (42 U.S.C. § 4001, *et seq.*) enacted a 1-year statute of limitations for an NFIP policyholder to bring a lawsuit after denial/disallowance or the partial denial/disallowance of the policyholder's claim. See 42 U.S.C. §



**Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)**

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4072. This 1-year statute of limitations was incorporated into the SFIP by FEMA. See 44 C.F.R. § 61, Appendices A(1) and A(2), Section VII(R), and Appendix A(3), Section VIII(R).

On November 12, 2012, FEMA issued Bulletin w-12092. Bulletin w-12092 did several things, but two items are primarily relevant for this Bulletin.

First, Bulletin w-12092 granted a limited waiver of the Proof of Loss requirement to allow payment of an undisputed amount based solely on an adjuster's report and insurer's approval without the SFIP-required Proof of Loss. In the event the insured disagreed with the payment received, the policyholder was (and is) required to send a Proof of Loss meeting the requirements of the SFIP with documentation supporting the additional amounts sought.

Second, Bulletin w-12092 waived the 60-day deadline to submit the SFIP-required Proof of Loss and granted a 1-year extension from the date of loss to send the Proof of Loss for the additional dollar amount(s) sought to the insurer. The insurer then evaluates the Proof of Loss and documentation and may pay the entire amount, partially pay and partially disallow/deny the amount, or entirely disallow/deny the amount sought for the items submitted in the Proof of Loss. The denial or disallowance, in whole or in part, must be in writing from the insurer. The insurer's letter should clearly state it is denial or disallowance and alert the insured of the remedies available, including litigation within 1 year from the date of the letter.

More recently, in FEMA Bulletin w-13060a, FEMA issued an additional extension of the Proof of Loss deadline, allowing an additional 6 months for an insured to submit the SFIP-required Proof of Loss with supporting documentation for any additional amounts sought. In total, FEMA extended the Proof of Loss deadline from 60 days to 1 ½ years for ME Sandy. This is an unprecedented action by FEMA that reflects FEMA's commitment to facilitating the ability of individuals insured by the NFIP to seek payment.

Unlike the SFIP Proof of Loss deadline, which is a regulation created by FEMA, FEMA cannot extend the time limit for NFIP-insureds to bring a lawsuit. The applicable time limit to file a lawsuit was set by statute, not FEMA. Although FEMA has the administrative authority to extend the Proof of Loss deadline it established by regulation, FEMA lacks the authority to extend the time limit to file a lawsuit established by statute. This statute of limitations has never been extended.

It is important to understand that the Proof of Loss is not the claim. The claim is the assertion by the insured that they are entitled to be paid for a covered loss under their SFIP (i.e., the demand for money). An NFIP policyholder whose insured property is damaged by an event such as ME Sandy only has one claim arising from that event, regardless of the number of Proofs of Loss that the insured may submit in support of that claim.

Even in the instance of an Increased Cost of Compliance (ICC) claim under Coverage D of the SFIP (which is not an indemnity claim because the coverage is not triggered by the physical loss from the flood but by a determination by the NFIP community that the building has been substantially damaged and must be brought up to the community's current floodplain management guidelines),

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there is only one claim that arises from that substantial damage determination regardless of the number of Proofs of Loss submitted by the insured.

The SFIP sets forth the process that the insured has to follow in supporting his or her claim in the General Conditions section of each form of the SFIP (which is Section VII for the Dwelling and General Property SFIP forms and Section VIII for the Residential Condominium Building Association Policy or "RCBAP" SFIP form). For example, Section VII(J)(1) of the SFIP requires prompt written notice of the loss. Also, Section VII(J)(4) and its subparts set forth what information must be included for the Proof of Loss (which is the policyholder's statement of the amount of money demanded and submitted in support of their claim) and indicate that it must be sent within 60 days after the loss.

NFIP court rulings hold that if the insured does not comply with "all" of the terms and conditions of the SFIP prior to filing a lawsuit (including the Proof of Loss requirements), then the necessary conditions for the insured to be able to bring a lawsuit have not been met. What this means is that, in those instances in which a denial letter has been issued such that the statutory 1 year to bring the lawsuit will run before the Proof of Loss extended deadline runs, the insured has to both file the lawsuit and have the required Proof of Loss requirements completed within 1 year of the date of the denial or partial denial of the claim. This situation will typically arise when the insurer has determined that the insured has not suffered a "direct physical loss by or from flood" and there is no coverage under the SFIP. For example, if the insurer has determined that flood waters did not reach the insured building, a denial letter will be sent because there is no insured loss and no coverage under the SFIP.

In any event, FEMA requires NFIP insurers to continue to work with their insureds. The Program can pay additional amounts if properly supported, even if the formal Proof of Loss deadline has passed. FEMA does this through the granting of the insured's request of an individual waiver of the Proof of Loss deadline through the insurance company. The NFIP makes every possible effort to insure that a proper claims payment and resolution of the claim are achieved in every instance.

The limited waiver and extension of the Proof of Loss deadline recognizes the difficulties insureds damaged by ME Sandy experienced evaluating damage and supporting their flood insurance claim. The typical dispute arises after an insured has received payment based on an adjuster's report and the insurer's approval and later believes there is additional uncompensated damage. The 1 year to sue typically will not be triggered until the required Proof of Loss for the additional amount sought is submitted and there is a complete or partial disallowance/denial of the amount sought. However, as discussed above, there are instances when the claim may be denied for reasons that do not require an adjuster's report or Proof of Loss from the insured. Even in those claims where a denial letter was issued within the first 6 months after ME Sandy, the insured still had a full year from the date of that denial letter to collect all required documentation, file the proof of loss, and then file a lawsuit if such is believed necessary.

**Interplay Between the Extension of the Proof of Loss Deadline for NFIP-Insureds Damaged By Meteorological Event Sandy and the 1-Year Statute of Limitations in 42 U.S.C. § 4072 (VII,R, Suit Against Us)**

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The extended time to file the Proof of Loss is an effective mechanism that allows insureds to fully present their claims. For the majority of claims, disputes will not arise until after the submission of the Proof of Loss and formal denial of the amount sought. While FEMA does the most it can to assist NFIP insureds, it cannot and does not waive or extend the applicable statute of limitations.

**Conclusion:**

We ask for your full support. Any questions or comments should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at [Russell.Tinsley@fema.dhs.gov](mailto:Russell.Tinsley@fema.dhs.gov).

cc: Vendors, IBHS, and Government Technical Representative



**FEMA**

W-13027a

May 16, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the  
National Flood Insurance Program (NFIP) Servicing Agent

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

SUBJECT: **Claim Guidance -- Sandy Supplemental Claims**

As published in WYO Bulletin [w-12092a](#) on November 9, 2012, the Associate Administrator issued a conditional and partial waiver of the Standard Flood Insurance Policy's (SFIP) proof of loss time requirement, permitting the insurer to pay a loss based on the adjuster's payment recommendation and estimate after the insurer examines the adjuster's final report. In that instance, the proof of loss is conditionally and partially waived and the time requirement is extended to within one year after the date of loss. That bulletin issuance reduced the policyholder's paper burden, which allowed insurers' claim payments to be issued sooner, but because of the complexity, number, and severity of many Sandy claims, requests for additional payments exceeding the adjuster's payment recommendations were expected.

When a policyholder disputes the adjuster's payment recommendation and estimate, a written request for a supplemental claim should be submitted along with a completed, signed, and sworn-to proof of loss attaching all documentation to fully support the supplemental claim such as: paid receipts or invoices for completed repairs; itemized (room by room) contractor's estimate; photographs of damage or of repairs completed or in progress; and other relevant documents. If related to disputed foundation damage, determination of basement or post-FIRM elevated building as defined in the SFIP, a written report is required from a licensed professional engineer or licensed surveyor (if required by the State). However, when the insurer agrees to a minor correction on a paid claim, the insurer may issue payment on a closed claim file based on the submission of the adjuster's revised final report as set forth in FEMA Bulletin [w-12092a](#).

When a policyholder files a request for a supplemental claim payment, the insurer may find the following tips helpful, in addition to their existing claim handling procedures:

- After the insurer finds the proof of loss to be in order and fully documented, the insurer may authorize the claim representative to send an acknowledgement notice the policyholder. The acknowledgement notice should also inform the policyholder of the expected turnaround time needed to review their request. A copy should be sent to the insurer. If such a notice is sent before the insurer is satisfied the proof of loss is complete and the documentation fully supports the supplemental, any notice must include a full reservation of rights.
- An interim report should be sent to the insurer every 30 days until the adjuster's final report for the insured's supplemental claim is complete and submitted to the insurer.
- Mailed or emailed correspondence sent to the policyholder may be copied to the insurer in lieu of an interim report.

The purpose of acknowledging the supplemental claim and interim reporting is not only a courtesy to the policyholder, it also gives the policyholder and the insurer the assurance the supplemental claim is being handled and communication between the policyholder and the adjuster is taking place.

Bulletin w-12092a did not offer a blanket waiver of the proof of loss requirement: and when a proof of loss is submitted by the policyholder, all provisions of the SFIP will apply including the provisions in Section VII(J) and (M) of the Dwelling and General Property Form, and Section VIII(J) and (M) in the RCBAP SFIP Form. Therefore, it is important that the insurer receive any signed and sworn-to proof of loss sent directly to the adjuster or adjusting firm, and that the insurer and adjuster are aware of the number of days elapsed after the insurer's receipt of the policyholder's signed and sworn-to proof of loss and agreement with the amount.

The insurer may find the following helpful in resolving or documenting claims including supplemental claims:

1. In practice, the replacement of a single or fewer items is more expensive per unit than many more of the same items identical in quality and installation.
2. It is important to recognize factors unique to a building or the local community that may inflate the cost to repair, such as the proximity or availability of building supplies or qualified labor and workspace accessibility in, under, or around the building.
3. An estimate should detail the full scope of repairs and take into account other required labor or material components, when they are not considered part of the estimated removal and replacement allowance for an item ruined by flood water.  
EXAMPLE: REMOVE AND RESET A COUNTERTOP EVEN THOUGH IT WAS UNTOUCHED BY FLOOD WATER, WHEN THE BASE CABINET IS RUINED REQUIRING ITS REMOVAL AND REPLACEMENT
4. Explain the need for better craftsmanship or material quality, such as stain-grade versus paint-grade; special milled woodwork: hardwood vs. softwood; solid wood or wood veneer vs. laminated fiberboard; or faux finish or wall texturing vs. flat painted surfaces.
5. When a building tear-out invoice is itemized, but is separate from an estimate of repair, it is more effective if the insurance estimate substitutes the original single line item to remove and replace with two line items: one to remove and another to replace.

