

NCAPER NATIONAL COALITION FOR ARTS PREPAREDNESS AND EMERGENCY RESPONSE

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March 22, 2024

In re: Docket FEMA-2023-0003

NCAPER, the National Coalition for Arts Preparedness and Emergency Response is pleased to submit these comments to the Federal Emergency Management Agency (FEMA) regarding the Interim Final Rule (IFR) issued January 22, 2024, amending the Code of Federal Regulations (CFR) sections governing the Individual Assistance Program (IHP) in order to increase equity within the program and meet the onrushing impact of climate change.

NCAPER was formed in 2006 in response to the significant losses and devastation artists and creative economies suffered in the wake of 21st-century disasters. In the wake of Hurricanes Katrina and Rita, the gaps in both public and private assistance for artists and creatives impacted by disaster became particularly evident (despite the creative and culture sectors accounting for over \$1.016 trillion in annual economic activity in 2021 according to the Bureau of Economic Analysis). As a voluntary task force of national, regional, state, and local arts organizations, public agencies, and foundations, the Coalition helps ensure that artists, arts/cultural organizations, cultural funders, and arts businesses have the capacity and ability to respond effectively to disasters and emergencies and can remain an essential collaborator in broader societal efforts for preparedness, emergency response, and recovery to ensure the resilience of the general community.

In this role, NCAPER has previously provided commentary to FEMA on this issue, and it is very clear that FEMA has heard our concerns, for which we are grateful.

Specifically, at this time, we are issuing our comments regarding the changes designed to expand eligibility under Other Needs Assistance (ONA) to (a) allow self-employed individuals, including artists and other cultural workers, to apply for and receive financial support to repair and/or replace “essential” tools, equipment and/or specialized or protective clothing lost, damaged and/or destroyed as a consequence of a presidentially-declared disaster and (b) to be able to do so without first having to apply to the Small Business Administration (SBA) for a loan and be denied before being able to apply for this support. These changes were effected by amending 44 CFR section 206.119, “Financial assistance to address other needs,” as well as adding a definition for “essential tools” to the definitions section, 44 CFR section 206.111, and clarifying that individuals will need to execute self-certification statements for the items to be repaired and/or replaced.

We thank FEMA for making these changes and the Biden administration for issuing Executive Orders 13984, issued January 20, 2021 and 14091, issued

February 16, 2023, geared toward “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” which were instrumental in achieving these results.

For the artists we serve, these changes can make the difference between someone being able to secure the instruments, paints, animation software and the like essential to their getting back to work and earning a living after a disaster -- thereby by removing their need for further government or private aid -- or not being able to do so.

We do have several concerns, though, that if not addressed could mean these amendments appear transformative on paper, but will be non-existent (or insufficient to achieve their aims) in reality.

Not being able to get back to work could result not only in peoples’ economic decline, but also worsen their mental/emotional state, thus their ability to get back to work. This could require the federal government to spend more funds to address their needs.

With this in mind, we note the following:

1. **We have a question as to whether new language means personal property must be located in a disaster-damaged primary residence or only that the applicant must have lived in a residence damaged by the disaster to apply and that the damaged property could have been damaged elsewhere. Either, however, will work to nullify the expansion to include self-employed individuals, especially artists:**

The prior provision, section 206.119, stated that its purpose was to provide financial assistance to those individuals and households who had other disaster-related expenses and serious needs. [206.119(a)] Among the items covered were personal property and transportation expenses. In fact, personal property and transportation expenses were grouped together under “types of assistance” to be provided [old section 206.119(b)(2)(i)]:

“FEMA may provide financial assistance for personal property and transportation items or services to meet the disaster-related necessary expenses and serious needs of individuals and households.”

Nowhere was there language stating the items needed to be located in a disaster-damaged primary residence or that the applicant had to live in a disaster-damaged primary residence.

