

MITIGATION POLICY LIMITS SUBSURFACE USES OF HMA-ACQUIRED PROPERTIES

FREQUENTLY ASKED QUESTIONS FOR HAZARD MITIGATION ASSISTANCE ACQUISITIONS WITH UNDERGROUND MINERAL ENCUMBRANCES (HYDRAULIC FRACTURING/HORIZONTAL DIRECTIONAL DRILLING-HDD)

- 1. Can a grantee appeal the open space compatibility determination on a project basis? Under what circumstances, if any, would FEMA determine that hydraulic fracturing/horizontal directional drilling (HDD) could be an allowable use with the open space requirements?**

Yes, a grantee can appeal. Eligible subapplicants, subgrantees or grantees may petition FEMA for review of application denials due to the existence of encumbrances allowing hydraulic fracturing/HDD or for a post-acquisition use involving hydraulic fracturing/HDD using existing processes available under the Hazard Mitigation Grant Program (HMGP), Flood Mitigation Assistance (FMA) and Pre-Disaster Mitigation (PDM) programs. For HMGP, the appeal process is described in 44 C.F.R. § 206.440 Appeals. For PDM and FMA, there is a reconsideration process which is described in the Hazard Mitigation Assistance Unified Guidance (Part VI Application Review Information B.5 Reconsideration Process).

The applicant may have two different bases for the appeal or request for reconsideration.

1. Pre-Award: FEMA determined the project was ineligible.
2. Post-Award: FEMA determined the post-acquisition use was unallowable.

The appeal or request should be submitted in writing to the Regional Administrator through the Grantee. The petition should contain documentation that justifies the request for reconsideration. The appeal should specify the provisions in federal law, regulation or policy with which the appellant believed the initial action was inconsistent. The applicant must determine the appropriate data to submit with its petition.

FEMA must still develop its own criteria for determining compatible open space uses before it can evaluate the compatibility of hydraulic fracturing/HDD on a specific site.

- 2. What is a National Environmental Policy Act review? Who funds it, who conducts it, and how long does it take?**

The National Environmental Policy Act (NEPA) was passed by Congress in 1970 and established a national policy for the protection and maintenance of the environment. NEPA established procedural requirements for federal agencies to review the environmental impact of a proposed major federal action that could significantly affect the environment. Under NEPA, a federal agency must consider the effects of the proposed action and alternatives to the action on the human environment before deciding to fund and implement the action. The NEPA process provides for several levels of environmental review and documentation. The

levels of documentation are described in Council of Environmental Quality (CEQ) regulations at 40 C.F.R. §§1500-1508.

Any action that FEMA initiates, approves or funds must undergo environmental review pursuant to NEPA unless that action is statutorily excluded from NEPA by Section 316 of the Stafford Act or qualifies as an emergency action under 44 C.F.R. § 10.13 (or superseding FEMA National Environmental Policy Act implementing procedures). FEMA must perform the NEPA review as part of the environmental planning and historic preservation (EHP) review. Therefore, HMA programs and grants must comply with NEPA and all other environmental and historic preservation laws, Acts, Executive Orders, regulations, as well as, with 44 C.F.R. Part 9, Floodplain Management and the Protection of Wetlands, and Part 10 (or superseding FEMA National Environmental Policy Act implementing procedures), Environmental Considerations. This may include identifying alternate locations and/or modifying the proposed project.

Applicants and subapplicants are required to provide information to support the FEMA EHP compliance review. The amount of time a NEPA review takes largely depends on the complexity of the project and its associated environmental impacts. For example a project that can be categorically excluded (CATEX) could take as little as one month, compared to a project that requires an Environmental Impact Statement, which could take at least a year.

See the Hazard Mitigation Assistance Unified Guidance for more information on compliance requirements under NEPA for HMA programs.

Property acquisition for open space projects is Categorical Excluded (CATEX) from NEPA because there are generally no significant environmental impacts from removing a structure from a hazard area, unless extraordinary circumstances exist (see 44 C.F.R. § 10.8(d)(2)(vii), d(3)). If hydraulic fracturing/HDD were allowed on a FEMA acquired property, there could be extensive environmental impacts from the activity, potentially adverse to conservation of the floodplain. In that case, the NEPA review process could take from several months to several years.

3. What happens to properties that have already been acquired that still have encumbrances?

FEMA generally will not approve property acquisition for open space projects involving properties with underground oil, gas or other mineral encumbrances that may allow hydraulic fracturing/HDD to occur.

These leases would be evaluated on a case by case basis to determine compliance with guidance under which the funding was provided by FEMA. In general, subsurface encumbrances on properties could not be activated without review by FEMA.