6. When the value of a supplemental claim is greater than documented by the policyholder, the request for additional information, such as a second (or third) itemized (room by room) estimate, or for a single item (or a group of estimated items), a detailed segregation of material costs and the quantity and price of labor, is fair and reasonable. If supporting documentation cannot be provided for an extended time, an insurer should suggest agreement with and payment of the undisputed amount and consider a future supplemental if necessary.
7. Sales tax should be applied to the unit price in an estimate for materials, as well as for labor when it is required by state, county, or municipal law. As a courtesy to the policyholder, the insurance estimate should be appropriately noted.
8. Electrical wiring – wet wiring will be replaced to the next dry connection (outlet, switch, receptacle, fixture, or junction box).
9. An allowance to re-nail, treat or re-strengthen existing metal fasteners at structural connections flooded by salt water should not be overlooked.
10. When free services were provided for building tear-out and contents debris removal, consideration of an allowance for construction material waste is reasonable. Attention should be given to FEMA Bulletin regarding Debris Removal [w-12090](#) issued on November 6, 2012.
11. When contents are involved in a supplemental claim, adjusters should be aware of FEMA Bulletin [w-12115](#), issued on December 19, 2012. If contents groupings were used in the initial claim payment, the entire detailed inventory should be submitted with photographs and all relevant documents to fully support the supplemental claim.
12. A supplemental claim solely based on an estimating program's periodic pricing update should not be paid.
13. Recommendations based on the adjuster's judgment are important to the NFIP claims process. However, when judgment creates an exceptional item, it should always be fully explained. This can be accomplished with a note in the adjuster's estimate, a photograph's annotation, correspondence from the adjuster to the insured, a comment in the adjuster's field scope notes, any narrative report, and the examiner's review notes. All of this should be made part of the claim file.

While the adjuster's estimate is only a payment recommendation and any assistance with the policyholder's proof of loss is only a courtesy, adjusters should always explain the claim process to the policyholders. It is expected that differences between the adjuster's recommended amount and the insured's supplemental request be explained, and the insured advised right away of any additional required documentation. With this in mind, the FEMA formal claims appeal process should never be suggested when proper claims handling can resolve differences. Communication with the policyholder is the key: acknowledging, following up, and informing of unforeseen delays as soon as they are anticipated. However, the policyholder is still responsible for proving the loss, only that portion of the supplemental that is fully supported can be paid, and the remaining claim must be denied.

Substantially Damaged Structures  
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FEMA fully appreciates the level of effort expended to assist the NFIP insured flood victims, and gratitude is extended to all program participants for their continued hard work during this extensive recovery process.

Any questions regarding this bulletin should be directed to Dan Thorne at [Anthony.Thorne@fema.dhs.gov](mailto:Anthony.Thorne@fema.dhs.gov).

Once again we ask for your cooperation.

cc: WYO Vendors, IBHS, Government Technical Representatives

Suggested Routing: Claims, selected Independent Adjusting Firms



**FEMA**

W-13029

May 15, 2013

MEMORANDUM FOR: Write Your Own (WYO) Principal Coordinators and the  
National Flood Insurance Program (NFIP) Direct Servicing Agent

A handwritten signature in black ink, appearing to read "James A. Sadler".

FROM: James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program

SUBJECT: **Proper Invocation and Usage of the Appraisal Clause Provisions in  
the Standard Flood Insurance Policy**

The Federal Emergency Management Agency (FEMA) administers the National Flood Insurance Program (NFIP) and promulgates all forms of the Standard Flood Insurance Policy (SFIP). There are three forms of the SFIP—the Dwelling Form, the General Property Form, and the Residential Condominium Building Association Policy (RCBAP)—which are promulgated and found at 44 C.F.R. § 61, Appendixes A(1), A(2), and A(3), respectively.

Each form of the SFIP contains an Appraisal clause in its General Conditions (Section VII (P) (in the Dwelling and General Property Forms), and Section VIII (P) in the RCBAP). FEMA is issuing this bulletin to provide guidance regarding when the Appraisal clause may be used, and what the necessary conditions are for invoking it.

The text of the Appraisal provision states the following:

**P. Appraisal**

If you and we fail to agree on the actual cash value or, if applicable, replacement cost of your damaged property to settle upon the amount of loss, then either may demand an Appraisal of loss. In this event, you and we will each choose a competent and impartial appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the State where the covered property is located. The appraisers will separately state the actual cash value, the replacement cost, and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon will



be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of actual cash value and loss.

Each party will:

1. Pay its own appraiser; and
2. Bear the other expenses of the Appraisal and umpire equally.

The SFIP Appraisal process is a mechanism for resolving only disputes regarding the dollar amounts to be paid for flood damages covered by the SFIP. The Appraisal process **cannot** be used as a method to determine scope of damage, coverage under the SFIP, or causation of damages. FEMA has had this rule in place in the Adjuster Claims Manual for many years. (See pp. V-33 (Dwelling Form commentary), V-71 (General Property Form commentary), and V-107 (RCBAP commentary) in the Adjuster Claims Manual.)

Further, FEMA believes that the Appraisal clause is one of the last resorts available for attempting to resolve a claim (initiating a lawsuit being the last resort) and it should not be used instead of the claims adjusting process. FEMA encourages the insured and the insurer to exhaust all other avenues available to determine the fair price for an agreed-to scope of loss. This includes the insured obtaining and providing all estimates (or if repairs or replacement has already occurred, actual receipts or invoices), photos, and any other relevant documentation or written narrative explanation that may support what the insured is claiming as a fair price of the agreed-to scope of loss.

For the Appraisal clause to be properly invoked, the following conditions must be met prior to the parties using the Appraisal process:

1. The named insured and the issuer of the SFIP must agree to the scope of loss and damages. This means that there must be a list of damaged items (the scope) that both parties agree were damaged by the flood event and covered by the SFIP. If the insured and insurer cannot agree on the scope of loss, then the Appraisal provision cannot be invoked. This means that a claim cannot be partially resolved by the Appraisal process and partially resolved by other means (such as an appeal to FEMA or through litigation). Appraisal can only be used when it will result in complete resolution of the entire claim.
2. The insured must have submitted a timely and complete Proof of Loss with supporting documentation for the items which the insured is seeking Appraisal. If an insured submitted a Proof of Loss for a dollar amount of damages and the insurer paid that amount in full, the Appraisal clause cannot be invoked because there is no dispute between the insured and insurer as to the scope of loss or pricing.

3. Appraisal is available only when the dispute between the parties involves the price to be paid for an SFIP-covered flood-damaged item. No other dispute of any type (e.g., coverage, scope, or causation) can be submitted to Appraisal. If any issue other than pricing is attempted to be resolved through use of the Appraisal process, then the Appraisal provision has not properly been invoked and the Appraisal process is not valid.
4. The Appraisers and umpire selected for the Appraisal process must be competent and impartial. This means that the individuals nominated to serve as Appraisers by the parties, and the umpire to be selected by the Appraisers, cannot be in a position to profit from a higher claim(s) payment made to the insured. For example, if the insured has hired a public adjuster or attorney whose fee is based upon the insured securing a higher claims payment, no one employed, affiliated with, or related to the public adjuster or attorney could serve as the Appraiser or the umpire. The same rule applies to the insurer; no one employed, affiliated with or related to the adjuster or owner of the adjusting company who could receive a higher fee based upon the insured receiving a greater payment could serve as the Appraiser or umpire. The Appraisal process would not be valid if the Appraiser and/or umpire were not competent and impartial.

If possible, the Appraisal provision should be invoked prior to the insured filing a lawsuit. Appraisal is a means to avoid a lawsuit, and FEMA encourages the use of Appraisal as a viable alternative to litigation. However, nothing prohibits the Appraisal provision from being invoked after a lawsuit has been filed as a means of fully resolving the litigation. Appraisal cannot be used as a means to resolve some issues and not others because of the necessity of having an agreed-to scope of loss before invoking the clause. This means that Appraisal would only be available after a lawsuit is filed if it would result in a resolution of all claims of the insured and a dismissal of the lawsuit. If the insurer does not have the policyholder's complete Proof of Loss to support the amount of the Appraisal award, the insurer, upon the policyholder's request must seek a waiver from the Federal Insurance Administrator of the time period to submit a Proof of Loss in order for the Appraisal award to be valid.

Amounts payable as a result of a successful Appraisal should be paid within the 60 days allowed by Section VII (M) of the SFIP; however, nothing prevents the parties from agreeing to a longer period of payment. If a matter is in litigation and the parties consent to the Appraisal process or Appraisal award, the insurer would arrange for payment in accordance with the normal process of paying such disputed amounts (which is typically upon conclusion of all litigation or appeals).

**Insurers should pay close attention to the time deadlines in the Appraisal provision with regard to appointing either an Appraiser and/or umpire.** If the insured makes an inappropriate demand for an Appraisal (as described above), then a denial letter should be sent as soon as practicable

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explaining why the Appraisal provision cannot be invoked, citing any applicable terms of the SFIP which may be at issue. Not responding to the Appraisal demand at all is not a good practice, as the SFIP provides a process for having an umpire appointed by a court of record in the state where the insured property is located. (Because a lawsuit may be brought only in the United States District Court where the insured property is located, a “court of record” would only be the United States District Court, as a state court could not preside over a matter involving an SFIP).

Please note that if an insured invokes the Appraisal process, the insured cannot subsequently file an appeal to FEMA. Similarly, if an insured submits an appeal to FEMA, the insured cannot subsequently invoke the Appraisal clause. (See 44 C.F.R. § 62.20 (c).) It should also be noted that FEMA is not a proper party to the Appraisal process when the policy is issued by a Write Your Own (WYO) Program participating insurance company because FEMA is not a party to that SFIP. (See 44 C.F.R. § 62.23 (g).)

This bulletin does not supersede or invalidate any term or condition of the SFIP. It contains FEMA’s interpretation of the Appraisal clause, under what condition it may be invoked, and is provided only as guidance.

**Conclusion:**

We ask for your full support. Any questions or comments regarding the Appraisal process should be directed to Russell Tinsley, Claims Examiner for the National Flood Insurance Program. Mr. Tinsley may be reached by email at: [Russell.Tinsley@fema.dhs.gov](mailto:Russell.Tinsley@fema.dhs.gov).

**If a WYO Carrier issues a payment in accordance with the terms and conditions set forth in this bulletin, and has the required documentation for these payments, then FEMA will use these standards in all reviews or audits of files, including any reviews under the Arrangement or the Improper Payments Information Act of 2002 (Public Law 107-300, 33 U.S.C. §3321 note), as amended by the Improper Payment Elimination and Recovery Act of 2010 (Public Law 111-204). However, if a payment is incorrectly made to an insured who has not had flood damages or the claim is not properly documented, or if the WYO Company inappropriately used the Appraisal provision, the WYO Company will be responsible to FEMA for the erroneous payment.**

**Authority: 44 C.F.R. § 61.13(d); 44 C.F.R. §§ 61, Appendices A(1), A(2) and A(3), General Conditions (P) and (M); 42 U.S.C. § 4019.**

cc: Vendors, IBHS, and Government Technical Representative

Required Routing: Claims, Underwriting



**FEMA**

W-13009

February 15, 2013

**MEMORANDUM TO:** Write Your Own (WYO) Company Principal Coordinators,  
the National Flood Insurance Program (NFIP) Direct Servicing Agent,  
and Selected Adjusting Firms

A handwritten signature in black ink, appearing to read "James A. Sadler".