In contrast, the amendment, which now collapses the former sub-section dealing with “types of assistance” and the sub-section elaborating “eligible costs” into a single one titled “types of assistance” still states that its purpose remains providing financial assistance to individuals and households adversely affected by major disasters, adding that their disaster-related necessary expenses and serious





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needs must be verifiable and documented, which we thoroughly support. 206.119(a)

However, “personal property” assistance, in marked contrast to “transportation” assistance, is now defined in the following manner, adding a new requirement:

“(6) Personal Property. **Necessary expenses to assist applicants whose primary residences were damaged by the disaster...** (emphasis added) 206.119(b)(6)

(7) Transportation. **Necessary expenses to assist applicants with transportation costs**, which may include the following: (i) Repairing or replacing vehicles; (emphasis added) 206.119(b)(7)

This requirement will be extremely deleterious to artists and, we imagine, other self-employed people, by eliminating a large percentage of individuals who would have qualified under the prior rule, if it had been expanded to include the self-employed.

To illustrate the problem with this change, we cite the following:

(a) CERF+ statistics reveal that 44% of craft artists work outside their residence, including in structures on their property outside the house. Given that visual artists may work with harmful chemicals, this can be a safety measure for those with whom they reside. Writers often work outside their home in co-working spaces where they might leave their computer while they go out for lunch or to a meeting; they may need more peace and quiet than their home can provide. Filmmakers regularly work on location. Artists who live in urban areas may live in very small apartments and are physically unable to do their work there because of its scale. Musicians may make noise when practicing that disturbs their housemates or their neighbors, necessitating use of another space to practice or rehearse. Items may be permanently located in some of these spaces. Others may be there temporarily, but when a disaster occurs.

(b) Musicians must take their instruments with them to perform and it is very likely someone would be performing on tour outside their state when a disaster occurs that damages their instrument/primary tool, or be performing at a wedding or other event in their locale or have their instruments stored in a facility like Soundstage in Nashville, TN, which was right near the Cumberland River when it flooded and destroyed the instruments and sound equipment of many musicians in 2010.

We ask that all these cases qualify for relief and that there be no requirement that the primary residence must have been destroyed in

order for the "essential tools" repair/replacement provision to come into effect. We note that automobiles are also personal property, but they are covered no matter where they are damaged in the course of a disaster. Automobiles are essential for transportation, and these items just described are essential for people to get back to work. We also note that people regularly take their portable computing devices with them to school and that these could be damaged while there.

We understand that FEMA may be fearful of opening the floodgates. We are also aware from the Individual Assistance Program and Policy Guide (IAPPG) that custom was to look to the disaster-damaged primary residence. However, if this new provision goes into effect with this requirement, it will not accord with the reality of artists' lives and work. It will be a provision without teeth - one that promises something on paper, but leaves out thousands who have lost the tools of their trade to disaster.

From other provisions in the IHP Regulations, we note that FEMA has always sought to provide different coverage rules for more vital needs or specific populations. For example, the equipment of people with disabilities is not subject to the cap; funeral, medical and dental expenses are not either. Automobiles are covered without reference to primary residence. This recognizes a greater urgency that these be covered. We hope FEMA sees that need here, as well, so self-employed people can get back to work.

We also note that studio and travel costs are allowable deductible expenses on a Schedule C. In our self-employment comments below at 2., we suggest FEMA follow the lead of the IRS. We do so here as well.

2. Clarification of the contours and limits of "self-employed."

Many artists and other self-employed people have "hybrid incomes," meaning they draw earnings from both 1099 and W-2 sources. This is typical and should not, in our opinion, preclude qualification as "self-employed." They may earn income from art-related and non-art related sources, a necessity for many in order to survive. They may not yet be earning any income from their art-making, but are functioning as professionals in their field and could suffer from a disaster that damages their essential tools.

We hope that FEMA will treat all of them as self-employed and that they will be able to apply and submit proof of this according to their circumstances. We note that FEMA has already said that those who file Schedule Cs will qualify for this aid and that it will treat the items they



use in their work as “personal property,” even as the Schedule C states it describes “Profit or Loss from Business”.