4. Is there a way to allow hydraulic fracturing/HDD as a post-acquisition land use for open space?

FEMA generally will not approve property acquisition for open space projects involving properties with underground oil, gas or other mineral encumbrances that may allow hydraulic fracturing/HDD to occur.

Other federal agencies with environmental and land use authorities are currently evaluating these practices. FEMA will review data on the environmental impacts of hydraulic fracturing and HDD developed in the future by these agencies and will determine whether hydraulic fracturing and HDD are activities compatible with open space that conserves the natural function of the floodplain.

5. Our municipality participated in the acquisition program. Now we own and maintain the properties at our expense. Why shouldn't we be allowed to lease the gas rights to help pay for maintenance?

Many communities have similar concerns. FEMA has struggled to address this issue. For many communities the extra cost is a small trade-off to spare them from dealing with future disaster recovery costs. Program guidelines do not allow FEMA to provide funding for maintenance after a property has been acquired. FEMA may not allow encumbrances incompatible with open space even if they provide an economic benefit to the municipality.

6. Some property owners were allowed to amend their leases to restrict surface access and then to proceed with acquisition. Now, some owners cannot do the same. Why?

Surface access is not the only issue involved with open space compatibility. Hydraulic fracturing/HDD has recently come to light as an issue of federal concern and FEMA is responsible from this point forward to ensure that any activity conducted on open space land funded by FEMA is compatible with the conservation of natural floodplain functions.

7. If a lease must be extinguished to allow for a property to be acquired, will this be an eligible project cost?

HMA program guidance allows costs for acquisition projects including fees associated with the title transfer, contract review, and other costs associated with conducting real estate settlement, including recording the deed and deed restrictions. A cost associated with eligible HMA activities must be reasonable, as well as allowable, allocable, and necessary to achieve the hazard mitigation purpose of a proposed activity. Costs associated with legal challenges relating to subsurface rights, lost income, etc., are not eligible costs.

8. Under what law or regulation does FEMA have the authority to disallow gas exploration/extraction leases that involve hydraulic fracturing/HDD?

44 C.F.R. Part 80 – Property Acquisition and Relocation for Open Space, § 80.19(a) requires FEMA, grantees, subgrantees and their respective representatives, successors, and assignees to assure the conservation of natural floodplain functions.

9. If the lease/rights holder can't be tracked down, can FEMA still acquire the property?

FEMA maintains its position that in such cases, a property acquisition project may still move forward. However, any long-dormant unextinguished rights involving hydraulic fracturing/HDD may not be exercised by the grantee, subgrantee, or other current holders of the property interest.

10. Can I reserve gas, oil & mineral rights that might involve hydraulic fracturing/HDD for myself (family) in an acquisition project?

No. All existing rights that might involve hydraulic fracturing/HDD must be extinguished and no new rights to extract subsurface gas, oil and minerals by hydraulic fracturing/HDD may be established.

11. Why didn't FEMA wait for the Environmental Protection Agency or Bureau of Land Management to release more information on the impact of hydraulic fracturing/HDD before implementing this policy?

FEMA is responsible for assuring the conservation of natural floodplain functions in accordance with 44 C.F.R. Part 80 requirements. Prior to acquisition, any encumbrances that are incompatible with open space use must be extinguished, and post-acquisition, FEMA only approve leases or similar encumbrances if their purpose is compatible with open space use. *See* 44 C.F.R. §§ 80.17(b), 80.19(b)(2). FEMA is required to enforce compliance with open space use under 44 C.F.R. Part 80. FEMA cannot authorize a use of open space such as hydraulic fracturing/HDD when available scientific data is insufficient to determine that hydraulic fracturing/HDD will not adversely affect the natural floodplain functions.

12. Why did it take so long for this policy to be finalized?

FEMA spends more money on flood mitigation than any other project type. Over the history of Hazard Mitigation Assistance programs, we have assisted many communities in acquiring floodplain properties across the United States. We have a responsibility to make sure these floodplains are protected and must carefully review guidance and policies that impact these programs. Because the new policy impacts all states, territories and tribes, it takes time to evaluate the national impacts of the policy. Given the complexities of the legal and environmental issues involved with considering whether hydraulic fracturing/HDD is an allowable use, the policy took an appropriate amount of time to prepare and receive the necessary legal reviews.

13. How will FEMA help properties that it can't acquire due to these encumbrances?

FEMA's programs are voluntary. If property owners are not willing to participate, we encourage your community to use the mitigation planning process to determine the best mitigation option for these properties.

14. Will FEMA pay to elevate structures that it can't acquire because of these encumbrances?

Elevation projects will be evaluated according to relevant laws, regulation, and program guidance.

15. Does this policy prevent the state or local government from acquiring the property under its own authority and funding?

No.