**FROM:** James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program

**SUBJECT:** **Water, Moisture, Mildew, or Mold Damage**

This bulletin is a reminder regarding the handling of mold and mildew claims in the National Flood Insurance Program (NFIP). Please refer to NFIP Clearinghouse Bulletin W-04020, dated May 7, 2004, which states:

**Water, Moisture, Mildew, or Mold Damage** – When this damage occurs in connection with a covered direct physical loss by or from flood, it will be covered unless there is clear evidence of the policyholder's failure to inspect and maintain the insured property, where it was feasible to do so. If such damage is the result of wicking, it is covered.

FEMA's position on such claims has not changed.

Any questions or comments regarding this extension should be directed to James A. Sadler, CPCU, AIC, Director of Claims, National Flood Insurance Program. Mr. Sadler may be reached by email at [James.Sadler2@fema.dhs.gov](mailto:James.Sadler2@fema.dhs.gov).

cc: Vendors, IBIS, FIPNC, Government Technical Representative

Required Routing: Claims, Underwriting




**FEMA**

W-12092a

November 9, 2012

**MEMORANDUM FOR:** Write Your Own (WYO) Company Principal Coordinators, WYO Vendors, NFIP Direct Servicing Agent, and Independent Adjusting Firms

**FROM:** David L. Miller   
Associate Administrator  
Federal Insurance and Mitigation Administration

**SUBJECT:** **Conditional and Partial Waiver of the Proof of Loss Requirement in the Standard Flood Insurance Policy (SFIP) for Losses Related to Meteorological Event Sandy and One Year Extension To Send a Proof of Loss In The Event An Insured Believes Additional Amounts Are Owed Under Their SFIP.**

[Revised Meteorological Event Sandy Dates of Loss]

Recently, a number of States experienced catastrophic losses as a result of Meteorological Event Sandy. The Federal Emergency Management Agency (FEMA) believes that there is an urgent need to rapidly process claim payments to Standard Flood Insurance Policy (SFIP) policyholders.

To increase the speed of claim payments, I am granting a conditional and partial waiver of the requirements in General Conditions (J) (4) and (9) of the SFIP Dwelling Form (Section VII (J) (4); (J) (9)), General Property Form (Section VII (J) (4); (J) (9)), and Residential Condominium Building Association Policy Form (RCBAP) (Section VIII (J) (4); (J) (9)). This conditional and partial waiver will permit the insurer to adjust and pay a loss based on the evaluation of damage in the adjuster's report instead of the signed Proof of Loss or insured-signed adjuster's report.

As part of this rapid claims process and under this waiver, the requirement in the General Conditions for the Dwelling Form (Section VII (M) (1)), the General Property Form (Section VII (M) (1)), and RCBAP Form (Section VIII (M) (1)), that losses will be payable 60 days after the insurer receives the insured's proof of loss or within 90 days after the insurer receives the insured-signed adjuster report will not apply. Instead, the covered loss will be payable as soon as practicable after the insurer receives and reviews the adjuster's report. Also, under the terms of this waiver, the 60 day time limit in the following sections will not apply: Dwelling Form (Section VII (J) (4) (7); M (2) (c)); General Property Form (Section VII (J) (4) (7); M (2) (c)); and RCBAP (Section VIII (J) (4) (7); M (2) (c)).

As part of this rapid claims process and under this waiver, the insurer will send the insured the payment for the covered loss, a copy of the adjuster's report, and a letter explaining this rapid claims procedure.

Negotiation of the payments based upon the adjuster's report will not prohibit an insured from seeking additional payment under his SFIP where coverage limits have not been exhausted. If the insured disagrees with the amount of the payment, the insured must send to the insurer a signed and sworn proof of loss meeting the requirements of Section VII(J) of the Dwelling and General Property SFIP Forms, and Section VIII(J) of the RCBAP SFIP, within the extension of time granted in this document. If payment is issued based upon the adjuster's report and no additional proofs of loss are submitted by the insured, the insurer will close the file.

Conditional and Partial Waiver of the Proof of Loss Requirement in the Standard Flood Insurance Policy (SFIP) for Losses Related to Meteorological Event Sandy and One Year Extension To Send a Proof of Loss In The Event An Insured Believes Additional Amounts Are Owed Under Their SFIP.

November 9, 2012

Page 2

If a proof of loss is submitted by the insured for additional amounts, all terms of the SFIP will apply and the insurer will then process the proof of loss. This means that the provisions in Sections VII(J) and VII(M) of the Dwelling and General Property SFIP Forms, and Sections VIII(J) and (M) of the RCBAP SFIP, which are waived only for the payment based upon the adjuster's report, will be applicable.

To allow enough time for insureds to evaluate their losses and have the opportunity to seek additional SFIP payments, I am extending the amount of time within which an insured must submit a proof of loss as required in SFIP Section VII (J)(4) of the Dwelling and General Property SFIP Forms, and Section VIII(J)(4) of the RCBAP from 60 days to one year from the date of the loss.

If the insurer denies the claim, in whole or in part, the insured may appeal directly to the Associate Administrator, Federal Insurance and Mitigation Administration. If a lawsuit is filed, it must be filed against the insurer within one year of the date of the first written denial of all or part of the claim as provided in General Conditions, Section VII (R) of the Dwelling and General Property SFIP Forms, and Section VIII(R) of the RCBAP SFIP.

This bulletin does not constitute a blanket waiver of the Proof of Loss requirements of the SFIP.

Application: The terms of this Bulletin apply only to flood damage caused by Meteorological Event Sandy with dates of loss beginning October 25, 2012 and continuing, in the States of FL, GA, SC, NC, VA, DC, MD, DE, WV, PA, NJ, NY, CT, RI, MA, NH, VT, ME.

The terms of this Bulletin will be used in subsequent reviews and audits of claims covered by this bulletin.

Authority: 44 C.F.R. § 61.13(d); 44 C.F.R. §§61, Appendices A(1), A(2) and A(3), General Condition (D); 44 C.F.R. § 62.23(k); 44 C.F.R. § 62, Appendix A(1), Articles II(G) and IV(B); 42 U.S.C. § 4019.

Any other questions or comments should be directed to Russ Tinsley, AIC. Mr. Tinsley's email address is [Russell.Tinsley@fema.dhs.gov](mailto:Russell.Tinsley@fema.dhs.gov).

cc: Vendors, IBHS, and Government Technical Representative

Required Routing: Reporting and Independent Adjusting Firms




FEMA

W-10017

March 4, 2010

MEMORANDUM FOR: Write Your Own (WYO) Company Principal Coordinators, the National Flood Insurance Program (NFIP) Servicing Agent, and Selected Adjusting Firms

FROM:   
James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program  
DHS/FEMA-MF-RN-CA

SUBJECT: Wind vs. Water – Adjusting Practice

In previous bulletins, FEMA discussed wind and flood investigative tips and a logical approach in addressing claims that involve both perils. Attached for your review are previous bulletins that address adjusting practices: WYO Bulletins W-08008, dated February 25, 2008 "Wind/Water Investigative Tips"; and W-08070, dated September 25, 2008 "Flood Insurance Claims Guidance."

The following will not ask adjusters to do much more than they currently do when approaching any flood or wind damaged building. There is no requirement for the flood adjuster to estimate the wind damage.

When adjusting wind/water losses the adjuster should use established and proven investigative methods when documenting flood and wind damage to buildings and/or contents occurring during hurricane or storm events. "Wind/Water Investigative Tips" can be helpful.

The adjuster is asked to record the process they always use when approaching a wind/water claim. In addition to looking for signs of flood damage and/or a General Condition of Flood and documenting the exterior water line, the adjusters should note any exterior wind damage, such as missing shingles, turbine or fascia damage. The adjuster should also photograph this damage and mention what was observed in the narrative report.

Remember, the **Standard Flood Insurance Policy (SFIP) Pays Only For Direct Physical Loss by or From Flood to Insured Property**. Once inside the building, the adjuster should always document the flood water line. Damage below this line is typically flood damage (exceptions like wicking should be noted in the narrative report). Damage above the flood water line is typically wind damage, such as water-stained ceilings or water damage at broken windows or exterior doors. This damage should also be photographed and mentioned in the narrative report.

Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 1 of 9

Wind vs. Water – Adjusting Practice

March 4, 2010

Page 2

Auditors of the NFIP have asked that adjusters explain their rationale or the adjuster's basis for identifying the separation of wind and water damage. Typically, this rationale is as simple as:

- Shingles damaged at the right front of roof;
- Interior water line three feet;
- Damage below the water line is caused by flood;
- Damage above the water line is caused by wind to include water-stained ceiling in the area of roof damage.

As this separation becomes narrower, the basis may be more detailed, but it should be kept concise. When the cause of damage overlaps, the basis must be clearly explained in the narrative report; otherwise, the adjuster may approach the insurer to request an engineer to provide a professional opinion on causation.

As always, any known unusual circumstances should be recorded in the narrative report.

Again, we ask for your full support. Any questions or comments regarding the wind verse water adjusting practices should be directed to James A. Sadler, CPCU, AIC, Director of Claims, National Flood Insurance Program. Mr. Sadler may be reached by email at [James.Sadler@dhs.gov](mailto:James.Sadler@dhs.gov).

cc: Vendors, IBHS, FIPNC, Government Technical Representative

Suggested Routing: Claims, Training, Underwriting, Adjusting Firms, Independent Flood Adjusters

Attachments

[www.fema.gov](http://www.fema.gov)

**Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 2 of 9**





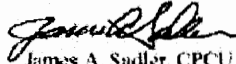
**FEMA**

W-08070

September 25, 2008

**MEMORANDUM FOR:** Write Your Own (WYO) Company Principal Coordinators,  
Vendors, NFIP Servicing Agent, and Selected Adjusting Firms

**FROM:**

  
James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program  
DHHS-FEMA-MT-RN-CA

**SUBJECT:** Flood Insurance Claims Guidance

In areas affected by both Hurricane Gustav and Hurricane Ike, FEMA has learned of many instances in which a claim caused by Gustav could not be inspected prior to the arrival of Ike. Therefore, the following claims guidance is issued for the benefit of policyholders, claim adjusters, WYO companies, and the NFIP Servicing Agent.

**1. Policyholders:**

Should report all flood damage from either or both of the hurricanes to their carrier. Whether or not insured against flood, property owners and renters who need assistance in addition to or other than that provided by the NFIP should be referred to the Disaster Support Resources area of the FEMA Website at [http://www.fema.gov/business/nfip/disaster\\_res.shtml](http://www.fema.gov/business/nfip/disaster_res.shtml).

**2. Claim Adjusters:**

- A. Must address prior losses, particularly from Hurricanes Katrina and Rita.
- B. Where possible, should separate, itemize, and document the damages from each hurricane.
- C. Must recognize and avoid duplication of coverage and payment for overlapping damage from prior losses or Hurricanes Gustav and Ike.
- D. Should use proven investigative methods to document windstorm damage to building or contents. See WYO Bulletin W-08008, dated February 25, 2008, for a discussion of Wind Water Investigative Tips.