Many self-employed people elect to file as S Corporations. They do this to gain the benefit of limited liability, but they still are only taxed at the personal level --- the corporation is not taxed separately; it is recognized to be the alter ego of the individual. Will FEMA follow the lead of the IRS on this and treat those who elect to be S Corporations as self-employed under this new provision? We hope so.

Possibility of Expanding Documentation Beyond Tax Returns and considering more than one year’s tax return in determining eligibility

FN 180 to the FR entry states that tax return documentation is necessary to establish self-employment. Our example above of the professional who has not yet earned income from their art practice, but who exhibits or performs regularly, as well as individuals who did not earn income from their art-making in the past year, but who have been working professionals for years, are realities that are quite common. The nature of “gig” working is that it can be sporadic and cyclical. These examples suggest that the government should consider expanding the documentation allowable as evidence of self-employment, especially if the goal is to get people back to work so they can earn income. Perhaps documentation of gallery shows, exhibitions, performances and the like can also be considered suitable documentation to determine eligibility as they substantiate that applicants are professionals and not hobbyists, though they have not yet earned income from their work.

We also suggest that at least the three prior years' income tax returns be considered (something SBA usually has done in other contexts), especially because freelancers do not have consistent income year to year.

- 3. What qualifies as a tool or equipment and how will this be determined? By whom? Which gets at the question of how much discretion lies with an individual reviewer and how much will be standardized and require higher-level review of decisions before they are made final.** Relevant Sections: Section 206.111- Definitions, Essential Tools; Section 206.119 (b)(6)(iv) - Financial Assistance to address other needs. Types of assistance. Personal Property; and Background Discussion at FR, page 4033, E. Section 206.113 Eligibility Factors.

Sometimes it will be obvious what constitutes a tool or equipment; in other cases, it might not be: Examples:

(a) musicians might not regard their guitar as a tool (the example of replacing a musician's guitar as an essential tool under 206.119(b)(6)(iv) is cited at page 4033 in the FR entry, under "E. Section 206.113 Eligibility Factors), so guidance will be necessary to help people understand what constitutes a tool or equipment. Will FEMA publish illustrative lists or provide examples? We hope so.

(b) Items like clay, canvases and paints are not tools in that they don't manipulate things, but they are essential to the creation of paintings and ceramics and a visual artist could not get back to work without them. Moreover, if a visual artist works in the medium of charcoal, pencil, ink or pastel, these function as both material and tool, so to allow these, but not paint, seems to bias the decision in favor of cases where the tool is *also* the medium/material.

We note that FEMA's IAPPG at page 168 states that supplies were considered under the previous tool repair and replacement provision that applied to people employed by others:

"Essential Tools: Assistance is based on a need to replace disaster-damaged essential tools, **supplies**, equipment, **items** required by an employer as a condition of employment, or required for education."
(emphasis added)

May we, therefore, feel safe in assuming artists' materials such as clay, paints and other supplies will qualify as "essential tools" or items capable of being covered under Section 206.119(b)(6)(iv)?

We note that a carpenter, too, needs to have nails and screws in order to do their work.

Decision-making Process/Reviewer Discretion

As to the issue of discretion's role in decision-making, we believe that a system where that is controlled for, so that self-employed people who are similarly situated don't receive different decisions, will be the most equitable system. Will FEMA be creating staff protocols to control for this? Or are there not individual reviewers or is there a higher, more standardized level of review? We advocate for all system measures that enable standardization and control against different results due to reviewer discretion.

4. Clarification of the Self-certification process for detailing and requesting repair/replacement costs. Upper Limits of Coverage: 206.119(a). FR entry at page 4010, Footnote 180

Section 206.119(a) calls for verifiable and documented necessary expenses and serious needs. Footnote 180 in the FR entry speaks about applicants, therefore, being required to submit a written statement of the lost/damaged/destroyed items the self-employed individual is requesting repair/replacement costs for.





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Does the statement or self-certification need to be notarized? We would advise against this because it could present a difficult hurdle post-disaster, though we understand if it is necessary. Will there be guidance as to what categories of information to provide or a fill-in form with said categories that will be provided? We hope so.