In approaching a flood claim that may also include wind damage, an adjuster should continue to recognize any excluded damages. If there is wind and flood damage, the adjuster should comment on the rationale of his/her decision regarding the separation of wind and flood

[www.fema.gov](http://www.fema.gov)

**Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 7 of 9**

damage. Most of the time this is simple -- water line and below is flood; above the waterline is wind. However, when a building has been heavily damaged or destroyed by storm forces, an engineer may be needed to determine causation. Adjusters should photograph the wind damage generally. Photos of wind damage do not have to be exhaustive, unless necessary to document that flood damage is minor or absent.

**3. WYO Companies and the NFIP Servicing Agent – Ike and Gustav Overlap:**

- A. If damages resulting from Hurricane Ike exceed the Hurricane Gustav damages, and the combined damages do not exceed the policy limit of liability, the Hurricane Gustav claim should be closed without payment. All covered damage should be considered under the Hurricane Ike claim.
- B. If the covered damage from either event exceeds the policy limit of liability, the adjuster should, to the best of his/her ability, separate and document the damage.
- C. The policy limits reinstate after each occurrence.
- D. Each claim will be subject to the deductible(s) applicable in the policy.
- E. This guidance is applicable to both building and personal property losses.

**4. Existing Guidance for Adjusters and Carriers:**

- A. Coverage of Connected Heating Machinery – Heating machinery, in a building, connected to and servicing the insured building, is covered. Reminder: air conditioning compressors in the open, connected to and servicing the building, are covered.
- B. Replacement Cost Loss Settlement – When insured property is eligible for replacement cost loss settlement, there is no longer any requirement to hold back the recoverable depreciation.
- C. Water, Moisture, Mildew, or Mold Damage – When this damage occurs in connection with a covered direct physical loss by or from flood, it will be covered unless there is clear evidence of the policyholder's failure to inspect and maintain the insured property, where it was feasible to do so. If such damage is the result of wicking, it is covered.
- D. Determination of the Lowest Elevated Floor – Full coverage for Post-FIRM elevated buildings begins at the lowest elevated floor. This is the lowest floor raised above ground, even if the pilings extend beyond it.
- E. Repair Estimating and Pricing Guidelines – We expect that the repair estimate be based on current local prices and that the pricing guidelines are used with discretion and flexibility. Repair estimates and corresponding settlements are always to be adjusted in accordance with

**Exhibit 14. Wind Vs Water – Adjusting Process (W-10017), page 8 of 9**

special conditions of the Standard Flood Insurance Policy[?] (e.g., the requirement for repair or replacement with material of like kind and quality), local pricing, and actual costs as provided by the policyholder and the selected contractor.

- F. Unit Cost and File Documentation – We expect unit costs to include all materials, sales tax, disposable equipment, rented equipment, and any overhead of the contractor. Additionally, we expect estimated costs of personal property to include any delivery costs, setup fees, and sales tax. These are standard practices within the insurance industry. When actual documented costs for items of like kind and quality, such as repair invoices from service contractors, receipts, and replacement quotes differ from this standard practice, reasonable additional costs should be considered.

cc: IBHS, FIPNC, Government Technical Representative

Suggested Routing: Claims, Underwriting, Data Processing, Marketing



# Flood Damage-Resistant Materials Requirements

for Buildings Located in Special Flood Hazard Areas in  
accordance with the National Flood Insurance Program

Technical Bulletin 2 / August 2008



FEMA

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Revision to Table 2 footnote (\*) made in October 2010.

Comments on the Technical Bulletins should be directed to:

Department of Homeland Security  
FEMA Federal Insurance and Mitigation Administration  
500 C Street, SW.  
Washington, D.C. 20472

Technical Bulletin 2-08 replaces Technical Bulletin 2-93, *Flood-Resistant Materials Requirements for Buildings Located in Special Flood Hazard Areas in accordance with the National Flood Insurance Program.*

## Introduction

Protecting buildings that are constructed in special flood hazard areas (SFHAs) from damage caused by flood forces is an important objective of the National Flood Insurance Program (NFIP). In support of this objective, the NFIP regulations include minimum building design criteria that apply to new construction, repair of substantially damaged buildings, and substantial improvement of existing buildings in SFHAs. The base flood is used to delineate SFHAs on Flood Insurance Rate Maps (FIRMs) prepared by the NFIP. The base flood is the flood that has a 1-percent chance of being equaled or exceeded in any given year (commonly called the "100-year" flood). Certain terms used in this Technical Bulletin are defined in the Glossary.

The NFIP regulations require the use of construction materials that are resistant to flood damage. The lowest floor of a residential building must be elevated to or above the base flood elevation (BFE), while the lowest floor of a non-residential building must be elevated to or above the BFE or dry floodproofed to the BFE.

All construction below the BFE is susceptible to flooding and must consist of flood damage-resistant building materials. The purpose of this Technical Bulletin is to provide current guidance on what constitute "materials resistant to flood damage" and how and when these materials must be used to improve a building's ability to withstand flooding.

Table 1 describes five classes of materials ranging from those that are highly resistant to floodwater damage, to those that have no resistance to flooding. Materials are broadly described as structural materials and finish materials based on how they are used in normal construction practices. Table 2 lists materials by generic names, and notes whether the materials are acceptable or unacceptable for use below the BFE. All building materials are in some way fastened or connected to the structure. Fasteners and connectors, as described in this Technical Bulletin, also must be resistant to flood damage.

A brief description of the process used to identify or determine whether the materials listed are flood damage-resistant is provided, followed by some simplified examples with diagrams to illustrate the use of these materials below the BFE. Three additional circumstances where flood damage-resistant materials are used or recommended are described: accessory structures, limited use of wet floodproofing, and buildings outside of SFHAs.

Questions about use of flood damage-resistant materials should be directed to the appropriate local official, NFIP State Coordinating Office, or one of the Federal Emergency Management Agency's (FEMA's) Regional Offices.

Under the NFIP, the "lowest floor" is the floor of the lowest enclosed area of a building. An unfinished or flood-resistant enclosure that is used solely for parking of vehicles, building access, or storage is not the lowest floor, provided the enclosure is built in compliance with applicable requirements.

As used by the NFIP, an "enclosure" is an area that is enclosed on all sides by walls.

The NFIP defines a "basement" as any area that is below-grade on all sides. The regulations do not allow basements to extend below the BFE.

## NFIP Regulations

The NFIP regulations for flood damage-resistant materials are codified in Title 14 of the Code of Federal Regulations, in Section 60.3(a)(3), which states that a community shall:

*“Review all permit applications to determine whether proposed building sites will be reasonably safe from flooding. If a proposed building site is in a floodprone area, all new construction and substantial improvements shall... (ii) be constructed with materials resistant to flood damage...”*

Proposals for substantial improvement of existing buildings in SFHAs, and proposals to repair those that have sustained substantial damage, must comply with the requirements for new construction. As part of issuing permits, community officials must review such proposals to determine whether they comply with the requirements, including the use of flood damage-resistant materials. Refer to the “Classification of Flood Damage-Resistant Materials” section of this Technical Bulletin for additional details. Further information on substantial improvement and substantial damage is found in *Answers to Questions About Substantially Damaged Buildings* (FEMA 213).

The NFIP Technical Bulletins provide guidance on the minimum requirements of the NFIP regulations. Community or State requirements that exceed those of the NFIP take precedence. Design professionals should contact the community to determine whether more restrictive provisions apply to the building or site in question. All other applicable requirements of the State or local building codes must also be met for buildings in all flood hazard areas.

## Required Use of Flood Damage-Resistant Materials

### Flood Damage-Resistant Material

“Flood [damage]-resistant material” is defined by the NFIP as “any building product [material, component or system] capable of withstanding direct and prolonged contact with floodwaters without sustaining significant damage.” The term “prolonged contact” means at least 72 hours, and the term “significant damage” means any damage requiring more than cosmetic repair. “Cosmetic repair” includes cleaning, sanitizing, and resurfacing (e.g., sanding, repair of joints, repainting) of the material. The cost of cosmetic repair should also be less than the cost of replacement of affected materials and systems. In addition to these requirements, individual materials that are considered flood damage-resistant must not cause degradation of adjacent materials or the systems of which the material is a part.

The *International Building Code* (IBC), by reference to ASCE 24 *Flood Resistant Design and Construction*, and the *International Residential Code* (IRC), require the use of flood damage-resistant materials.

**All building materials below the BFE must be flood damage-resistant**, regardless of the expected or historic flood duration. For example, buildings in coastal areas that experience relatively short-duration flooding (generally, flooding with a duration of less than 24 hours) must be constructed with flood damage-resistant materials below the BFE. As noted in Table 2, **only Class 4 and Class 5 materials are acceptable for areas below the BFE in buildings in SFHAs.**

In some instances, materials that are not flood damage-resistant materials, such as wiring for fire alarms and emergency lighting, are allowed below the BFE if specifically required to address life safety and electric code requirements for building access and storage areas.

### **How Flood Damage-Resistant Materials Affect Flood Insurance Rates**

Careful attention to compliance with the NFIP regulations for flood damage-resistant materials is important during design, plan review, construction, and inspection. Compliance influences both the building's vulnerability to flood damage and the cost of NFIP flood insurance. Flood insurance will not pay a claim for finish materials located in basements or in enclosed areas below the lowest floor of elevated buildings, even if such materials are considered to be flood damage-resistant. NFIP claims for damage below the BFE are limited to utilities and equipment, such as furnaces and water heaters.

### **Classification of Flood Damage-Resistant Materials**

The information in this Technical Bulletin was initially developed based on information in the U.S. Army Corps of Engineers' *Flood Proofing Regulations* (1995), and has been updated based on additional information from FEMA-funded studies and reports, technical experts, and industry and trade groups. Table 1 classifies building materials according to their ability to resist flood damage.



Table 1. Class Descriptions of Materials

NFIP	Class	Class Description
ACCEPTABLE	5	Highly resistant to floodwater <sup>1</sup> damage, including damage caused by moving water. <sup>2</sup> These materials can survive wetting and drying and may be successfully cleaned after a flood to render them free of most harmful pollutants. <sup>3</sup> Materials in this class are permitted for partially enclosed or outside uses with essentially unmitigated flood exposure.
	4	Resistant to floodwater <sup>1</sup> damage from wetting and drying, but less durable when exposed to moving water. <sup>2</sup> These materials can survive wetting and drying and may be successfully cleaned after a flood to render them free of most harmful pollutants. <sup>3</sup> Materials in this class may be exposed to and/or submerged in floodwaters in interior spaces and do not require special waterproofing protection.
UNACCEPTABLE	3	Resistant to clean water <sup>4</sup> damage, but not floodwater damage. Materials in this class may be submerged in clean water during periods of flooding. These materials can survive wetting and drying, but may not be able to be successfully cleaned after floods to render them free of most <sup>3</sup> harmful pollutants.
	2	Not resistant to clean water <sup>4</sup> damage. Materials in this class are used in predominantly dry spaces that may be subject to occasional water vapor and/or slight seepage. These materials cannot survive the wetting and drying associated with floods.
	1	Not resistant to clean water <sup>4</sup> damage or moisture damage. Materials in this class are used in spaces with conditions of complete dryness. These materials cannot survive the wetting and drying associated with floods.

Notes:

1. Floodwater is assumed to be considered "black" water; black water contains pollutants such as sewage, chemicals, heavy metals, or other toxic substances that are potentially hazardous to humans.
2. Moving water is defined as water moving at low velocities of 5 feet per second (fps) or less. Water moving at velocities greater than 5 fps may cause structural damage to building materials.
3. Some materials can be successfully cleaned of most of the pollutants typically found in floodwater. However, some individual pollutants such as heating oil can be extremely difficult to remove from uncoated concrete. These materials are flood damage-resistant except when exposed to individual pollutants that cannot be successfully cleaned.
4. Clean water includes potable water as well as "gray" water; gray water is wastewater collected from normal uses (laundry, bathing, food preparation, etc.).

MODIFIED FROM: USACE 1995 *Flood Proofing Regulations*

Table 2 lists structural materials and finish materials commonly used in construction of floors, walls, and ceilings. For the purpose of this Technical Bulletin, structural materials and finish materials are defined as follows:

- **Structural materials** include all elements necessary to provide structural support, rigidity, and integrity to a building or building component. Structural materials include floor slabs, beams, subfloors, framing, and structural building components such as trusses, wall panels, I-joists and headers, and interior/exterior sheathing.

- **Finish materials** include all coverings, finishes, and elements that do not provide structural support or rigidity to a building or building component. Finish materials include floor coverings, wall and ceiling surface treatments, insulation, cabinets, doors, partitions, and windows.

## Notes Regarding Classification of Materials

The classifications in Table 2 are based on the best information available at the time of publication. However, flood damage-resistance is determined by factors that may be a function of the specific application and by the characteristics of the floodwaters. Each situation requires sound judgment and knowledge of probable contaminants in local floodwaters to select materials that are required to resist flood damage. For materials and products that are listed in Table 2, manufacturers' use and installation instructions must be followed to ensure maximum performance. Masonry and wood products used below the BFE must comply with the applicable standards published by the American Society for Testing and Materials (ASTM), the American Concrete Institute (ACI), the Truss Plate Institute (TPI), the American Forest & Paper Association (AF&PA), and other appropriate organizations.

1. **Materials Not Listed:** Table 2 does not list all available structural materials and finish materials. For materials and products not listed, manufacturers' literature (i.e., specifications, materials safety data sheets, test reports) should be evaluated to determine if the product meets flood damage-resistance requirements. Materials and products that are not listed in Table 2 may be used if accepted by the local official. Acceptance should be based on sufficient evidence, provided by the applicant, that the materials proposed to be used below the BFE will resist flood damage without requiring more than cosmetic repair and cleaning.
2. **Unacceptable Materials:** Class 1, 2, and 3 materials are unacceptable for below-BFE applications for one or more of the following reasons:
  - Normal adhesives specified for above-grade use are water soluble or are not resistant to alkali or acid in water, including groundwater seepage and vapor.
  - The materials contain wood or paper products, or other materials that dissolve or deteriorate, lose structural integrity, or are adversely affected by water.
  - Sheet-type floor coverings (linoleum, rubber tile) or wall coverings (wallpaper) restrict drying of the materials they cover.
  - Materials are dimensionally unstable.
  - Materials absorb or retain excessive water after submergence.
3. **Impact of Material Combinations:** In some cases, the combination of acceptable structural and finish materials can negatively impact the classification of individual materials. This is illustrated by the following examples:

- Vinyl tile with chemical-set adhesives is an acceptable finish flooring material when placed on a concrete structural floor. However, when the same vinyl tile is applied over a plywood structural floor, it is no longer considered acceptable because the vinyl tile must be removed to allow the plywood to dry.
  - Polyester-epoxy or oil-based paints are acceptable wall finishes when applied to a concrete structural wall. However, when the same paint is applied to a wood wall, it is no longer considered acceptable. Recent FEMA-supported studies by Oak Ridge National Laboratory have found that low-permeability paint can inhibit drying of the wood wall.
4. **Impact of Long-Duration Exposure and/or Contaminants:** The classifications of materials listed in Table 2 do not take into account the effects of long-duration exposure to floodwaters or contaminants carried by floodwaters. This is illustrated by the following examples:
- Following Hurricane Katrina, FEMA deployed a Mitigation Assessment Team (MAT) to examine how building materials performed after long-duration exposure (2 to 3 weeks) to floodwaters (FEMA 549). The field survey revealed that some materials absorbed floodborne biological and chemical contaminants. However, it is not known at this time if a shorter duration flood event would have significantly altered the absorption rates of those contaminants.
  - Building owners, design professionals, and local officials should consider potential exposure to floodborne contaminants when selecting flood damage-resistant materials. For example, Table 2 lists cast-in-place concrete, concrete block, and solid structural wood (2x4s, etc.), as acceptable flood damage-resistant materials. However, experience has shown that buildings with those materials can be rendered unacceptable for habitation after being subjected to floodwaters with significant quantities of petroleum-based products such as home heating oil. Commonly used cleaning and remediation practices do not reduce the “off-gassing” of volatile hydrocarbons from embedded oil residues to acceptable levels that are established by the U.S. Environmental Protection Agency. Other materials, when exposed to these types of contaminants, may also not perform acceptably as flood damage-resistant materials.

Table 2. Types, Uses, and Classifications of Materials

Types of Building Materials	Uses of Building Materials		Classes of Building Materials				
	Floors	Walls/ Cellings	Acceptable		Unacceptable		
			5	4	3	2	1
<b>Structural Materials (floor slabs, beams, subfloors, framing, and interior/exterior sheathing)</b>							
Asbestos-cement board		■	■				
Brick							
Face or glazed		■	■				
Common (clay)		■		■			
Cast stone (in waterproof mortar)		■	■				
Cement board/fiber-cement board		■	■				
Cement/latex, formed-in-place	■			■			
Clay tile, structural glazed		■	■				
Concrete, precast or cast-in-place	■	■	■				
Concrete block <sup>1</sup>		■	■				
Gypsum products							
Paper-faced gypsum board		■			■		
Non-paper-faced gypsum board		■		■			
Greenboard		■				■	
Keene's cement or plaster		■			■		
Plaster, otherwise, including acoustical		■				■	
Sheathing panels, exterior grade		■			■		
Water-resistant, fiber-reinforced gypsum exterior sheathing		■		■			
Hardboard (high-density fiberboard)							
Tempered, enamel or plastic coated		■				■	
All other types		■					■
Mineral fiberboard		■					■
Oriented-strand board (OSB)							
Exterior grade	■	■				■	
Edge swell-resistant OSB	■	■				■	
All other types	■	■					■
Particle board	■						■
Plywood							
Marine grade	■	■	■				
Preservative-treated, alkaline copper quaternary (ACQ) or copper azole (C-A)	■	■		■			

Table 2. Types, Uses, and Classifications of Materials (continued)

Types of Building Materials	Uses of Building Materials		Classes of Building Materials				
	Floors	Walls/ Ceilings	Acceptable		Unacceptable		
			5	4	3	2	1
<b>Structural Materials (floor slabs, beams, subfloors, framing, and interior/exterior sheathing)</b>							
Preservative-treated, Borate <sup>2</sup>	■	■	■				
Exterior grade/Exposure1 (WBP – weather and boll proof)	■	■		■			
All other types	■	■					■
<b>Recycled plastic lumber (RPL)</b>							
Commingled, with 80-90% polyethylene (PE)	■		■				
Fiber-reinforced, with glass fiber strands	■		■				
High-density polyethylene (HDPE), up to 95%	■		■				
Wood-filled, with 50% sawdust or wood fiber	■				■		
<b>Stone</b>							
Natural or artificial non-absorbent solid or veneer, waterproof grout	■	■	■				
All other applications		■				■	
<b>Structural Building Components</b>							
Floor trusses, wood, solid (2x4s), decay-resistant or preservative-treated	■	■		■			
Floor trusses, steel <sup>3</sup>	■		■				
Headers and beams, solid (2x4s) or plywood, exterior grade or preservative-treated		■		■			
Headers and beams, OSB, exterior grade or edge-swell resistant		■				■	
Headers and beams, steel <sup>3</sup>		■	■				
I-joists	■					■	
Wall panels, plywood, exterior grade or preservative-treated		■		■			
Wall panels, OSB, exterior grade or edge-swell resistant		■				■	
Wall panels, steel <sup>3</sup>		■		■			

Table 2. Types, Uses, and Classifications of Materials (continued)

Types of Building Materials	Uses of Building Materials		Classes of Building Materials					
	Floors	Walls/ Ceilings	Acceptable		Unacceptable			
			5	4	3	2	1	
<b>Structural Materials (floor slabs, beams, subfloors, framing, and interior/exterior sheathing)</b>								
Wood								
Solid, standard, structural (2x4s)		■		■				
Solid, standard, finish/trim		■			■			
Solid, decay-resistant <sup>4</sup>	■	■	■					
Solid, preservative-treated, ACQ or C-A		■		■				
Solid, preservative-treated, Borate <sup>2</sup>		■		■				
<b>Finish Materials (floor coverings, wall and ceiling finishes, insulation, cabinets, doors, partitions, and windows)</b>								
Asphalt tile <sup>5</sup>								
With asphaltic adhesives	■				■			
All other types	■							■
Cabinets, built-in								
Wood		■				■		
Particle board		■						■
Metal <sup>3</sup>		■		■				
Carpeting	■							■
Ceramic and porcelain tile								
With mortar set	■	■		■				
With organic adhesives	■	■				■		
Concrete tile, with mortar set	■		■					
Corkboard		■				■		
Doors								
Wood, hollow		■				■		
Wood, lightweight panel construction		■				■		
Wood, solid		■				■		
Metal, hollow <sup>3</sup>		■		■				
Metal, wood core <sup>3</sup>		■		■				
Metal, foam-filled core <sup>3</sup>		■		■				
Fiberglass, wood core		■		■				
Epoxy, formed-in-place	■		■					

Table 2. Types, Uses, and Classifications of Materials (continued)

Types of Building Materials	Uses of Building Materials		Classes of Building Materials					
	Floors	Walls/ Ceilings	Acceptable		Unacceptable			
			5	4	3	2	1	
<b>Finish Materials (floor coverings, wall and ceiling finishes, insulation, cabinets, doors, partitions, and windows)</b>								
Glass (sheets, colored tiles, panels)		■		■				
Glass blocks		■	■					
<b>Insulation</b>								
Sprayed polyurethane foam (SPUF) or closed-cell plastic foams	■	■	■					
Inorganic – fiberglass, mineral wool: batts, blankets, or blown	■	■			■			
All other types (cellulose, cotton, open-cell plastic foams, etc.)	■	■				■		
Linoleum	■							■
Magnesite (magnesium oxychloride)	■							■
Mastic felt-base floor covering	■							■
Mastic flooring, formed-in-place	■		■					
Metals, non-ferrous (aluminum, copper, or zinc tiles)		■			■			
<b>Metals</b>								
Non-ferrous (aluminum, copper, or zinc tiles)		■			■			
Metals, ferrous <sup>3</sup>		■		■				
<b>Paint</b>								
Polyester-epoxy and other oil-based waterproof types		■		■				
Latex		■		■				
<b>Partitions, folding</b>								
Wood		■					■	
Metal <sup>3</sup>		■		■				
Fabric-covered		■						■
<b>Partitions, stationary (free-standing)</b>								
Wood frame		■		■				
Metal <sup>3</sup>		■		■				
Glass, unreinforced		■		■				
Glass, reinforced		■		■				
Gypsum, solid or block		■						■