We believe a model answer or an actual fill-in form could make it easier for self-employed people and would standardize the process and information for FEMA, such that similarly-situated cases have the greatest chance of being treated similarly and therefore, equitably; also, this will ensure people don't leave out necessary information and are able to make their best case. For example, it would be useful to guide people to not just name the items that were damaged or destroyed ("1 bass guitar"), but that they be prompted to be very specific about the brand and model, e.g., of any instruments, as costs could vary considerably and for a professional musician, replacement with a lesser instrument would not enable them to get back to work. As a visual arts example, they could be prompted to cite the brand, number and type of brushes, not just that they need brushes, as, again, the quality of the brush is relevant to a working artist.

We believe they should also be prompted to answer whether or not: (a) they are seeking repair or replacement costs (or whether they would be seeking the former in the first instance and pursuing the latter if repair is impossible) and be prompted to (b) provide an estimate of the repair/replacement cost in their locale, as these can vary state to state or city to city (although online costs will be the same in most instances, with some exceptions). Possibly the actual cost of their damaged instrument or other tool should also be requested.

Balanced against this, however, should be the fact that they are under duress and may not be able to secure this information at the necessary time. If this is the case, then we ask whether FEMA itself could ensure it calculates replacement costs taking into account the quality of the specific damaged tool, e.g., the value of the damaged "Les Paul" Fender guitar rather than any electric guitar (even if the government cannot cover the full replacement cost).

Amount of Coverage Possible

At an Informational Webinar about the IFR that FEMA held with CERF+ and NCAPER on March 4, 2024, we were told that the provision of estimated costs by the applicant *is* part of the process. We were also told that, in fact, the request for this aid is not submitted upfront, but after an applicant's initial registration, as a consequence of the request being submitted and/or the visit of an

Inspector to their home. Since the Regulation does not cover this, we would appreciate clarification and confirmation so we can provide information to our constituents.

Also, the only information we have seen in the Regulation itself about the upper limit of coverage is that the amount received cannot exceed whatever the current limit is for IHP, at least for Housing Assistance and ONA - that amount currently being \$42,500.

However, at our March 4th webinar, we were informed that there are suggested amounts for different categories of ONA and that a musician, for example, should not expect to receive the amount of money necessary to replace the lost or damaged tool/equipment with a comparable level item. This will make it impossible for professional artists to get back to work. While we assume those with very valuable instruments, e.g., will have insurance coverage and we understand that the government cannot necessarily make people whole in this regard, we need to advocate that for replacement costs to be functional for artists, items of comparable value need to be covered to the highest extent possible. We also note that craft artists may need to replace kilns they use. It is our understanding that \$4,000-5,000 for these items is a typical average cost and the figure CERF+ uses for replacement value.

We understand that FEMA operates with a hierarchy of coverage, such that money related to housing needs may precede its delivery of personal property loss coverage. Might it be possible for individuals themselves to opt for their essential tools to be covered before other categories of relief are considered so that the coverage is meaningful and capable of fulfilling the repair or replacement reality?

5. **Clarifying question about the IHP cap and insurance:** We find this confusing. Does the IHP cap mean that if someone's insurance covered their loss of essential tools to the extent of \$42,500, but the total loss was \$75,000, that FEMA would award zero under ONA because it will only cover items up to the \$42,500 cap and insurance has covered that amount? Or will FEMA cover the additional loss of \$32,500, which amount is less than the \$42,500 IHP cap? We understand that an applicant can subsequently go to SBA for further aid, but we need clarification on this issue, again so we can provide correct guidance to our constituents.

We are so happy and thankful that FEMA has issued these amendments. They have the potential to be life-changing for self-employed people, including artists and other cultural workers. All of our comments are geared toward ensuring they function well.





Thank you so much for considering our comments and questions, which are endorsed by the NCAPER Steering Committee and the other organizations endorsing this submission.

Very truly yours,

Janet Newcomb
Executive Director
NCAPER
jnewcomb@ncaper.org
607/368-5871
www.ncaper.org
<https://www.facebook.com/ncaper>
<https://www.instagram.com/ncaper2006/>

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