Table 2. Types, Uses, and Classifications of Materials (continued)

Types of Building Materials	Uses of Building Materials		Classes of Building Materials				
	Floors	Walls/ Ceilings	Acceptable		Unacceptable		
			5	4	3	2	1
<b>Finish Materials (floor coverings, wall and ceiling finishes, insulation, cabinets, doors, partitions, and windows)</b>							
Polyurethane, formed-in-place	■		■				
Polyvinyl acetate (PVA) emulsion cement	■						■
<b>Rubber</b>							
Moldings and trim with epoxy polyamide adhesive or latex-hydraulic cement		■		■			
All other applications		■					■
<b>Rubber sheets or tiles<sup>5</sup></b>							
With chemical-set adhesives <sup>6</sup>	■		■				
All other applications	■						■
Silicone floor, formed-in-place	■		■				
<b>Steel (panels, trim, tile)</b>							
With waterproof adhesives <sup>3</sup>		■	■				
With non-waterproof adhesives		■				■	
<b>Terrazo</b>	■			■			
<b>Vinyl asbestos tile (semi-flexible vinyl)<sup>5</sup></b>							
With asphaltic adhesives	■		■				
All other applications	■						■
Vinyl sheets or tiles (coated on cork or wood product backings)	■						■
<b>Vinyl sheets or tiles (homogeneous)<sup>5</sup></b>							
With chemical-set adhesives <sup>6</sup>	■			■			
All other applications	■						■
<b>Wall coverings</b>							
Paper, burlap, cloth types		■					■
Vinyl, plastic, wall paper		■					■
<b>Wood floor coverings</b>							
Wood (solid)	■						■
Engineered wood flooring	■					■	
Plastic laminate flooring	■					■	
Wood composition blocks, laid in cement mortar	■					■	
Wood composition blocks, dipped and laid in hot pitch or bitumen	■					■	



Notes\*:

- 1 Unfilled concrete block cells can create a reservoir that can hold water following a flood, which can make the blocks difficult or impossible to clean if the floodwaters are contaminated.
  - 2 Borate preservative-treated wood meets the NFIP requirements for flood damage-resistance; however, the borate can leach out of the wood if the material is continuously exposed to standing or moving water.
  - 3 Not recommended in areas subject to salt-water flooding.
  - 4 Examples of decay-resistant lumber include heart wood of redwood, cedar, and black locust. Refer to Section 2302 of the International Building Code® (IBC®) and Section R202 of the International Residential Code® (IRC®) for guidance.
  - 5 Using normally specified suspended flooring (i.e., above-grade) adhesives, including sulfite liquor (lignin or "linoleum paste"), rubber/asphaltic dispersions, or "alcohol" type resinous adhesives (culmar, oleoresin).
  - 6 Examples include epoxy-polyamide adhesives or latex-hydraulic cement.
- \* In addition to the requirements of TB 2 for flood damage resistance, building materials must also comply with any additional requirements of applicable building codes. For example, for wood products such as solid 2x4s and plywood, applicable building code requirements typically include protection against decay and termites and will specify use of preservative-treated or decay-resistant wood for certain applications. Applications that require preservative-treated or decay-resistant species include wood in contact with the ground, wood exposed to weather, wood on exterior foundation walls, or wood members close to the exposed ground. In some cases, applicable building code requirements (such as those in ASCE 24-05 and IRC 2008) do not reflect updated guidance in TB 2 and specify that all wood used below the design flood elevation be preservative-treated or naturally decay-resistant regardless of proximity to ground or exposure to weather. (Revision made in October 2010)

## Fasteners and Connectors

The term "fasteners" typically refers to nails, screws, bolts, and anchors. The term "connectors" typically refers to manufactured devices used to connect two or more building components. Joist hangers, post bases, hurricane ties and clips, and mud-sill anchors are examples of connectors. Fasteners and connectors are materials and thus must be made of flood damage-resistant materials in order to comply with the NFIP requirements.

Table 2 does not specifically address fasteners and connectors. However, it is clear that the performance of buildings that are exposed to flooding is, at least in part, a function of the fasteners and connectors used to put the components together.

When preservative-treated woods are used, particular attention is required for fasteners and connectors because some treatments are more corrosive than others, which could shorten the service life of the fasteners and connectors. For example, alkaline copper quaternary (ACQ) treatments are more corrosive than traditional acid copper chromate (ACC) treatments. If corrosion occurs, buildings are less likely to withstand flood loads and other loads. Fasteners and connectors made of stainless steel, hot-dipped zinc-coated galvanized steel, silicon bronze, or copper are recommended for use with preservative-treated wood.

Specifications for fasteners and connectors used in buildings in SFHAs are in ASCE 24, a standard referenced by the IBC. Chapter 23 of the IBC has specific requirements for connections and fasteners used with wood, including preservative-treated wood. Similar specifications are in Chapter 3 of the IRC.

This Technical Bulletin, consistent with ASCE 24 and the International Code Series, recommends that stainless steel or hot-dip galvanized fasteners and connectors be used below the BFE in both inland (noncorrosive) and coastal (corrosive) areas. In coastal environments where airborne salts contribute to corrosion, it is recommended that corrosion-resistant fasteners and connectors be used throughout the building where they may be exposed. For

additional guidance, see Technical Bulletin 8, *Corrosion Protection for Metal Connectors in Coastal Areas*. Also see TPI/WTCA *Guidelines for Use of Alternative Preservative Treatments with Metal Connector Plates* for further guidance on metal plate connected wood trusses manufactured with preservative treated lumber (<http://www.sbcindustry.com/images/PTWGuidelines.pdf>).

## Construction Examples

### Buildings in Zones A, AE, A1-A30, AR, AO, and AH

Figure 1 illustrates a solid foundation wall (crawl-space) elevated to meet the minimum requirement that the lowest floor be at the BFE. Figure 2 illustrates framed walls that may be used for enclosures below the BFE that are used for parking of vehicles, building access, and storage.

To maximize allowable use of enclosures below the BFE, it is a common practice to extend the foundation a full story, even though that puts the lowest floor well above the BFE. In such cases, while the NFIP requirement is that flood damage-resistant materials be used only below the BFE, it is strongly recommended that such materials be used for all construction below the lowest floor. This will reduce flood damage to the enclosed area in the event flooding exceeds the BFE. For additional guidance on enclosures in A zones, see Technical Bulletin 1, *Openings in Foundation Walls and Walls of Enclosures Below Elevated Buildings in Special Flood Hazard Areas*.

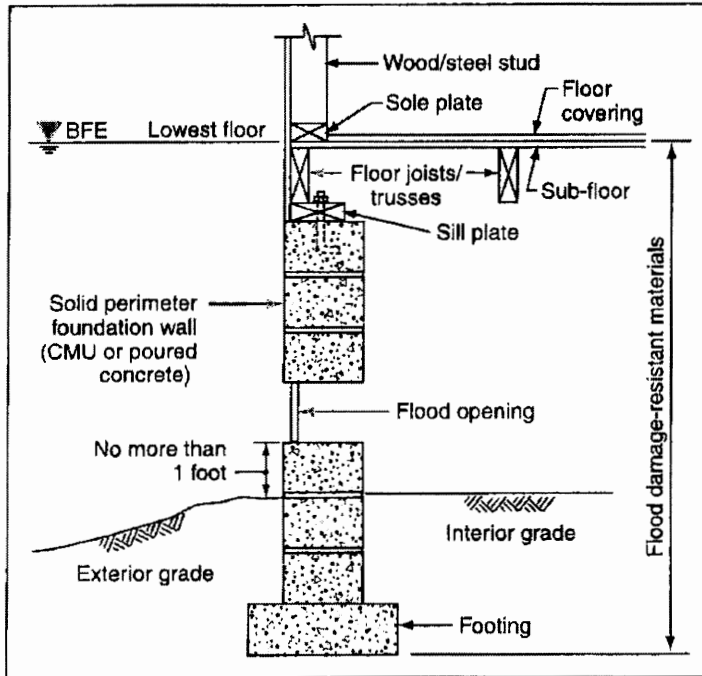


Figure 1. Building elevated on solid foundation walls meeting the minimum NFIP requirements for Zones A, AE, A1-A30, AR, AO, and AH

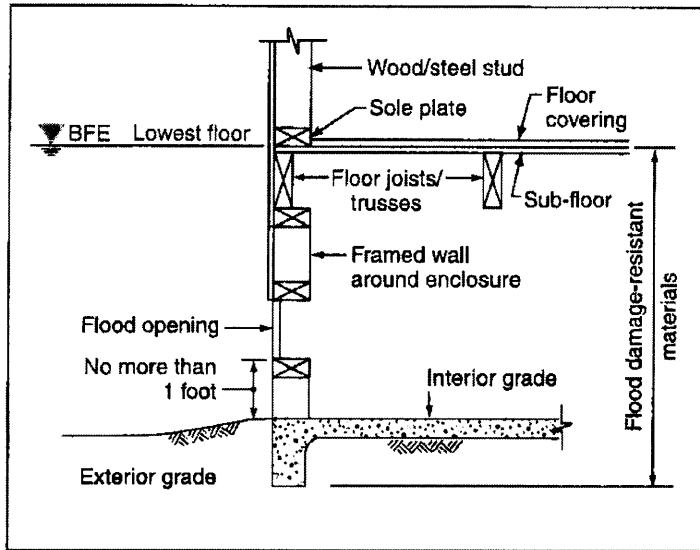


Figure 2. Framed enclosure under building elevated in accordance with NFIP requirements for Zones A, AE, A1-A30, AO, and AH

### Buildings in Zones V, VE, and V1-V30

The NFIP regulations require that the bottom of the lowest horizontal structural member of the lowest floor (usually the floor beam or girder) of buildings in Zones V, VE, and V1-V30 be at or above the BFE. Therefore, all materials below the bottom of those members must be flood damage-resistant materials. This requirement applies to lattice work and screening, and also to materials used to construct breakaway walls that enclose areas below the lowest floor. Depending on the design parameters selected, breakaway walls may remain in place during low-level floods and must be flood damage-resistant so that they can be readily cleaned and not deteriorate over time due to wetting. Figure 3 illustrates the requirement. For additional guidance on breakaway walls used to enclose areas under buildings in V zones, see Technical Bulletin 9, *Design and Construction Guidance for Breakaway Walls Below Elevated Coastal Buildings*.

## Additional Uses of Flood Damage-Resistant Materials

### Accessory Structures

Accessory structures may be allowed in SFHAs provided they are located, installed, and constructed in ways that comply with NFIP requirements. Some communities allow accessory structures that are limited to the uses specified for enclosures below the BFE: parking of vehicles and storage. As with other buildings, accessory structures below the BFE are required to be constructed with flood damage-resistant materials. In addition, accessory structures must be anchored to resist flotation, collapse, and lateral movement and comply with other requirements based on the flood zone. For additional information and requirements, contact the appropriate community permitting office.

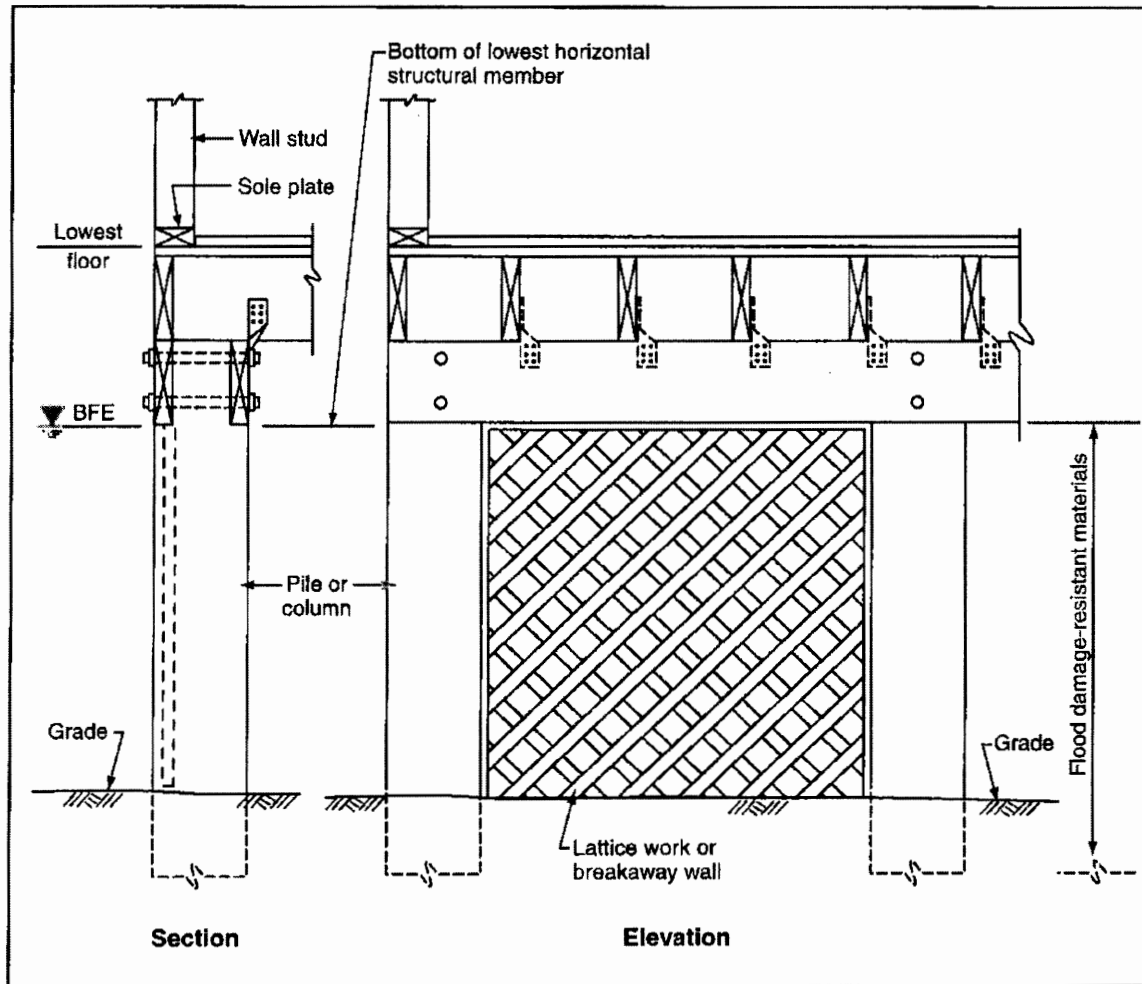


Figure 3. Flood damage-resistant building material requirements for buildings elevated in accordance with NFIP requirements for Zones V, VE, and V1-V30

### Wet Floodproofing

Wet floodproofing is a method to reduce damage that typically involves three elements: allowing floodwaters to enter and exit to minimize structural damage, using flood damage-resistant materials, and elevating utility service and equipment. When a building is retrofitted to be wet floodproofed, non-flood damage-resistant materials that are below the BFE should be removed and replaced with flood damage-resistant materials. This will reduce the costs of repair and facilitate faster recovery.

Wet floodproofing is not allowed in lieu of complying with the lowest floor elevation requirements for new residential buildings (or dry floodproofing of nonresidential buildings in A zones). The exception is accessory structures, as noted on the previous page. Wet floodproofing may also be used to voluntarily retrofit buildings that are older than the date of the community's first FIRM (commonly referred to as "pre-FIRM"), provided the requirement to

bring such buildings into compliance is not triggered (called “substantial improvement”). Figure 1 illustrates some suggested retrofitting of interior walls in a pre-FIRM building. However, please note that the techniques illustrated in Figure 1 cannot be used to bring a substantially damaged or substantially improved building into compliance with the NFIP. For additional information on wet floodproofing, see Technical Bulletin 7, *Wet Floodproofing Requirements*.

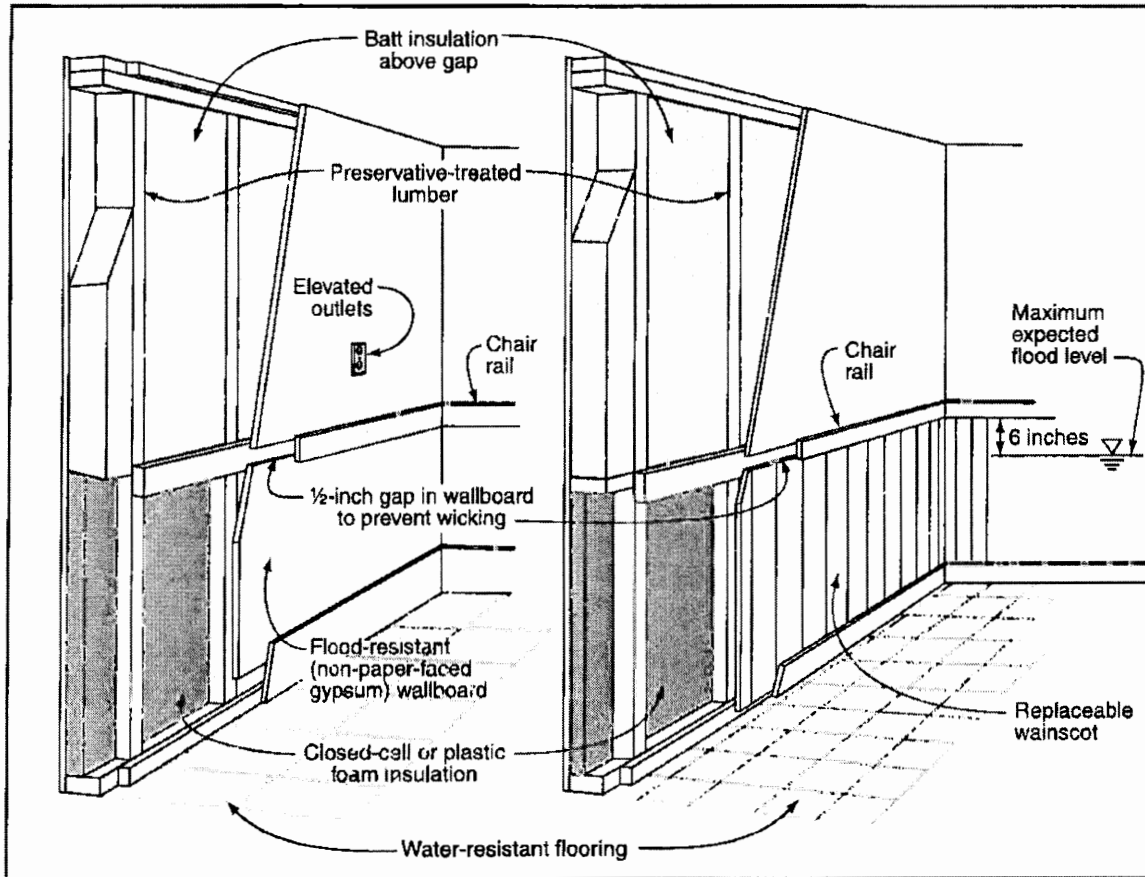


Figure 4. Partial wet floodproofing technique using flood damage-resistant materials for finished wall construction.

### Buildings Outside of SFHAs

FEMA reports that up to 25 percent of NFIP flood insurance claims are paid on buildings that are outside of the mapped SFHA. This occurs for many reasons, including out-of-date maps and local drainage problems. In areas known to be prone to flooding that are not subject to the NFIP requirements, it is recommended that flood damage-resistant materials be used for construction of new buildings and for repair or renovation of existing buildings. Figure 4 illustrates some options.

## The NFIP

The U.S. Congress established the NFIP with the passage of the National Flood Insurance Act of 1968. The NFIP is a Federal program enabling property owners in participating communities to purchase insurance as protection against flood losses, in exchange for State and community floodplain management regulations that reduce future flood damages. Participation in the NFIP is based on an agreement between communities and the Federal Government. If a community adopts and enforces adequate floodplain management regulations, FEMA will make flood insurance available within the community.

Title 44 of the U.S. Code of Federal Regulations contains the NFIP criteria for floodplain management, including design and construction standards for new and substantially improved buildings located in SFHAs identified on the NFIP's FIRMs. FEMA encourages communities to adopt floodplain management regulations that exceed the NFIP criteria. As an insurance alternative to disaster assistance, the NFIP reduces the escalating costs of repairing damage to buildings and their contents caused by floods.

## NFIP Technical Bulletins

This is one of a series of Technical Bulletins that FEMA has produced to provide guidance concerning the building performance requirements of the NFIP. These requirements are contained in Title 44 of the U.S. Code of Federal Regulations at Section 60.3. The bulletins are intended for use by State and local officials responsible for interpreting and enforcing the requirements in their floodplain management regulations and building codes, and by members of the development community, such as design professionals and builders. New bulletins, as well as updates of existing bulletins, are issued periodically, as necessary. The bulletins do not create regulations; rather, they provide specific guidance for complying with the requirements of existing NFIP regulations. Users of the Technical Bulletins who need additional guidance should contact their NFIP State Coordinator or the appropriate FEMA regional office. *The User's Guide to Technical Bulletins* (<http://www.fema.gov/pdf/fima/guide01.pdf>) lists the bulletins issued to date.

## Ordering Technical Bulletins

The quickest and easiest way to acquire copies of FEMA's Technical Bulletins is to download them from the FEMA website (<http://www.fema.gov/plan/prevent/floodplain/techbul.shtm>).

Technical Bulletins also may be ordered free of charge from the FEMA Distribution Center by calling 1-800-480-2520, or by faxing a request to 1-240-699-0525, Monday through Friday between 8 a.m. and 5 p.m. EST. Please provide the FEMA publication number, title, and quantity of each publication requested, along with your name, address, zip code, and daytime telephone number. Written requests may be submitted by email to: [FEMA-Publications-Warehouse@dhs.gov](mailto:FEMA-Publications-Warehouse@dhs.gov)

## Further Information

The following publications provide further information concerning the use of flood damage-resistant materials.

Algan, H. and Wendt, R. 2005. *Pre-Standard Development for the Testing of Flood-Damage-Resistant Residential Envelope Systems, Comparison of Field and Laboratory Results - Summary Report*, Oak Ridge National Laboratory, June 2005.

American Red Cross, FEMA. 1992. *Repairing Your Flooded Home*, FEMA 232, ARC 4477.

American Society of Civil Engineers, Structural Engineering Institute. 2005. *Flood Resistant Design and Construction*, ASCE/SEI 24-05.

American Society of Civil Engineers, Structural Engineering Institute. 2005. *Minimum Design Loads for Buildings and Other Structures*, ASCE/SEI 7-05.

Brick Institute of America, n.d. *Technical Notes for Brick Construction*, Brick Institute of America, McLean, Virginia.

California Integrated Waste Management Board. 2004. "Recycled Plastic Lumber," California Integrated Waste Management Board, web page, last updated June 22, 2004 (<http://www.ciwmb.ca.gov/Plastic/Recycled/Lumber>).

Department of Energy. 2005. *Energy-Efficient Flood-Damage-Resistant Home Reconstruction*, ([http://www.ornl.gov/sci/res\\_buildings/FEMA-attachments/Flood\\_damage-reconstruction.pdf](http://www.ornl.gov/sci/res_buildings/FEMA-attachments/Flood_damage-reconstruction.pdf)).

FEMA. 1991. *Answers to Questions About Substantially Damaged Buildings*, FEMA 213.

FEMA. 1993. *Wet Floodproofing Requirements*, Technical Bulletin 7-93, FLA-TB-7.

FEMA. 1996. *Corrosion Protection for Metal Connectors in Coastal Areas*, Technical Bulletin 8-96, FLA-TB-8.

FEMA. 2000. *Coastal Construction Manual*, FEMA 55CD (3rd edition).

FEMA. 2005. *Home Builder's Guide to Coastal Construction: Technical Fact Sheet Series*, FEMA 499.

FEMA. 2006. *Mitigation Assessment Team Report: Hurricane Katrina in the Gulf Coast*, FEMA 549.

FEMA. 2007. *National Flood Insurance Program: Flood Insurance Manual*, Revised October 2007.

International Code Council, Inc. 2006. International Building Code®, IBC® 2006.

International Code Council, Inc. 2006. International Residential Code®, IRC® 2006.

Simpson Strong-Tie. 2008. *Technical Bulletin: Preservative-Treated Wood*, Simpson Strong-Tie T-PTWOOD08-R, July 2008 (<http://www.strongtie.com/ftp/bulletins/T-PTWOOD08-R.pdf>).

TPI/WTCA. 2004. *TPI/WTCA Guidelines for Use of Alternative Preservative Treatments with Metal Connector Plates*, updated June 4, 2007, (<http://www.sbcindustry.com/images/PTWGuidelines.pdf>).

U.S. Army Corps of Engineers. 1984. *Flood Proofing Systems and Techniques*, U.S. Army Corps of Engineers, December 1984.

U.S. Army Corps of Engineers. 1995. *Flood Proofing Regulations*, Chapters 9 and 10, U.S. Army Corps of Engineers, EP 1165-2-314.

Wood Truss Council of America (WTCA). 2005. *The Load Guide: Guide to Good Practice for Specifying and Applying Loads to Structural Building Components*, (<http://www.sbcindustry.com/loads.php>).

World Floor Covering Association (WFCA). n.d., Anaheim, California (<http://www.wfca.org/index.html>).

## Glossary

**Accessory structure** — A structure that is on the same parcel of property as a principal structure, the use of which is incidental to the use of the principal structure.

**Base flood** — The flood having a 1-percent chance of being equaled or exceeded in any given year, commonly referred to as the “100-year flood.” The base flood is the national standard used by the NFIP and all Federal agencies for the purposes of requiring the purchase of flood insurance and regulating new development.

**Base flood elevation (BFE)** — The height of the base (1-percent annual chance or 100-year) flood in relation to a specified datum, usually the National Geodetic Vertical Datum of 1929, or the North American Vertical Datum of 1988.

**Basement** — Any area of a building having its floor subgrade (below ground level) on all sides.

**Enclosure or enclosed area** — Areas created by a crawlspace or solid walls that fully enclose areas below the BFE.

**Federal Emergency Management Agency (FEMA)** — The Federal agency that, in addition to carrying out other activities, administers the National Flood Insurance Program.

**Federal Insurance and Mitigation Administration (FIMA)** — The component of FEMA directly responsible for administering the flood hazard identification and floodplain management aspects of the NFIP.



**Flood Insurance Rate Map (FIRM)** — The official map of a community on which FEMA has delineated both the special flood hazard areas (SFHAs) and the risk premium zones applicable to the community.

**Floodprone area** — Any land area susceptible to being inundated by floodwater from any source.

**Lowest floor** — The lowest floor of the lowest enclosed area of a building, including a basement. Any NFIP-compliant unfinished or flood-resistant enclosure usable solely for parking of vehicles, building access, or storage (in an area other than a basement) is not considered a building's lowest floor, provided the enclosure does not render the structure in violation of the applicable design requirements of the NFIP.

**Registered Design Professional** — An individual who is registered or licensed to practice their respective design profession as defined by the statutory requirements of the professional registration laws of the State or jurisdiction in which the project is to be constructed.

**Special Flood Hazard Area (SFHA)** — An area delineated on a FIRM as being subject to inundation by the base flood and designated as Zone A, AE, A1-A30, AR, AO, AH, A99, V, VE, or V1-V30.

**Substantial damage** — Damage of any origin sustained by a structure whereby the cost of restoring the structure to its before-damaged condition would equal or exceed 50 percent of the market value of the structure before the damage occurred. Structures that are determined to be substantially damaged are considered to be substantial improvements, regardless of the actual repair work performed.

**Substantial improvement** — Any reconstruction, rehabilitation, addition, or other improvement of a structure, the cost of which equals or exceeds 50 percent of the market value of the structure (or smaller percentage if established by the community) before the "start of construction" of the improvement. This term includes structures that have incurred "substantial damage," regardless of the actual repair work performed.

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

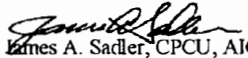


**FEMA**

W-08008

February 25, 2008

MEMORANDUM TO: Write Your Own (WYO) Company Principal Coordinators  
National Flood Insurance Program (NFIP) Servicing Agent

FROM:   
James A. Sadler, CPCU, AIC  
Director of Claims  
National Flood Insurance Program

SUBJECT: *Wind/Water Investigative Tips*

Hurricanes and other severe storms may result in damage caused by both wind and flood. When handling these claims, adjusters should use proven investigative methods such as those provided in the attached document, which was adapted from the 1998 NFIP pamphlet, *Wind/Water Investigative Tips*. These tips will be included in the revised *NFIP Claims Adjuster Manual*, when published.

Attachment

cc: Vendors, IBHS, Government Technical Representative

Suggested Distribution: Claims Department, Adjusting Firms, Independent Adjusters, and Staff Adjusters Handling NFIP Claims

[www.fema.gov](http://www.fema.gov)

**Exhibit 14.** Wind Vs Water – Adjusting Process (W-10017), page 3 of 9

## Wind/Water Investigative Tips

### Important Things to Do When Investigating a Claim

- Research local newspapers and/or check with the local weather service, the U.S. Weather Bureau, or other agencies to determine the specific data relative to the storm.
- When damage is caused by a hurricane, tropical storm, nor'easter, or other event that may cause both wind and flood damage, determine and record the following (*check and record the timing and duration for each*):

<u>Data Element</u>	<u>Measurement</u>	<u>Timing</u>	<u>Duration</u>
Highest Wind Speed	_____	_____	_____
Barometric Pressure	_____	_____	_____
Amount of Rainfall	_____	_____	_____
Tidal Heights	_____	_____	_____
Storm Surge	_____	_____	_____
Wave Heights	_____	_____	_____

- Record the distance and direction of the insured risk relative to the eye of the storm. Remember that the waves are higher to the right of the storm's path.
- Research and record site conditions:
  - Original ground elevation
  - Distance from body of water
  - After-storm ground elevation or other indications of scour
  - Amount and type of storm debris
- Canvas the neighborhood for eye-witnesses and take their recorded or signed statements. Be certain to identify where each witness was at the time of the storm, the amounts or descriptions of wind and flood each witness saw, and the time of day that each saw it. Record in the claims files only what each witness actually says—not hearsay or your opinion.
- Check for and photograph the debris line. Measure and record how many feet the debris line is from the shoreline and from the insured risk. Be sure to describe the topography in detail.

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- Check for and photograph houses and objects adjacent to the insured risk. If damage appears to be different from that of the insured risk, determine why and record the reason in the claim files. Usually, the damage is different for one of two reasons:
  - Different cause of damage (e.g., a tornado can cut a relatively narrow path, leaving neighboring buildings relatively undamaged).
  - Different building construction and anchoring. Look for connectors or tie-down straps for elevated buildings and enclosures beneath elevated buildings. Check the pilings for evidence of scouring. Photograph the remaining pilings, showing patterns of the leaning pilings. Determine how deep the pilings were installed and measure the distance between pilings.
- Determine and record in the claim file a complete description of the damaged or demolished building, including the type of construction; whether elevated (if elevated with an enclosure, be sure to indicate the type of enclosure – breakaway walls, open lattice work, vents, etc.); number of floors (including basement); roof covering and pitch; windows, carports, etc.; and the building's relative position to the wind. It is also important to include a description of the foundation type (slab, piles, piers, etc.) and damage.
- Photograph (close-up) the remains of connectors or tie-downs. Be sure to describe the size, type, brand, method of installation, and if possible the brand name.
- Make a notation in the initial report where evidence suggests the insured risk was not built as securely as neighboring buildings. The flood insurer or coastal plan, for example, may want to check the local building codes to determine if a building construction violation has occurred and document the claim files, both with copies of the code and the evidence of a violation. The age of the building and the effective dates of the building codes need to be documented.
- Check for and photograph any wind-caused openings in the building and/or missing roof shingles.
- Check for and photograph all possible wind-related water marks or stains visible on both the exterior and interior walls and ceilings of the building.
- Check for and photograph all possible flood-related water marks or stains visible on both the exterior and interior of the building.
- Check for and photograph any water marks visible on nearby trees or fence posts, or other buildings.

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- Check for and photograph any uprooted trees or trees snapped off at a high level.
- Check for, photograph, and note in the claim files any evidence of severe erosion such as leaning pilings or houses "nosed down" in the ground. Leaning or bent pilings can occur both as a result of flooding and as a result of a building being pushed over by wind forces or blown off its pilings.

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